

YEARBOOK
of ANTITRUST
and REGULATORY
STUDIES

Vol. 2009, 2(2)



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Vol. 2009, 2(2)



CENTRE OF ANTITRUST AND REGULATORY STUDIES Warsaw University



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

Sixth Publication of the Publishing Programme

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Warszawskiego, Warszawa 2009

Cover: Dariusz Kondefer

ISSN 1689-9024

PUBLISHER



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Editorial foreword

The Editorial Board is pleased to present the second volume of the **Yearbook of Antitrust and Regulatory Studies** (YARS 2009, 2(2)). We hope that it will prove of interest to our foreign readers primarily because the majority of its research papers deal with the most important current problems of competition law enforcement. These include, in particular, the effectiveness of the fight against cartels, considering both its economic as well as investigatory and procedural side, and the practical development of private antitrust enforcement in a “new” Member State. We believe that this alone places our publication in line with the mainstream discussion of both European academics and professionals in the competition law field. Nonetheless, it would be justified to say that at this point in time it is too early to evaluate the actual effectiveness of the Polish Leniency Programme and of the private enforcement of Polish competition law.

The primary part of YARS 2009, 2(2) opens with an insightful paper by A. Fornalczyk, the first President of the Polish Competition Authority. The author not only presents the academic basis for the economisation of the fight against cartels but also proves that the practical knowledge and understanding of the new economic approach in combating cartels is growing even in Poland. The following paper by R. Molski discusses not only the legal basis but also the first implementation experiences of the Polish Leniency Programme. P. Podrecki analyses rules governing the assertion of civil law liability in the event of a competition law infringement. E. Rumak and P. Sitarek deliver another legal article devoted to the intersection of the leniency scheme with private enforcement of antitrust rules in Poland. The following paper by K. Tosza will likely prove familiar to our European readers seeing as it presents some of the most universally difficult aspects of antitrust proceedings concerning payment card systems. YARS 2009, 2(2) also contains two papers entirely devoted to regulatory consideration. B. Nowak presents the various legal challenges of the liberalisation of the Polish energy sector and M. Król considers the cost and benefits of vertical separation of railway firms in Poland from an economic point of view.

The Editorial Board also welcomes the article by O. Andriyczuk containing many insightful comments concerning the axiology of competition law – clearly a key current antitrust problem. It was always our intention to present our readers with a guest article exceeding the essentially Polish context of our publication. We are therefore especially pleased to have the possibility of publishing in YARS 2009, 2(2) a polemic paper directly reflecting on the article by D. Miąsik (*Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law*) published in YARS 2008, 1(1). The very fact of a polemic paper being submitted to us by a foreign reader so soon after the birth of our publication makes us hope that the impact of YARS will continue to grow as we warmly welcome any contributions of that type.

Aside from its research papers, the current volume of YARS also contains a series of detailed reviews concerning the various legislative changes that took place in Poland in 2008 in the antitrust field as well as in infrastructure sectors. Case comments concerning key legal proceedings of 2008, including the ETS judgment C-227/07 concerning Polish telecoms law, are presented next followed by relevant book reviews that cover antitrust issues as well as the law and policy applicable to telecoms and the energy sector. YARS 2009, 2(2) closes with reports concerning the various activities undertaken by CSAiR in 2008 or in which it has participated alongside public bodies (the Polish Energy Regulatory Office) and legal firms (Wierzbowski Eversheds and Markiewicz & Sroczyński). These activities included workshops and seminars dealing with some of the most important problems of correct politics, law and economics of antitrust and regulation in telecoms and the energy sector.

The Editorial Board is very pleased to say that another step has been taken on the way to completing the YARS Advisory Board which includes academics and practitioners from Poland and abroad representing primarily major academic institutions but also law and consulting firms which have a special interest in antitrust and regulatory issues. We are especially grateful that the membership of the YARS Advisory Board has been accepted by such distinguished scholars as Professors E. Fox, J. Masing and R. Whish. We also warmly welcome the first representative of the Polish business world – the head of a leading Polish ice cream producer. We hope to welcome additional members in 2009 from the academic, legal, consulting and business world from both home and abroad.

The Editorial Board continues to hope that YARS will strongly contribute to the development of legal and economic libraries concerning the antitrust and regulatory fields especially in that it will continue to provide its readers with up to date insights into the workings of antitrust and regulation in a “new” EU Member State.

Warsaw, December 2009.

Tadeusz Skoczny
Editor-in-chief

List of acronyms

AUTHORITIES:

- AMW**
(*Agencja Mienia Wojskowego*) – Military Properties Agency
- UOKiK**
(*Urząd Ochrony Konkurencji i Konsumentów*) – Office of Competition and Consumer Protection
- SOKiK**
(*Sąd Ochrony Konkurencji i Konsumentów*) – Court of Competition and Consumer Protection
- UKE**
(*Urząd Komunikacji Elektronicznej*) – Office of Electronic Communications
- URE**
(*Urząd Regulacji Energetyk*) – Energy Regulatory Office
- UTK**
(*Urząd Transportu Kolejowego*) – Rail Transport Office

LEGAL ACTS:

- Competition Act** – Polish Competition and Consumers Protection Act of 2007
- KC**
(*Kodeks Cywilny*) – Polish Civil Code
- KPA**
(*Kodeks Postępowania Administracyjnego*) – Polish Administrative Procedure Code
- KPC**
(*Kodeks Postępowania Cywilnego*) – Polish Code of Civil Procedures
- PT** – Polish Telecommunications Law of 2004
- PL** – Polish Aviation Law of 2002

P O L E M I C S

Does Competition Matter? An Attempt of Analytical ‘Unbundling’ of Competition from Consumer Welfare: *A Response to Miąsik*

by

Oles Andriychuk*

CONTENTS

- I. Introduction
- II. Competition and liberal democracy
- III. Constitutionality of antitrust goals
- IV. Rule of form v. rule of reason
- V. Methodology of separation
- VI. Conclusion

Abstract

This paper is an attempt to evaluate the conceptual relationship between two central elements of the theory of antitrust: competition and consumer welfare. These two notions are analysed in their mutual dependency. In terms of methodology, the paper proposes to structurally separate competition from consumer welfare. This technique is successfully applied in the domain of legal philosophy when the correlation between law and morality is debated. The main purpose of this paper is to show that both competition and consumer welfare are economic values of fundamental importance with no *ex ante* hierarchical dominance of consumer welfare over competition. In case of conflict, priority might be given to either of these values depending on the context of the assessment. This paper has a discursive character, it constitutes a response to Dawid Miąsik’s article entitled: ‘Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish

* Oles Andriychuk (oles.andriychuk@eui.eu) PhD researcher, Department of Law, European University Institute, Florence, postdoctoral research fellow at the Centre for Competition Policy, University of East Anglia (from September 2009). The author is very grateful to the EUI for offering a genuine interdisciplinary environment which enables critical thinking. The usual disclaimer applies.

Antitrust Law' which was published in the 'Yearbook of Antitrust and Regulatory Studies' 2008 vol. 1.

Classifications and key words: goals of competition law; deontological v. utilitarian antitrust; separability thesis; competition and liberal democracy; rule of form v. rule of reason.

I. Introduction

In a thoughtful and persuasive paper on the role of consumer welfare in contemporary antitrust theory¹, Miąsik provides an in-depth analysis of Polish legislative and adjudicative practices of defining the goal(s) of competition law and policy. Miąsik explores different approaches and methods presented in Polish antitrust doctrine, qualifying them in a clear and approachable manner. The conclusions of the paper suggests that “[P]olish [as well as all others – O A] competition law seems to be very consumer-oriented and generally follows the rule that ‘what is good for consumers, is good for competition’². Miąsik also notes that competition “[i]s and should be protected because it is beneficial for consumers, the economy and therefore for the whole society”³.

These statements correctly reflect the reality of antitrust. Normatively however, both of these assertions are contestable. It will be shown here that conceptually competition should sometimes be protected notwithstanding the interests of consumers and, on occasion, even at their expense. The discrepancy in the perception of competition requires a broader theoretical discussion on the essence and the role of competition in liberal democracy. Thus, the purpose of this paper is to compare different approaches to the notion of *competition* and *consumer welfare*, to undertake a structural separation of these phenomena and, to provide some conceptual benchmarks for their comparison.

The central issue which needs to be properly articulated here is whether competition encompasses its own societal value⁴ or, whether it is merely an

¹ D. Miąsik, “Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law” (2008) 1(1) *YARS*.

² D. Miąsik, *ibid.*, p. 56.

³ D. Miąsik, *ibid.*, p. 36.

⁴ F. A. von Hayek, “Competition as a Discovery Procedure”, [in:] F. A. von Hayek, *New studies in philosophy, politics, economics, and the history of ideas*, Taylor & Francis, 1978: “[C]ompetition is valuable only because, and so far as, its results are unpredictable and on the whole different from those which anyone has, or could have, deliberately aimed at”.

instrument of achieving other, more “tangible”, economic objectives⁵. In fact, the methodological task of this paper is to undertake a transposition, into the realm of antitrust, of the classical dilemma between *rules* and *interests* contained in political and legal theory⁶. Depending on the ideological approach adopted, economic interests can be seen in terms of consumer welfare, efficiency, total welfare, industrial growth, innovation or any other *tangible* economic results. All these benchmarks have one thing in common – they consider competition solely as a *means* to an end, rather than an end in its own right. The *end* of antitrust policy is found, instead, in its substantial economic outcomes.

Theories which consider competition to be merely an instrument of achieving external goals (more important/the only valuable societal goals) can be classified as *utilitarian*⁷ antitrust theories. Concepts that consider competition to be more than merely a tool to increase productivity, generate welfare or maximise efficiency, are classified as *deontological* antitrust theorists⁸. The latter views perceive competition as a distinctive feature of liberal democracy that should be protected irrespective of the outcomes which it brings to society. This paper attempts to demonstrate that by emphasising the deontological elements of competition we make the entire discussion of the goals of competition law more coherent. The claim is not made here, however, that competition should be protected at any cost in all cases. The conflicts between different legitimate values are inevitable (competition and consumer welfare are only two of many such values) thus it is impossible for policymakers to fully avoid the necessity to make trade-offs. Nonetheless, the

⁵ Ph. Lowe, “The design of competition policy institutions for the 21st century – the experience of the European Commission and DG Competition” (2008) 3 *EC Competition Policy Newsletter*: “In the Commission’s view, the ultimate objective of its intervention in the area of antitrust and merger control should be the promotion of consumer welfare”.

⁶ M. Weber, “Objectivity and Understanding in Economics” [in:] M. Weber, *Methodology of the Social Sciences*, New York 1977: “All serious reflection about the ultimate elements of meaningful human conduct is oriented primarily in terms of the categories ‘end’ and ‘means’. We desire something concretely either ‘for its own sake’ or as a means of achieving something else which is more highly desired”.

⁷ The terminological distinction between *utilitarianism*, *consequentialism*, *teleology* and *instrumentalism* is irrelevant for the purpose of this paper. It does not analyse the differences between *rule-utilitarianism* and *act-utilitarianism* neither.

⁸ The deontological approach in legal theory is typical for the positivistic legal doctrines. In classical philosophy the deontological approach is related inter alia to the Kantian tradition. D. M. Hausman, M. S. McPherson, *Economic Analysis, Moral Philosophy and Public Policy*, Cambridge University Press 2008: “Moral systems like the Ten Commandments are called ‘deontological’... [D]eontological (non-consequentialist) ethical theories employ both agent-centered prerogatives (they sometimes permit agents to act in a way that does not maximise the good) and agent-centred constraints (they sometimes prohibit agents from acting so as to maximise the good)”.

compromises between different policies should have an *ad hoc* nature and depend on the particular circumstances of each case. They should not be based on an *ex ante* set hierarchy of values where the position of competition is lower than that of consumer welfare.

II. Competition and liberal democracy

As can be understood from the very etymology of the term, *competition* is a notion which encompasses a process, more than a result⁹. The notion of consumer welfare, on the other hand, is result-oriented. If we are interested in the outcomes that can be generated by competition only, then the very process of rivalry between undertakings would be seen as unnecessary or, at least, not indispensable. If, however, we consider that competition (seen as a process) is important for the societal paradigm of economic development, then the outcomes generated by this process are not the only reason for the rivalry between undertakings to exist. Methodologically, the latter approach appears to be more consistent with the idea of liberal democracy¹⁰.

Miąsik shows that the majority of Polish case-law considers competition as a means to increase welfare, while deontological elements of antitrust are present in some decisions¹¹. His examples demonstrate that the Polish antitrust

⁹ P. A. McNutt, "Taxonomy of Non-Market Economics for European Competition Policy – The Search for the True Competitive Price" (2003) 26(2) *World Competition*: "We argue that competition is a process, and as such can be described, rather than defined".

¹⁰ D. J. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford 1998: "The genesis of the idea of protecting competition was imbedded in the idea of protecting freedom, and thus it is important to review... the role and substance of the concept of freedom... The institutions and traditions of liberalism not only scripted thinking about economic competition, but also carried its political fortunes".

¹¹ D. Miąsik, *ibid.*, p. 34: "In some cases..., statement can be found that the purpose of competition law is 'to secure conditions for the development of competition' (Judgement of the Supreme Court of 24 May 2004, III SK 41/04 (2005)...)... 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 economy market (Decision of the President of UOKiK of 4 July 2008...). Other examples include declarations pursuant to which "[t]he good protected under the act is the existence of competition as the atmosphere in which economic activity is conducted" while the protection of consumers (as purchasers of goods and services offered under competition conditions) is executed "by the way" (Judgement 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). Statements can even be found that "the task of competition authorities and antitrust law is to lead to a total (unlimited) and effective competition on the relevant market (Decision of the President of the UOKiK of 10

doctrine is not exclusively dominated by the consumer welfare ethos. Miąsik's study reveals even more than "[t]hat the goals of Polish competition law have always been limited to enhancing efficiency and consumer welfare"¹².

Competition is not only an important value in economics, it is also very much appreciated in the sphere of politics and culture. Inasmuch as the distinctive elements of competition are identical in its political, cultural and economic sense, we can draw a parallel between the economic side of competition and its political (elections) and cultural (freedom of speech) dimensions. In all of its three aspects, competition constitutes the essence of a liberal society¹³. The political aspect of competition is traditionally known as *democracy* (whereby elections are a competitory¹⁴ process, where political parties compete for the preference of the electorate). The cultural dimension of competition is commonly associated with *pluralism* (with the freedom of speech considered to be a competitory process, where different opinion-makers compete for the preference of citizens). The economic side of competition is reflected in the notion of *markets* (with the economic exchange of goods and services as a competitory process, where undertakings compete for the preference of consumers).

In other words, electoral democracy is a competition of political programs; pluralism – a competition of cultural ideas; and the market – a competition of goods and services. We apprise free elections and free speech not because of their *a priori* effectiveness, but because the freedom to elect and to speak constitute the political and cultural essence of democracy. The same applies to its economic aspect as encompassed in the notion of free competition.

October 2005, DOK-127/2005)". All these decisions advocate deontological value of competition as an independent process.

¹² D. Miąsik, *ibid.*, p. 33.

¹³ J. Baquero Cruz, *Between Competition and Free Movement*, Oxford 2002: "[There is a tendency among competition specialists to treat their topic in a highly technical way, as distinct from the economic constitutional law of the Community. As the law now stands, however, the competition rules contained in the Treaty have a constitutional status and may be interpreted as shaping a *law of economic liberty* from restraints of competition and abuses of private economic power, not only a *law of economic efficiency*. Thus, an efficiency-oriented approach to the Community competition rules may not be in tune with the current normative structure".

¹⁴ In my view it is more precise to use the term "competitor" rather than "competitive". The scope of the latter term is much broader and apart from its antitrust sense (i.e. "involving rivalry") it also encompasses the rather industrial meaning of "competitiveness" as "being of good enough value to be successful against other competitors". The notion of "competitiveness" indicates the ability to compete. This ability can be achieved either by applying competition, protectionism or dirigisme. As we know, competition is not the exclusive way to achieve efficiency and industrial growth. The term "competitor" is oriented to the very process of competition. It is not interested in the final results of this process. For instance, the term "competitive market" can be interpreted as (i) a market which is strong enough to compete externally with other markets or as (ii) a market with strong internal competition.

If this presumption is correct, then competition deserves protection as a matter of principle and public choice, even in cases where it does not necessarily bring the best economic results. Competition in this constellation plays a pivotal role for the political, cultural and economic life of societies. It constitutes an important social value and represents a clear-cut public choice. In this sense, competition is not an indispensable way to generate welfare. It is rather a *luxury* product similar to most other rights and values. Often, from the utilitarian perspective, it might be seen as a redundant unnecessary practice with no, or minimal, positive effects. However, competition is protected not because it is the most efficient model for economic relations, but because this model is most compatible with freedom.

III. Constitutionality of antitrust goals

The first question addressed by Miąsik is the discrepancy between the goals of competition law and the legislative acts which contain them. The author correctly observes that most antitrust rules are designed in a very ambivalent form, which makes it possible to interpret them differently depending on the context¹⁵. This approach is confirmed by other distinguished authors¹⁶. In my view, the statutory ambiguity belongs to universal attributes of law¹⁷ and legal interpretation¹⁸ as well as, more specifically, to constitutional legal

¹⁵ D. Miąsik, *ibid.*, p. 34: “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 (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)), that 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”.

¹⁶ C. D. Ehlermann, “Introduction” [in:] C. D. Ehlermann, L. L. Laudati (eds.), *The Objectives of Competition Policy, European Competition Law Annual 1997*, Oxford 1998: “Objectives are rarely defined expressly in competition statutes... They have to be inferred from legislative provisions which are broadly worded”.

¹⁷ In the Dworkinian sense, law itself is seen as a gapless interpretative process.

¹⁸ Unless perceived in terms of Barak’s “purposive interpretation” (see A. Barak, *Purposive Interpretation in Law*, Princeton and Oxford 2005: “Purposive interpretation is holistic. It views each text being interpreted as part of the legal system as a whole. Whoever interprets one text, interprets all texts. Each individual text is connected to the totality of texts in the legal system”), or Radbruch hermeneutic: G. Radbruch, “Legal Philosophy” [in:] *The Legal Philosophies of Lask Radbruch and Dabin*, Harvard University Press 1950: “The interpreter may understand

provisions. Following his presumption, Miąsik asks: “[h]ow 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 anti-competitive, then as pro-competitive and it is now, in turn, viewed with caution?”¹⁹. He explains this situation by distinguishing between the goals of competition law and the statutory provisions that authorise or prohibit some legally significant actions. Miąsik states that the goals of competition law are not often defined and contained in its statutory acts but rather, that they are considered to be doctrinal, conceptual premises of the regulatory and judiciary authorities.

According to Miąsik, the theories concerning the role and place of the goals of competition law are defined most precisely, extensively and authoritatively in the case law of the relevant courts: “[c]ase 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”²⁰. Indeed, Miąsik’s explanation appears to be satisfactory in respect to the importance of the judicial interpretation of legal provisions. However, in the continental legal tradition the judicial interpretation plays an important role only on the practical level. Conceptually, it is still overshadowed by the statutory provisions.. Indeed, judicial activism and judicial ‘lawmaking’ are becoming common and convenient practices also in many continental countries; however, their interpretation of statutory provisions still has an *ad hoc* nature and it does not change its ontological status.

According to positivistic theories²¹, if a societal value has been explicitly embedded in a constitutional act, this value should be protected even in cases where judicial opinion deviates from the norm or states otherwise²².

the law better than its creators understood it; the law may be wiser than its authors – indeed, it must be wiser than its authors”.

¹⁹ D. Miąsik, *ibid.*, p. 34.

²⁰ D. Miąsik, *ibid.*, p. 35.

²¹ M. H. Kramer, *In Defence of Legal Positivism*, Oxford University Press 1999: “Though legality and morality are of course combinable, they are likewise disjoinable... What exactly is meant by the claim that law and morality are always separable? One thing clearly not meant is that law and morality are always separate. Separability does not entail separateness... [T]here can exist any number of contingent connections between legal requirements and moral requirements. A refusal to acknowledge the possibility of such connections would be at least as foolish and misguided as an insistence that they must actually obtain in all circumstances... [What this view] contends is not that legal requirements and moral requirements must diverge, but that legal requirements and moral requirements can diverge... Anyone seeking to gain a clear understanding of the relationships between law, justice and morality must attend to numerous distinctions within each of those phenomena”.

²² J. Raz, “Legal Principles and the Limits of Law” (1972) 81(5) *The Yale Law Journal*: “The literal interpretation of judicial rhetoric is made possible only if one is prepared to join

The continental culture of legal interpretation does not unequivocally require complete coherency of judicial decisions either with one another, or even with statutory provisions. Each judicial decision that comes into effect is presumed to be legal – there is no requirement to cross-check newer decisions with their predecessors. Thus, constitutional norms can be interpreted and applied differently by different actors. This attribute of continental legal systems prevents situations where previous precedents play the role of *lex specialis*, because case law is undoubtedly placed below the hierarchical superiority of constitutional provisions. As a result, even under the presumption that case law contains some features of statutory provisions, it constitutes merely a “*lex inferiori*”²³ to constitutional norms. Thus the generic constitutional provision that “competition should be protected” is neither specified nor concretised by judicial practice. It should only be applied by courts.

From the continental, positivistic perspective, the consistency of legal interpretation with previous case law is merely *strongly desirable*, rather than *absolutely indispensable*. What is strictly required is the consistency with the hierarchy of statutory provisions. This would not be the case in common law jurisdictions, including to a large extent the EU case law culture. Therefore, I can only partly share Miąsik’s methodology of distinguishing between the goals of competition law and statutory provisions. I also have my reservation about the validity of Miąsik’s view that “[i]t 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”²⁴. Miąsik’s remedy, which shifts the attention from the “useless” provisions of

the courts in endorsing two really harmful myths. One is the myth that there is a considerable body of specific moral values shared by the population of a large and modern country. The myth of the common morality has made much of the oppression of minorities possible. It also allows judges to support a partisan point of view while masquerading as the servant of a general consensus. The second myth is that the most general values provide sufficient ground for practical conclusions. This myth holds that, since we all have a general desire for prosperity, progress, culture, justice, and so on, we all want precisely the same things and support exactly the same ideals; and that all the differences between us result from disagreements of fact about the most efficient policies to secure the common goals. In fact, much disagreement about more specific goals and about less general values is genuine moral disagreement, which cannot be resolved by appeal to the most general value-formulations which we all endorse, for these bear different interpretations for different people”.

²³ This would not be the case from a legal pluralism perspective, which tolerates wide discrepancies between the form and the idea of law. See e.g. V. Champeil-Desplats, “Legal Reasoning and Plurality of Values: Axio-Teleological Conflict of Norms” [in:] A. Soeteman (ed.), *Pluralism and Law. Proceedings of the 20th IVR World Congress*, Volume 4: Legal Reasoning, Amsterdam 2001: “The legal systems built on a percept of coherence badly adapt to the coexistence of norms prescribing contradictory conducts”.

²⁴ D. Miąsik, *ibid.*, p. 34.

statutory norm to the more 'fruitful' and detailed provisions developed by case law, is logically consistent with the model in which case law is on the top of the legal hierarchy. This paper, however, advocates the opposite view. It assumes that statutory provisions are more than 'abstract generality' which *ipso facto* requires additional interpretation. Statutory provisions are *rules* and not *guidelines*.

Statutory provisions should be correlated with the goals of competition law in *form-essence* or *substance-idea* categories. In other words, each statute contains more than is expected by a restrictive interpreter. Ontologically, each statutory provision is presented in its positive structure (form) and simultaneously contains its ideal dimension ("ideal" in its *philosophical* rather than *poetic* sense of the word)²⁵. The relationship between antitrust goals and legislature are strongly correlated; they are mutually dependent and cannot be separated from each other. Thus, it is not the differences in goals which are responsible for "[d]ivergent applications of identical, or highly similar, rules contained in various legal systems"²⁶, but the very nature of law which inevitably encompasses the productive tensions between the form and the essence of legal provisions. Taking a closer look at the correlation between the form and the essence of the law is thus necessary. In the domain of antitrust theory, this relation is particularly obvious in the conflict between *per se rules* and the *rule of reason*, which will be explored in the next section.

IV. Rule of form v. rule of reason

By applying a dialectical analysis²⁷, we can observe that agreements which violate Article 81(1) EC, can be immunised from antitrust sanctions for two reasons: (i) because the agreement can have positive effects on competition

²⁵ F. Atria, *On Law and Legal Reasoning*, Oxford 2001: "D.1.3.29 (Paul, libri singulari ad legem Cinciam). Contra legem facit, qui id facit quod lex prohibet, in fraudem uero, qui saluis uerbis legis sententiam eius circumuenit (it is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense). In other words, it is not possible to know whether by following a rule we are following the law unless we can ascertain theratio (sensus) legis".

²⁶ R. Whish, *Competition Law*, Oxford 2001, p. 16 (cited by Miąsik, *ibid.*, p. 34).

²⁷ Dialectics is a tool of analytical thinking, which accepts controversies within the norms, considering them as inevitable and productive forces of evolutionary development. In the area of antitrust dialectics *inter alia* means that different economic values (such as consumer welfare, economic efficiency, industrial growth, protection of competitory process, etc.) cannot be entirely consistent with one another, the trade-offs between them are then inevitable. Such inconsistencies are considered as the "fuel" for "an engine of freedom".

itself and, (ii) because the agreement can have positive effects on other important societal values, such as consumer welfare, innovation or industrial growth. It is therefore necessary to undertake an analytical separation of competition from consumer welfare. Competition and consumer welfare are two important societal values. Both of them are equally necessary for society. They, however, should not be seen as the synonyms.

Present day evaluation of the positive effects of anti-competitive agreements is based on the presumption that the agreement can be either pro- or anti-competitive. However, this is not always the case. In some situations the same agreement can be simultaneously anti-competitive, pro-competitive as well as beneficial to consumers. In other cases, a given agreement can be simultaneously anti-competitive and pro-competitive but detrimental to consumers. Since competition constitutes an important societal value of liberal democracy, pro-competitive effects of anti-competitive agreements can sometimes outweigh the negative effects it has either on consumer welfare or competition. In other circumstances, the latter can be more important than the former. In both scenarios, this new additional test is necessary. This test can be performed by applying dialectics, which (i) separates competition from consumer welfare and, (ii) internalises pro-competitive elements of anti-competitive agreements.

Analytically, the conflict between rule of form and rule of reason is inevitable and generally productive. The relationship between those two notions has the same structure as the ancient philosophical dilemmas between form and essence, letter and spirit, norm and effect. Nowadays, it is encompassed in the terms of legal formalism and legal realism²⁸. Antitrust doctrine strives to *solve* this conflict yet from the perspective of dialectical analysis, the conflict is irresolvable. The existence of the conflict has to be *accepted*. The tensions between the *per se* rule and the rule of reason should be seen in their dialectical

²⁸ B. Tamanaha, "The Bogus Tale About the Legal Formalists", St. John's University, Legal Studies Research Working Paper Series, Paper No. 08-0130, April 2008: "Contemporary perspectives on judging are dominated by the story about the formalists and the realists. This chronicle has been repeated innumerable times. From the 1870s through the 1920s – the heyday of legal formalism-lawyers and judges saw law as autonomous, comprehensive, gapless, logically consistent, and determinate, and believed that judges engaged in pure mechanical deduction from this body of law to produce single correct outcomes. In the 1920s and 1930s, building upon the pioneering work of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo, the legal realists exploded legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for most every legal rule or principle, and that legal principles can produce more than one outcome. The realists argued that judges decide outcomes in accordance with their personal views then construct legal decisions to rationalise or justify the desired outcome".

interplay. They are an engine for the evolutionary development of antitrust scholarship.

For example, according to the landmark *Leegin*²⁹ decision: “The rule [of reason] distinguishes between restraints with anti-competitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer’s best interest”³⁰. In this respect, the doctrine equalises anti-competitive effects with harm to consumers. Respectively, pro-competitive effects are measured in terms of consumer benefit. The Court shows a clear example of holistic (i.e. either-yes-or-no approach) antitrust reasoning whereby an agreement can be either pro- or anti-competitive: “Vertical retail-price agreements have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed”³¹.

Although the *per se* rule is rejected mostly due to its administrative opportunism, the rule of reason also tends to base itself on the same methodological postulates – sacrificing analytical consistency for the sake of practical certainty. Following an alternative methodology of antitrust analysis, which is encompassed in the idea of dialectics, some agreements can be *simultaneously* pro- and anti-competitive. Thus, the balancing of the different effects of an agreement should not be seen in “either or” terms, as is currently the case³². Similarly, the fact that pro-competitive elements can outweigh an agreement’s anti-competitive ones should not be seen as the absorption of one by the others. The rule of reason concerns merely the immunisation from antitrust sanctions of otherwise anti-competitive conduct.

The Court states that “[t]he rule of reason is designed and used to eliminate anti-competitive transactions from the market”³³. The origins and essence of the rule of reason are not in the elimination of anti-competitive transactions from the market. On the contrary, the origins lie in the immunisation of anti-competitive transactions from antitrust sanctions, because the benefits of such transactions outweigh their negative impact on competition. It might be misleading to assume that the rule of reason impels pro-competitive agreements seeing as its purpose is to authorise anti-competitive agreements. The reason for such authorisation can be twofold. The conduct can be immunised because it brings better outcomes for consumers, industrial growth or innovation.

²⁹ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

³⁰ *Leegin*, *ibid.*

³¹ *Leegin*, *ibid.*

³² *Leegin*, *ibid.*: “The rule of reason is designed and used to ascertain whether transactions are anticompetitive or precompetitive”; *Leegin*, *ibid.*: “While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases”.

³³ *Leegin*, *ibid.*

Similarly, though *prima facie* paradoxically, it can be immunised because its pro-competitive elements outweigh the anti-competitive ones, but not because the agreement “loses” its anti-competitive nature.

The latter situation is possible after a conceptual separation of competition, as an independent economic value, from consumer welfare, another independent economic value. The two are equally important yet different realms. Acknowledging that each market action impacts the economy in many direct and indirect ways, we can see a so-called “butterfly-effect competition” where everything depends on everything else³⁴. If so, then some market practices can be harmful to some relevant markets while beneficial to others. Hence, properly shown positive effects for competition on some markets, can justify the application of the rule of reason to agreements that have anti-competitive effects on other markets. This justification is neither a blanket authorisation of restrictive conduct, nor a statement that this conduct is in fact pro-competitive, as it is currently the case.

V. Methodology of separation

The political management of competition (its instrumentalisation in order to achieve ancillary economic benefits) is inevitable and desirable. It does not constitute however competition policy *sensu stricto*. Instead, it is set in the ambit of either consumer welfare policy, industrial policy or innovation policy. Competition, as an inevitable element of the market, has to be “unbundled” from other legitimate economic goals. The specificity of competition requires a separate analysis, which does not have to be subordinated solely to the utilitarian framework of consumer welfare, economic efficiency and other economic, political and societal goals³⁵. Competition also has an inherent value

³⁴ J. A. Schumpeter, *Capitalism, Socialism and Democracy?*, London 1976: “The opening up of new markets, foreign or domestic, and the organisational development from the craft shop and factory ... illustrate[s] the same process of individual mutation ... that incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism [O.A. – i.e. “about market”]”.

³⁵ J. M. Buchanan, V. J. Vanberg, “The Market as a Creative Process” [in:] D. M. Hausman, *The Philosophy of Economics, An Anthology*, Third Edition, Cambridge University Press 2008: “The market economy ... neither maximises nor minimises anything. It simply allows participants to pursue that which they value, subject to the preferences and endowments of the others, and within the constraints of general “rules of the game” that allow, and provide incentives for individuals to try out new ways of doing things”.

as *par in parem*³⁶. Such a description of the relationships between different goals and values facilitates the decision-making process seeing as it requires the regulator to prove the necessity to prioritise one goal over the others³⁷ without going into their rhetorical subordination. In other words, the regulator does not have to invent a sophisticated theory of “what serves what” each time that its actions may diminish the interests of one policy or another. There simply is no “external”, independently defined objective against which the results of market processes can be evaluated. Each public regulatory authority shows an inherent tendency towards “economic optimisation”³⁸. This temptation of policymakers often leads to over-regulation.

In fact, neither competition nor any other societal value can be prioritised in all cases. However, the deontological (or value-oriented) approach to competition does not seek to explain this lack of legal protection by diminishing the internal importance of competition. Quite the contrary, the fact that some societal values have been somewhat restricted, due to the priority given to other values, does not necessarily mean that the former are reduced in their ontological essence.

Certain conduct of an undertaking can go against competition but in favour of consumer welfare. The opposite can also be true: a market practice beneficial to competition can be harmful to consumers. A practice does not necessarily need to be anti-competitive in order to be declared incompatible with other economic goals. The holistic (either-yes-or-no; either-good-or-bad) perception of policies with no mutual intersection and contradiction does not reflect reality. The negotiability of rights, and in particular the right to compete, relativises the notion of their absolute protection. No right can exist without its external correlation to another right. These rights are often in conflict with

³⁶ Compare this approach with the position of Richard Posner: R. A. Posner, *Antitrust Law*, The University of Chicago Press 2001: “Efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further”.

³⁷ Ch. Kirchner, “Goals of Antitrust and Competition Law Revisited” [in:] D. Schmidtchen, M. Albert, S. Voigt (eds.), *The More Economic Approach to European Competition Law*, Tübingen, 2007: “[C]ompetition policy is competing with other policies which may pursue conflicting ends, e.g. agricultural policy, industrial policy, environmental policy...”.

³⁸ The rationale behind this is quite simple. Imagine that on the South, on the North, on the West and on the East of country X four manufacturers produce orange juice. All ingredients of this product are equal, and the companies compete at the level of marketing rather than at the level of quality. The intuition of a dirigist regulator would be to “save” costs for the economy (i.e. transportation, aggressive advertisement, overproduction etc.) and to limit distribution of four identical products to the regions where they are produced. For the regulator this approach has many chimerical “advantages” and the idea of a free market with undistorted competition is therefore jeopardised by this regulatory temptation every time it fails to provide better outcomes.

each other. A vivid example of the negotiability rights is a leniency program, which is essentially an agreement between a regulator and an infringer not to prosecute otherwise illegal behaviour if the infringer provides the regulator with important information. The idea of the non-negotiable nature of certain rights, such as human dignity, can exist only in an environment where all other rights are totally subordinate to it. The existence of two different absolute rights requires a compromise between them.

From the structural perspective, the conditions contained in Article 81(3) EC are not competition law *sensu stricto*. Rather, they constitute transitory guidelines on how to balance competition with innovation, economic efficiency and consumer welfare. They are a bridge between different policies, an algorithm for fine-tuning and balancing different interests and priorities within the EC; a compromise between competition and other legitimate goals, but not a competition policy as such. There are many elements of consumer welfare and economic efficiency in both rights, but the balance between them does not have to be based on the level of efficiency or other political goals. The alleged lack of mobility and economic productivity of the structure-based approach is related to industrial goals rather than to competition policy. If competition law was to be perceived through the perspective of efficiency, that would mean that competition does not have an intrinsic value in and of itself but is seen only as a mean of increasing consumer welfare. If, however, competition law is understood as an independent societal value, like industrial policy is understood as another independent societal value, than it would indeed be necessary to establish a formula for their balancing. In such case, one can reasonably accept the deviation from competition rules in order to achieve industrial goals, but the rules as such will remain the same. In other words, the task of the public regulator is not to substitute the *raison d'être* of one policy by another, but to conduct a permanent balancing act where trade-offs are made between them. This being said, a compromise between principles does not mean that one is replaced by another.

VI. Conclusion

Miąsik's paper provides a very fruitful and methodologically harmonious analysis of the goals of competition law. The author not only expresses very original ideas related to the theory of antitrust, but also substantiates them by numerous relevant judicial decisions. While not fully agreeing with Miąsik's theoretical positions and disagreeing with him on some technical questions, this paper widely supports Miąsik's findings with perhaps the exception of

a few slight discrepancies which are likely to derive from the difference on the doctrinal backgrounds of the two papers.

The notion of competition is inherently present in the economies of all liberal democracies. Indeed, there are many parallels between the economic concept of antitrust and the political notion of democracy. As soon as social values are being considered, it is no longer possible to perform a simple efficiency test. Human rights – the right to compete being one of them – have an absolute nature and cannot be compromised by mere efficiency criteria. The scope of rights is broader than the societal ability to protect them. Some rights are in conflict with each other and thus, there is often a need of reconciliation. Yet, at the conceptual level all rights remain absolute in their essence. The biggest political skill and the highest academic endeavour lies in the ability to find (or at least to articulate and define) the most appropriate solution in this perpetual practice of multi-compromises between different societal values and interests. Each society is characterised by a number of factors that distinguish it from their counterparts. Both are relying on competition as an invisible managerial hand which not only helps to articulate the most efficient political ideas and economic practices, but also prevents a monopolisation of economic and political power.

Literature

- Akman P., “Searching for the Long-Lost Soul of Article 82 EC” (2009) 29(2) *Oxford Journal of Legal Studies*.
- Amato G., *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*, Hart Publishing 1997.
- Atria F., *On Law and Legal Reasoning*, Oxford 2001.
- Bork R.H., *The Antitrust Paradox: A Policy At War With Itself*, New York 1993.
- Budzinski O., *An Evolutionary Theory of Competition*, Philipps-University of Marburg, 2004.
- Crane D.A., “Chicago, Post-Chicago, and Neo-Chicago, Reviewing Robert Pitofski (ed.), *How the Chicago School Overshot the Mark*, Oxford University Press, USA, 2008”, Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies April 2009, Working Paper No. 259.
- Cruz J.B., *Between Competition and Free Movement*, Oxford 2002.
- Ehlermann C.D., Laudati L.L. (eds.), *The Objectives of Competition Policy, European Competition Law Annual 1997*, Oxford 1998.
- Fox E.M., “We Protect Competition, You Protect Competitors” (2003) 26(2) *World Competition*.
- Fuller L.L., “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) 71 *Harvard Law Review*.

- Hovenkamp H., *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, 2005.
- Ingram P.G., *Censorship and Free Speech: Some Philosophical Bearings*, Ashgate, Burlington, USA 2000.
- Kirchner C., “Goals of Antitrust and Competition Law Revisited” [in:] Schmidtchen D., Albert M., Voigt S. (eds.), *The More Economic Approach to European Competition Law*, Tübingen, 2007.
- Kramer M.H., *In Defence of Legal Positivism*, Oxford University Press 1999.
- Lenel H.O., “Evolution of the Social Market Economy” [in:] A. Peacock, H. Willgerodt (eds.), *German Neo-Liberals and the Social Market Economy*, MacMillan 1989.
- Odudu O., *The Boundaries of EC Competition Law: The Scope of Article 81*, Oxford 2006.

A short comment on Andriychuk

by

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When submitting my paper on the goals of Polish competition law, I was convinced that it would start a debate among Polish antitrust scholars and practitioners concerning this fundamental issue for any antitrust jurisdiction. I was also hoping that it would be reinforced by input from abroad. The fact that my contribution resulted in a discursive article confirms that the goals of antitrust law have always been, still are, and will continue to be a controversial and invigorating issue for further discussion.

My paper was not designed as a theoretical discussion on the notion of competition, preferable goals of antitrust law, or analytical methods of applying statutory prohibitions. It was also not meant to provide a practical solution to this problem. Considering the lack of similar studies, my paper was intended to present a review of the development of Polish jurisprudence between 1990 and 2008, which, I believe, has evolved in an interesting way. By stressing the importance of consumer interests, Polish jurisprudence has managed to avoid the pitfalls of a “restriction of the freedom of action” and “allocative efficiency”, using instead the concept of “consumer detriment” as the denominator of competition restrictions. Given the form of my input, my paper should be viewed as an introduction to a wider debate. As such, it differs from Andriychuk’s article, which is a clear statement on how this issue should be resolved, even though it is not related to Polish experiences.

I agree with Andriychuk’s opinion that “statutory ambiguity belongs to universal attributes of law and legal interpretation”. However, the degree of ambiguity of antitrust rules is very significant. The prohibitions of restrictive agreements and unilateral abuses of market power do not provide undertakings with exact information as to what is actually prohibited. What indicates that

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an agreement has anti-competitive aim or effect? What constitutes dominant position and the abuse thereof? Even if the exemplary lists of restrictive practices that fall within the scope of the two general prohibitions are considered, who can tell – just by reading the text of the legal rules – what an unfair price is (Article 82 a EC or Article 9(2)(1) of the Polish Competition and Consumer Protection Act) or whether a refusal to supply an undertaking interested in exporting the goods amounts to a dominant position abuse? Thus, while I can generally agree with Andriychuk’s statement that “statutory provisions are *rules* and not *guidelines*”, I can accept it only in so far as statutory provisions do not refer to extralegal norms or values. If they do, then they become guidelines that show the direction of a possible interpretation, requiring business and judicial practice to develop to provide them with an actual content and meaning.

Referring back to one of the aforementioned examples, what constitutes an unfair price? It may be high or low or both. Until jurisprudence settles the issue, it is not possible to specify why a certain price is unfair, unless with reference to a comparative interpretation. As a result, judicial interpretation plays a more important role than has been traditionally attributed to it. The importance of judicial activism in determining the content of positive law has increased dramatically in the last 30 years, both with the proliferation of the courts of the highest instances at the European and international level and with the development of EC law. Judicial interpretation is of much more importance than accepted by Andriychuk, since ECJ’s preliminary rulings are binding on the courts of Member States¹ and because the ECJ requires national judges to be “adventurous” when applying established principles of domestic law in proceedings where issues of EC law are at stake² (with the result that national courts must disregard nearly everything that stands in the way of the effectiveness of EC law). The great impact of judicial interpretation can also be attributed to the fact that, at the national level (at least in Poland), a judge can choose between the authority of the ECJ, the CFI, the European Court of Human Rights, the Supreme Court or the Constitutional Tribunal as well as between EC, international, national laws or Constitutions, when determining the legal basis of his or her decision. Once a continental judge uses the opportunity offered by such a variety of legal authorities, it is likely he will no longer be willing to follow the tradition of legal positivism and of the priority of a textual interpretation.

¹ C-8/08 *T-Mobile Netherlands and others* (available at <http://curia.europa.eu>), para. 50: “In applying Article 81 EC, any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States”.

² C-453/99 *Courage and Crehan* [2001] ECR I-6297.

Andriychuk states that pursuant to *deontological* antitrust theories competition is “a distinctive feature of liberal democracy that should be protected irrespective of the outcomes which it brings to society” since “competition constitutes the essence of a liberal society”. It follows that “competition deserves protection as a matter of principle and public choice, even in cases where it does not necessarily bring the best economic results”. After all, from an etymological point of view, and therefore following a textual interpretation, “*competition* is a notion which encompasses a process, more than a result”. He then writes that “If competition law was to be perceived through the perspective of efficiency, that would mean that competition does not have an intrinsic value in and of itself but is seen only as a means of increasing consumer welfare“. This is the core thesis of Andriychuk’s response to my review and I would like to focus my comments on this statement.

First of all, competition in general is not a feature peculiar to or present in a liberal democracy only, even though it is indeed of special importance to this type of government.

Second, while it is true that the meaning of “competition” in common language is “rivalry”, it is nevertheless questionable to assume that competition law protects only competition, and hence the “process of rivalry” or the “competitive environment”. Legal norms are always used to achieve a certain result. Why should competition law be any different? If the EC’s concept of effective competition is considered, competition (and hence competition law) is viewed from a utilitarian perspective because “effective competition” means “as much competition as needed to achieve the goals of the Treaty”³. In this case, what if the legislator decides to focus on the results rather than the process?

Third, should competition law protect the very existence of competition seen as a process of rivalry, then any restriction of rivalry would amount to a restriction of competition. Andriychuk’s argument is appealing because of its simplicity, the legal certainty it offers and the fact that it facilitates the application of antitrust rules. However, it once again results in a substantial shift in antitrust analysis. If Article 81 is taken as an example (seeing as it is quite easy to establish whether certain behavior restricts competition by proving that collusion restricts rivalry on the relevant market), the key element of its application shifts from Article 81(1) to Article 81(3) EC. Considering that according to Andriychuk “from the structural perspective, the conditions

³ See also direct references to consumer interests in 85/76 *Hoffmann La Roche & Co. v Commission of the European Communities* [1979] ECR 461 – “[A]rticle 86 therefore covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(f) of the Treaty” (para. 125).

contained in Article 81(3) EC are not competition law *sensu stricto*. Rather, they constitute transitory guidelines on how to balance competition with innovation, economic efficiency and consumer welfare. They are a bridge between different policies, an algorithm for fine-tuning and balancing different interests and priorities within the EC; a compromise between competition and other legitimate goals, but not a competition policy as such”, this shift means that certain anti-competitive agreements are not prohibited because they actually, or usually (group exemptions), promote certain non-competition related values. If so, then Article 81(3) has nothing to do with competition law.

This approach was criticized as early as the mid 1960s⁴ and I do not think that it is acceptable today from a practical point of view. Following a strict application of Article 81(1), Article 81(3) can be treated as a set of statutory guidelines about what positive effects of a restriction of rivalry are relevant in order to avoid the application of the basic prohibition. This part of my comment on Andriychuk’s thesis shows once again the deficiencies of the structure of Article 81: pursuant to Article 81(1), agreements restricting competition are prohibited, as incompatible with the common market but they escape this prohibition, and its legal consequences, if the conditions of Article 81(3) are met. However, as Andriychuk correctly observes, they remain anti-competitive from an ontological perspective since the restriction of competition forms a necessary condition for the application of Article 81(1). This structure was demolished by Regulation 1/2003 Article 1, leaving aside all the doubts concerning the legality of such an amendment of the Treaty, from 1 May 2004, agreements that fall within the scope of Article 81(1) but meet the conditions of Article 81(3) are not prohibited.

Last but not least, if competition law was to care only about competition itself, it would not be able to deal with various instances of exploitative abuses because it would only cover practices directed against competitors (actual or potential). Exploitative practices form an important part of Polish jurisprudence. As Andriychuk correctly points out, there may be instances when competition should be protected irrespective of the short term benefit to consumers. However, this should only be the case when it is necessary to avoid future or long term harm to consumer interests. Such negative effects can result from a behavior that, while beneficial to consumers at the time of its legal assessment, harms competitors or other market players that do not compete with parties to the agreement or the dominant undertaking. This approach is present in a series of Polish transport cases relating to very low (sometimes even predatory) prices introduced on selected routes by dominant

⁴ Starting with Judge R. Joliet’s dissertation *The rule of reason in antitrust law*, Hague 1967.

incumbent coach operators when faced with competition from new entrants. This body of case-law shows that consumer detriment can go hand to hand with ordoliberal competition protection.

Andriychuk writes that the current evaluation of restrictive agreements is based on the assumption that an agreement can be either pro- or anti-competitive. He claims however that in reality the same agreement can be simultaneously anti-competitive, pro-competitive as well as beneficial to consumers. If we stick to the definition of competition as a process of rivalry then an anti-competitive agreement (because it restricts rivalry between the parties) can be procompetitive in the sense that it increases rivalry on the market. If it is, then I believe that such an agreement is beneficial to consumers because they benefit from increased competition on the market. Such understanding of consumer benefit (in order to avoid the sometimes misleading term of “consumer welfare”) can easily be fitted into the requirements of Article 81(3) by, for instance, emphasizing the enlarged scope of the products on the market.

Although I have some reservations about Andriychuk’s theory, I admit that his stimulating views find support in numerous rulings of the European courts, including a very recent one. In *Syfait II*⁵, the analysis of the competitive impact of refusal to supply was almost non-existent, that this case falls short of a form based approach or a per se prohibition of refusal to supply an existing customer engaged in parallel trade. In para. 34, the ECJ declares that refusal to supply “[c]onstitutes abuse of that dominant position under Article 82 EC where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor”. In para. 35, the ECJ tries to provide more details concerning the issue of when “a trading party” may be eliminated as a competitor if it acts as a distributor of the products of the supplier. In para. 37, the ECJ states that “[a] practice by which an undertaking in a dominant position aims to restrict parallel trade in the products that it puts on the market constitutes abuse of that dominant position”. At this point, the core of the analysis shifts to the issue of objective justification, to which most of the ruling is devoted (para. 40-76). Similarly, in the C-209/07 *BIDS*⁶ case, when explaining the notion of agreements that restrict competition by their “object”, the ECJ states that this category covers arrangements meant to enable competitors to “[i]mplement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale”, because

⁵ C-468/06 to 478/06 *Sot. Lélou kai Sia EE* [2008] ECR I-7139.

⁶ C-209/07 *Beef Industry Development Society and Barry Brothers*, available at <http://curia.europa.eu>.

such arrangements go against the basic concept whereby “[e]ach economic operator must determine independently the policy which it intends to adopt on the common market” (para. 34).

It is also not difficult to apply Andriychuk’s theory to the market integration goal of EC competition law. It can easily be argued that a restriction on one’s ability to buy or sell in another Member State limits competition because it restricts the rivalry between undertakings from other Member States. Such an approach is evident in *Syfait II*, where the EJC explains in para. 35 that refusal to meet the orders of an existing customer, who is a wholesaler exporting to other Member States, restricts competition. This is so, when it impedes the activities of such a wholesaler in the Member State of establishment and placing the order, or if it leads to the elimination of effective competition from this wholesaler in the distribution of the contested products on the markets of other Member States.

Andriychuk’s response, my review and this commentary show clearly that there is still much to debate about the goals of antitrust law.

A R T I C L E S

Economic Approach to Counteracting Cartels

by

Anna Fornalczyk*

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Abstract

Horizontal agreements between competitors concerning price fixing, quotas, distribution and/or supply market share – cartels – represent the most severe form of competition law infringement. Why are these agreements subject to the highest fines and, in some countries (USA, Canada, Mexico, UK), subject to both fines as well as imprisonment? What are the economic grounds for such severe punishment? How important is an economic analysis for the results of anti-cartel proceedings considering that they are prohibited *per se*, that is, absolutely and unconditionally? Does growing market concentration and resulting transparency increase the significance of the economic approach to the evaluation of market effects of the behaviour of business? Which methods make it possible to differentiate cartels from competition in oligopolistic markets including economic and econometric analyses? This paper will present an answer to the aforementioned questions on the basis of literature studies, an analysis of Polish case law between 2000–2009 as well as the author's extensive experience in the field of antitrust consultancy.

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Classifications and key words: cartels, collusions, explicit and tacit collusions, transparent markets, relevant markets, anti-competitive agreements.

I. Economic dimension of cartels

The Polish Competition and Consumers Protection Act of 2007¹ (thereafter the Act of 2007) protects competition as a public interest similarly to the situation found in other EU countries. Widely discussed in literature, this is justified from the economic perspective by the role competition plays in achieving resource allocation and the effectiveness of firms acting under competitive pressure which in turn holds back consumer prices, maintaining or increasing social wellbeing². Some believe, that competition not only facilitates effectiveness and stops price increases but also serves other goals such as the EU's aim of “[m]arket integration, openness, control of dominance, fairness, and competitiveness, the growth of efficient, dynamic and responsive firms for the sake of European economic strength in world markets”³.

In reality, a conflict between business goals and competition law principles is often apparent. Competition law finds justification in microeconomic theory, and not only in the concept of social deadweight loss⁴, but also in the concept explaining the essence, reasons and ways to minimize market failures⁵.

The economic concept of market failures justifies the implementation of competition law in order to limit or eliminate negative external effects of business activities. These effects are associated with the exercise of monopolistic practices. Entrepreneurs base their businesses on a cost-benefit analysis, which may suggest the profitability of practices consisting of an abuse of dominance and/or of the conclusion of an agreement stabilising their own market position by restricting competition. Polish entrepreneurs are quite frequently unaware

¹ Journal of Laws 2007 No 50, item 331, with subsequent amendments.

² H.R. Varian, *Mikroekonomia*, Warszawa 1997, p. 560–573; L.M.B. Cabral, *Introduction to Industrial Organization*, Cambridge 2000, p. 252–254.

³ E. Fox, *The Competition Law of the European Union In Comparative Perspective*, St. Paul, MN, West Publishing Co. 2009, p. 31.

⁴ E. Czarny, E. Nojszewska, *Mikroekonomia*, Warszawa 2000, p. 152–153.

⁵ O.E. Williamson, *Markets and Hierarchies. Analysis and Antitrust Implications*, New York 1983, p. 5–6; W.J. Baumol, A.S. Blinder, *Economics Principles and Policy*, San Diego 1988, p. 648; J.E. Stiglitz, *Economics of the Public Sector*, New York 1988, p. 71–81; E. Czarny, E. Nojszewska, *Mikroekonomia*, p. 348–373.

of the fact that economically acceptable and rational business actions may in fact infringe competition law⁶.

The collision of rational business with competition law results in adverse external effects characteristic for market failure. They are considered to be negative because the achievement of such business goals may restrict competition and go against social interests⁷. The external character of such effects can be traced back to the fact that the losses incurred by other market players (competitors, consumers) are not included in the cost-benefit analysis carried out by the entrepreneur pursuing a monopolistic practice. In fact, the exercise of such practices constitutes a “zero-one” game seeing as entity (entities) involved in monopolistic practices benefits from them at the expense of other market players.

It is hard to imagine that entrepreneurs would assess external losses associated with their practices and include them in their own cost-benefit analysis as applied, for instance, in the case of environmental charges. Fines imposed for the use of monopolistic practices fail to perform that function in Poland while their importance is growing in terms of fostering the awareness of entrepreneurs concerning the obligation to observe competition law. A company or a consumer who suffered losses, due to monopolistic practices of a dominant undertaking or a cartel, may rely on private enforcement to alleviate them. However, while private enforcement is popular in the US and gaining importance in Europe, the lengthiness of court suits remains a strongly deterrent for private enforcement in Poland.

Restricting market power resulting from a dominant position or cartel requires state intervention. In case of Polish competition law, this translates into the opening of explanatory and/or antitrust proceedings by the President of the Office of Competition and Consumers Protection (hereafter, President of UOKiK). Mentioned here should be however the administrative weaknesses formulated by J. Stiglitz reflected in excessive administrative regulation which restricts business initiative and adversely affects the economy, including consumers⁸. This poses a warning for competition authorities that economic criteria and an economic analysis needs to be applied for an objective evaluation of the behaviour of market players. For example, Herbert Hovenkamp states that the application of competition law is necessary if administrative intervention into market processes is economically justified⁹.

⁶ *Znajomość prawa o ochronie konkurencji i zasadach przydzielania pomocy publicznej wśród polskich przedsiębiorców*, UOKiK, Warszawa 2009, p. 14, 59–60.

⁷ R. Whish, *Competition Law*, London, Edinburgh 1993, p. 127.

⁸ J.E. Stiglitz, *Economics...*, p. 5–6.

⁹ H. Hovenkamp, *The Antitrust Enterprise. Principle and Execution*, Harvard 2005, p. 10.

Particularly in the US, the issues of an economic justification for the application of competition law has been a topic of dispute for decades between liberals and the representatives of a structural approach to market behaviour of companies. The liberal economists of the Chicago and post-Chicago School believe that, except for the monitoring of large concentrations and cartels, administrative intervention in anti-competitive business behaviour is unnecessary. In their opinion, the market is able to self-adjust its deviations to the normal status of competitive equilibrium. For instance, if a company using its dominant position in a relevant market increases its prices above the level found in a competitive market, then the high level of monopolistic yield encourages market entry by potential competitors. The post-Chicago School furthers the market behaviour concept using game theory, more sophisticated analyses based on market information asymmetry, the economy of scale and the concept of rising rival's costs¹⁰.

Microeconomics explains it as generating economic profit when inter-sectorial differentiations cause capital flows from less to more effective applications until the economic profit reaches zero level, where the economy is in competitive equilibrium¹¹. This process is limited by entry and exit barriers¹². The higher the barriers, the more difficult it is for a potential competitor to enter a market characterised by high economic profits – businesses operating in that market maintain their market power and benefit from monopolistic profits. This fact is frequently the reason for companies to create and maintain barriers of administrative, structural or strategic nature.

Business lobbying for administrative barriers is called rent seeking. Structural barriers result from technological processes and translate into economic terms of demand for material, personal and financial resources the size of which differs in various sectors (thus they are called objective barriers). Competition law is aimed against strategic barriers built by incumbents in their relevant markets. An agreement between competitors operating in a particular market may effectively close that market for potential competition, enabling parties to that agreement to apply monopolistic practices and achieve profits thereof.

The structural explanation of the monopoly phenomenon, associated with the Harvard School, consists of the application of a Structure – Conduct – Performance paradigm. This paradigm, also known to organisation and management theory, leads to the conclusion that companies operate within the limits set by market structure¹³. Competition authorities are thus required

¹⁰ Ibidem, p. 31–91.

¹¹ K. N. Hylton, *Antitrust Law. Economic Theory & Common Law Evolution*, Cambridge 2003, p. 9.

¹² J. Bain, *Barriers to New Competition*, Augustus M. Kelly Publishers, USA 1993.

¹³ H. Hovenkamp, *The Antitrust Enterprise...*, p. 33–35.

to preventively monitor concentrations so as to prevent the creation of business structures facilitating monopolistic practices seeing as it is better to prevent the occurrence of market conditions generating such practices than to counteract the practices themselves. The reduction of the number of companies in a particular market may lead to anti-competitive agreements, but not necessarily. It is long since it was noted that, in a transparent market, conscious parallelism may appear as a consequence of independent decisions of businesses operating in that market concerning their prices and production volumes¹⁴. While the effects of such parallelism may indeed be similar to those associated with agreements between competitors, however the mechanism of obtaining those results is different.

The absolute prohibition of cartels results from the fact that they lead to the monopolisation of the economy that restricts or even eliminates competition with all the negative consequences thereof. It is also important that the organisation of a cartel is more time and cost efficient than building a dominant position by a company in its own relevant market¹⁵. This justifies the implementation of particularly severe restrictions against agreements between competitors aimed at price fixing, setting production and sales quotas, sharing markets, setting other terms of trade or the exchange of sensitive information¹⁶.

Articles 6 and 7 of the Act of 2007 contains a prohibition of agreements “[w]hich have as their object or effect the elimination, restriction or any other infringement of competition on the relevant market shall be prohibited, in particular those consisting in:

- 1) fixing, directly or indirectly, prices and other conditions of purchase or sales of products,
- 2) limiting or controlling production or supply as well as technical development or investments,
- 3) sharing markets of supply or purchase,
(...)
- 7) collusion between entrepreneurs entering a tender, or by those entrepreneurs and the entrepreneur being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price”.

¹⁴ J.A. Rahl, “Conspiracy and the Anti-Trust Laws” (1950) 44 *Illinois Law Review* 743.

¹⁵ H. Hovenkamp, *The Antitrust Enterprise...*, p. 125.

¹⁶ R. Whish, *Competition Law*, p. 127; R.A. Posner, F.H. Easterbrook, *Antitrust Cases. Economic Notes and Other Materials*, West Publishing 1981, p. 96–98; M. Motta, *Competition Policy. Theory and Practice*, Cambridge 2005, p. 137; A. Fornalczyk, *Biznes a ochrona konkurencji*, Kraków 2007, p. 85–86; *Zmowy cenowe*, UOKiK, Warszawa 2009, p. 11; M. Bernatt, A. Jurkowska, T. Skoczny, *Ochrona konkurencji i konsumentów*, Warszawa 2007, p. 59.

The aforementioned examples of anti-competitive agreements are not covered by the three legislative exemptions: a) the *de minimis* exemption, b) the rule of reason, and c) block exemptions.

Of direct relevance to cartel proceedings is the fact that the Act of 2007 treats the intention to restrict or eliminate competition in a relevant market (purpose of an agreement) as an action infringing competition law, irrespective of its implementation (effect of an agreement). Establishing such an aim requires an examination whether it appeared in written and/or oral agreements or in documents containing reports of the meetings of the representatives of an alleged cartel. Herbert Hovenkamp called this approach as “fundamentally subjective”. It is characteristic to the legal approach associated with cartels. Economists do not see cartels through the prism of written or oral agreements but evaluate them from the point of view of the market structure and the strategy executed by their alleged members. Hovenkamp called the economic approach to cartels as “fundamentally objective”¹⁷.

II. Counteracting cartels in the Decisions of the President of the Office of Competition and Consumers Protection

The majority of the decisions of the Polish UOKiK, known as the Antimonopoly Office between 1990-1995, concerns the preventive monitoring of concentrations and a small percentage relates to cartels (anti-competitive horizontal agreements). Nevertheless, the focus has now clearly shifted towards cartels especially since the Act of 2007 has eliminated motions (Art. 49 and 86) in favour of an *ex officio* initiation of competition law proceedings.

The decisions of the President of UOKiK against cartels can be classified into three categories:

- a) counteracting price fixing and setting other terms of business activities by entrepreneurs associated in professional associations (Union of Polish Architects, Regional Pharmaceutical Chambers in Łódź and Poznań, Warsaw Veterinary Chamber, Polish Chamber of Electronic Communication),
- b) agreements between entrepreneurs (sugar plants, producers of chemical fertilizers, taxi corporations, municipal utilities, funeral services, outdoor advertising agencies, yeast producers, local market management companies, press distribution agencies, real estate agencies),
- c) tender agreements (furniture manufacturers, municipal waste management companies, companies renting mooring infrastructure, public transport companies).

¹⁷ H. Hovenkamp, *The Antitrust Enterprise*..., p. 126, 135.

Currently underway are proceedings against an alleged cartel of cement producers and against an alleged cartel of waste management companies from Białystok, which is charged with setting binding terms in a tender announced by local authorities.

The UOKiK finds information necessary to establish a restriction of competition associated with fixing minimum fees for services provided by members of professional associations in draft statutes or already adopted by-laws of such associations as they contain provisions contradictory to Article 6(1)(1) of the Act of 2007. In the case of tender collusions, the information sources can be traced back to motions and/or notifications filed by the organisers of the tenders or by bidders not participating in the collusion.

The UOKiK acquires information concerning price fixing agreements, production quotas and/or market sharing from various sources: market research carried out by its office staff, information received from consumers and entrepreneurs who either supply or purchase goods allegedly regulated by a cartel and the leniency programme which is proving to be an effective new source of information for the authorities. New and effective source of information is the leniency policy, which was introduced in the European Union in 1996, and has been in force in Poland since 2004. Since then 16 leniency notices have been filed with the Office. The programme was enacted in Poland in February 2007 (Law: Art. 109) and further developed by a Regulation of the Council of Ministers of January 2009. In 2009 the President of UOKiK published additional guidelines explaining the goals and application procedure of the programme.

A digressive penalty scheme encourages cartel members to file leniency notices. An entrepreneur will not be punished with a statutory penalty for participating in a cartel as long as it is not its initiator, as long as it is the first to provides the President of UOKiK with information on the cartel which is sufficient to initiate proceedings, and as long as the company quits the cartel upon filing the leniency notice. The second applicant, satisfying the aforementioned criteria, may have its penalty reduced by no more than 50%. The third may receive a 30% reduction while further applications might have their fines reduced by up to 20%.

The effectiveness of anti-cartel proceedings is reinforced by the statutory competences of the President of UOKiK to control and dawn raid the premises and/or goods associated with a cartel. That competence is subject to consent by the Polish Court for Competition and Consumers Protection granted, within 48 hours, upon the request of the President of UOKiK– the Court's decision in this respect cannot be appealed (Art. 64). An actual dawn raid took place in May 2006 in the premises of eight cement producers “Polski

Cement” Association of Cement Producers and a legal bureau working for the Association¹⁸.

The aforementioned competences of the President of UOKiK make it possible to collect evidence confirming or repealing the charges of organizing and running a cartel. However, they do not exclude the application of a thorough analysis characteristic for the “fundamentally objective” approach to the market conduct of entrepreneurs charged with cartel offences.

III. Role of economic analysis in anti-cartel proceedings

The evaluation of market consequences of alleged cartels is performed in two stages in the economics of competition law. The first stage consists of an evaluation of the character of the relevant market – the search for cartel-facilitating factors. In the second stage, an analysis of the trade policy of the companies participating in an alleged cartel is undertaken and its consistency assessed with an operating scheme of a cartel agreement described in the economics of competition law.

The economics of competition law mentions the following factors facilitating cartel collusions¹⁹:

- a) level of market concentration – the higher is market concentration, the easier it is to organise a cartel,
- b) high barriers to entry and exit the relevant market – the higher the barriers, the stronger the motives to enter into a cartel, the more durable the cartel and the longer the period of generating monopolistic profits,
- c) insignificant market shares of small companies not participating in the cartel – they may not threaten the existence of the cartel by snatching customers from cartel members through underpricing and offering better terms of contract (e.g. payment terms),
- d) price elasticity of demand – the higher the elasticity, the more difficult it is to fix high prices which generate expected yields for cartel members,
- e) expected demand changes – for a member of a cartel, it is not worth going against a cartel agreement in order to increase its immediate profits when significant demand growth is foreseen for the cartel (growing market); this leads to a conclusion that on a mature market without prospects

¹⁸ *Zmowy cenowe*, p. 27.

¹⁹ H. Hovenkamp, *The Antitrust Enterprise...*, p. 132–133, M. Motta, *Competition Policy*, p. 142–159; R.A. Posner, F.H. Easterbrock, *Antitrust Cases...*, p. 336–346.

- for significant demand growth, the motives for cartelization are weaker while the tendency to breach the price agreement is stronger,
- f) product uniformity and standardisation – the more uniform and standardised the product, the stronger the tendency among entrepreneurs to enter into a cartel,
 - g) regularity and frequency of orders – the higher and the rarer the orders, the weaker the tendency to form a cartel and, should the cartel already exist, the stronger the tendency to breach cartel agreements,
 - h) market power of the consumers – the greater the negotiating power of the consumers, the weaker the tendency to conclude cartel agreement by the sellers and, should the cartel already exist, the easier it is to destabilize it by individual negotiations concerning prices and other contractual terms,
 - i) ratio of fixed costs in company operating costs – the higher the ratio, the stronger the tendency to form a cartel in order to reduce market risk,
 - j) market structure symmetry – the more symmetrical the market (with a limited number of market players), the stronger the tendency to form a cartel,
 - k) resale price fixing – the application of vertical restrictions facilitates the formation of a cartel as it increases the potential control over the distributors' price discipline,
 - l) ownership relations between companies – agreements concluded within a capital group are not subject to competition law unless such agreements adversely and severely affect competition in a relevant market²⁰.

Establishing the existence of cartel facilitating factors is considered to be the purpose of the relevant market analysis which requires the economic approach to determine: actual and potential competition (market barriers), price elasticity of demand, market development level, cost structure of the members of the alleged cartel and their market power as well as the market power of their customers. Probability of cartel formation is low on unfavourable markets however its analysis requires statistical data and information concerning the market under examination. This frequently proves a major barrier for the application of an economic analysis. Particularly in the Polish economy, market dynamics causes the relevant data to be impossible to compare in the longer term because it is not long since most companies introduced electronic accounting and statistics systems that could provide such data (in general, this is a period after the year 2000).

²⁰ S. Gronowski, *Ustawa antymonopolowa – komentarz*, Warszawa 1999, p. 78.

IV. Market transparency of cartels

Collusion among competitors may not only apply to price fixing, production quotas or market sharing. It may also affect, for example, exiting one relevant market with a guarantee of exclusivity on another, co-ordination of payment terms in transactions with consumers and/or suppliers or agreeing transport conditions for sold products (own or customer's transport). Independently from the issue of the 'object' of a collusive agreement, the application of competition law requires an examination whether a particular market conduct results from overt or tacit collusion. In the latter case, competition law shall not be applicable because, even though its market effects may seem similar to those of an overt collusion, entrepreneurs have neither met nor agreed upon their actions²¹. It is doubtful whether a convergence of market actions of competitors may at all be defined as collusion, even a tacit one.

Oligopolistic market structures, widely discussed in economic theory, are used in the economics of competition law²². Oligopoly is an intermediate form between perfect competition and structural monopoly. The main characteristics of oligopoly include:

- a) limited number of producers and a large number of consumers,
- b) barriers to entry, in particular, technological and/or economic ones but also administrative or strategic,
- c) products offered in the market are usually close substitutes, even though they may be both homogeneous and heterogeneous,
- d) producers and consumers have perfect information concerning the market – market is transparent.

A limited number of producers operating on an oligopolistic market translates into a relative ease of obtaining information about the relevant competitors. This is essential for increasing market transparency which may be facilitated by the following factors:

- a) symmetry level – the closer market shares of the competitors, the more symmetric the oligopoly and the more transparent the market,
- b) market concentration level – the more concentrated the oligopoly, the more transparent the market; market concentration is measured by market shares using the concentration rate or the Herfindahl-Hirschman

²¹ M. Motta, *Competition Policy*, p. 137–138.

²² H.R. Varian, *Mikroekonomia*, p. 471; P.A. Samuelson, W.D. Nordhaus, *Ekonomia*, vol. 1, Warszawa 1998, p. 769; J. Tirole, *The Theory of Industrial Organization*, The MIT Press 1988, p. 209; E. Czarny, E. Nojszewska, *Mikroekonomia*, p. 168–216; H. Hovenkamp, *The Antitrust Enterprise...*, p. 126–131; K. N. Hylton, *Antitrust Law...*, p. 21–23, 73–81; M. Motta, *Competition Policy*, p. 138.

Index – depending upon the number of competitors in the relevant market and the symmetry level of the oligopoly.

Conduct of competitors in an oligopoly is explained by the interdependence theory formulated by Augustin Cournot. In his model of product quantity equilibrium, Cournot described the interdependence between strategies of competitors in a particular form of oligopoly – a duopoly. His model was further developed by Heinrich von Stackelberg who presumed that one of the members of the duopoly knew that its competitor was following the principles of the Cournot model. Such a presumption leads to the “price-leader and price-follower” pattern²³.

Another model for analysing the equilibrium in a duopoly was formulated by Joseph Bertrand who examined the price interdependence of market behaviour of companies. From the perspective information collection in a transparent market, the Bertrand model seems to be more useful because it is easier to watch the prices of a company’s competitors rather than the volume of their sales. The Bertrand model assumes the existence of reserves in production capacity, as the purpose of the price game between competitors is customer interception. Additional demand for cheaper goods may only be satisfied subject to production increase. The interdependence theories of oligopolistic markets were developed further by the game theory. A conclusion is drawn from the interdependence theory that conscious parallelism of decisions on prices and production quotas should not be treated as collusion and, consequently, as an illegal action subject to competition law enforcement²⁴.

Interdependence (generating market followers) is reached through market research and strategic planning, or even by playing a sophisticated business game in order to mislead other market players. Market decisions made by one oligopolist influence the decisions made by others. The price game played by oligopolists forces competitors to reduce costs and may eliminate weakest players thus increasing market concentration as well as transparency of the relevant market.

In case of an oligopoly offering homogeneous products (such as cement, steel or flour), the product brand is not the key determinant for customers – instead they consider the price to be the primary selection criterion on such markets facilitating price competition between existing market players. Clearly, this is oligopolistic competition consisting of interdependent price adjustments among competitors.

The realisation that the economics of competition law recognises the interdependence theory as an objective mechanism of oligopolistic markets does not change the fact that concentrated market structures facilitate the

²³ E. Czarny, E. Nojszewska, *Mikroekonomia*, p. 196–205.

²⁴ K. N. Hylton, *Antitrust Law...*, p. 80–81.

formation of cartels. It is essential therefore for competition authorities to assess whether the similarity of prices and/or other contractual terms derives from an agreement between competitors or from interdependence of their market actions in a transparent market.

Cartels may be organised in different ways. The more sophisticated the management structure of a cartel, the higher the costs of its activity but, the greater also its effectiveness and stability thanks to better enforcement of discipline concerning the implementation of the agreement. The European cement cartel, which operated for ten years with the support of the European Association of Cement Producers (Cembureau), eight national associations and 33 cement manufacturers, constitutes a good example of a precise organisation and stability of a cartel. The grounds of all UOKiK's cartel decisions did not indicate that Polish cartels were organised in an equally precise way. It is likely that the weak discipline of Polish cartels results from a general lack of social capital (the inability to co-operate among Poles in various areas including, most probably, also cartel agreements).

My experience as an antitrust consultant to large companies in Poland explicitly indicates however that the more transparent the market, the higher the chance that meetings between competitors (even those of which minutes are kept) are not collusive. Instead, they often constitute a form of market research directed at shaping the individual actions of participating companies, which may be interdependent from the plans of their competitors. Similarly, a contribution to the financing of a sectorial association engaged in information exchange, or facilitating such exchange during the meetings of its members, is treated as costs of information collection. In practice, it is often less expensive to support such an association than conducting individual market research or purchasing data from specialised research companies.

Polish experiences show also that the competition authority should treat leniency notices with extreme prudence because it is possible that the applicant is more intent on harming its competitors than on benefiting from a penalty reduction. This of course does not discredit the leniency procedure as such (effectively applied in the USA since 1978), but it is worth pointing out the risk of its misuse.

V. Criteria and consequences of effectiveness of cartel

An analysis of past cartel agreements allowed the economics of competition law to identify six presumptions for a "good" operation of a cartel²⁵:

²⁵ H. Hovenkamp, *Federal Antitrust Policy. The Law of Competition and its Practice*, St. Paul, MN 1994, p. 141.

- a) relevant market must have high barriers to entry and exit – the higher the barriers, the stronger the tendency among cartel participants to maintain discipline because there is no threat that newcomers will destabilize the market on which the cartel operates; when barriers to entry and exit are low (contestable market), a cartel might not be threatened either, if the new entrants join the agreement,
- b) cartel members must have market shares which will guarantee them safe operations – market shares of companies not participating in the cartel must be sufficiently small for their sale increase to not affect the cartel agreement,
- c) contrary to the common view, the key issue in cartel agreements are not prices (which may be monitored on a transparent market using information provided by the buyers during price negotiations) but production quotas that guarantee the stability of the market share of cartel members; significant variations existing in marginal costs may pose a serious difficulty when distributing production quotas among cartel members,
- d) internal cartel management system must ensure the detection of all breaches of the agreement; the possibility of discretionary infringements weakens its power and may transform it into an apparent cartel,
- e) infringements of the cartel agreement must be penalised – if breaches go unpunished, the cartel's discipline weakens which may transform it into an apparent cartel,
- f) there must be a safeguard against disclosing the existence of the cartel – the social harm of explicit collusion causes their absolute prohibition and activates competition law in order to counteract this form of market monopolisation.

The flow of market information is believed to be a key factor in economic concepts concerning oligopoly, market transparency and/or competition restricting agreements. This may be an exchange of trade, investment, innovation and financial information classified as private – directed only to competitors²⁶. It constitutes a manifestation of explicit collusion, even though some believe that such an exchange of information helps to better satisfy consumer needs and accelerates innovations. The explanation of this phenomenon may be found in the concept of co-opetition, according to which entrepreneurs are willing and should co-operate in the process of added value creation, while they should compete in the process of added value distribution in the relevant market²⁷.

²⁶ M. Motta, *Competition Policy...*, p. 153.

²⁷ A.M. Branderburger, B.J. Nalebuff, *Co-opetition*, New York 1998, p. 4.

Public information exchange consists of the distribution of information to all market players (competitors, buyers and consumers). Although this type of information flow can facilitate price-fixing agreements, it simultaneously improves market transparency for consumers. It was analysed by the UOKiK in its explanatory proceedings concerning fuel prices at local gas stations²⁸ discontinued in the end, when the uniformization retail prices was found to be the result of parallel actions of gas station owners or price following. Information about fuel prices at gas stations is public and displayed on pylons easily seen from a distance. Parallel action is not prohibited by competition law and the President of UOKiK did not find collusion between the gas stations.

While the economics of competition law is focusing more and more on the market effects of cartel operations, a key question arises: how can an infringement of competition law be established if there is no hard evidence in the form of documents confirming the existence of a cartel, market analysis does not confirm price convergence, fixed market shares and market division? Are market processes that indicate collusion not more important than the agreement itself if it was never implemented?

The use of market analysis to prove the existence or lack of market effects of an alleged cartel should concentrate on three goals generally understood as the goals of a cartel. First, price-fixing is effective when: cartel members have similar production costs, including the ratio of fixed to total costs; transactions are frequent and small and; the bidding power of buyers is low making them unable to threaten the cartel. If these criteria are not fulfilled, the cartel lacks discipline in the application of the fixed prices, which might reduce it to price lists only that are generally in the public domain. Actual prices result from negotiations among sellers and buyers. Very often buyers use prices offered by one seller as an argument in a transactional game with other sellers. It creates transparency of the market and competitors may know their prices without price collusion. The evaluation of actual prices requires an analysis of prices in a particular period. Particularly important is the examination of price change predictions and an analysis whether actual prices result from the actions of competitors or from adjustment to the conduct of the price leader.

Second, market division may result from agreements but not always does seeing as transport costs should also be taken into consideration. Competition law case law assumes that transport costs constitute a market barrier if their proportion in a single transaction exceeds 5%. Thus, depending on the physical and chemical properties of the goods, the producer may be selling its products in a particular territory not as a result of an agreement between competitors, but due to the optimization of trade logistics. Natural sellers' markets might

²⁸ *Zmowy cenowe*, p. 23–24.

exist in such cases, where the possibility of an entry onto another market can not be excluded, but would require profitability depends on transport costs.

Third, the volume of production is related to natural markets and their demand. If the analysis of pricing policy and of the optimization of distributional logistics indicates that it was impossible to establish the existence of a cartel regulating these areas, then the presumption on fixing production quotas would be illogical. Production quota fixing is a substitute for price-fixing, if the prices result from an attempt to maximize the profit of the seller and price negotiations with buyers, then production quotas must result from a cost-price analysis.

Economic analyses, being fully aware of their statistical and methodological weaknesses, should be applied in anti-cartel proceedings in order to keep the equilibrium between a legalistic and an economic approach to the evaluation of business performance. The economic theory, used by the economics of competition law, has at its disposal many concepts and instruments for the evaluation of market effects of an identified collusion or for excluding the existence of such an agreement on a given relevant market. The need for an economization of antitrust proceedings, including anti-cartel ones, pointed out in the economics of competition law, should modify the current approach applied to cartels. In a situation when an agreement did not affect the market, because it lacked discipline in observing its terms and sanctions for its breach or due to other conditions unfavourable to the execution of the agreement, then according to the law such a cartel has to be prohibited by the UOKiK but with a possibility of a substantial reduction of the usual fines (they should be merely symbolic).

VI. Summary

Prices convergence on a market for goods traded by various producers, concentration of their basic product quotas in a particular territory and relative stability of their market shares – do not always have to indicate the existence of an agreement between the players on that market. An economic analysis of their trade policies, of the optimization of distributional logistics and of the relationship between the volume of production and the demand level on a relevant market, may ultimately prove that their market conduct is shaped by the interdependence of business decisions made on a transparent market. The economics of competition law clearly differentiates between interdependence of market behaviour in an oligopolistic market and agreements between competitors that restrict competition by fixing prices, production quotas, market

sharing or building barriers to entry for potential newcomers. Competition law should be applied only in cases when the competition authority can prove the existence of an overt collusion but not in cases of tacit ones.

Literature

- Bain J., *Barriers to New Competition*, Augustus M. Kelly Publishers, USA 1993.
- Baumol W.J., Blinder A.S., *Economics Principles and Policy*, San Diego 1988.
- Bernatt M., Jurkowska A., Skoczny T., *Ochrona konkurencji i konsumentów [Competition and Consumers Protection]*, Warszawa 2007.
- Branderburger A.M., Nalebuff B.J., *Co-opetition*, New York 1998.
- Cabral L.M.B., *Introduction to Industrial Organization*, Cambridge 2000.
- Czarny E., Nojszewska E., *Mikroekonomia [Microeconomics]*, Warszawa 2000.
- Fornalczyk A., *Biznes a ochrona konkurencji [Business and Competition Protection]*, Kraków 2007.
- Fox E.M., *The Competition Law of the European Union In Comparative Perspective*, St. Paul, MN: West Publishing Co. 2009.
- Gronowski S., *Ustawa antymonopolowa – komentarz [Antimonopoly Law – Commentary]* Warszawa 1999.
- Hovenkamp H., *Federal Antitrust Policy. The Law of Competition and its Practice*, St. Paul, MN: West Publishing Co. 1994.
- Hovenkamp H., *The Antitrust Enterprise. Principle and Execution*, Harvard 2005.
- Hylton K. N., *Antitrust Law. Economic Theory & Common Law Evolution*, Cambridge 2003.
- Motta M., *Competition Policy. Theory and Practice*, Cambridge 2005.
- Posner R.A., Easterbrook F.H., *Antitrust Cases. Economic Notes and Other Materials. Second Edition*, West Publishing 1981.
- Rahl J.A., “**Conspiracy and the Anti-Trust Laws**” (1950) 44 *Illinois Law Review* 743.
- Samuelson P.A., Nordhaus W.D., *Ekonomia [Economics]*, vol. 1, Warszawa 1998.
- Stiglitz J.E., *Economics of the Public Sector*, New York 1988.
- Tirole J., *The Theory of Industrial Organization*, The MIT Press 1988.
- Varian H.R., *Mikroekonomia [Microeconomics]*, Warszawa 1997.
- Whish R., *Competition Law*, London, Edinburgh 1993.
- Williamson O.E., *Markets and Hierarchies. Analysis and Antitrust Implications*, New York 1983.
- Zmowy cenowe [Price-fixing agreements], UOKiK, Warszawa 2009.
- Znajomość prawa o ochronie konkurencji i zasadach przydzielania pomocy publicznej wśród polskich przedsiębiorców [Polish entrepreneurs’ knowledge about competition law and principles of granting state aid], UOKiK, Warszawa 2009.

Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough

by

Rajmund Molski*

“We have to agree on prices [...] Polish law does not protect us and the legislator does not recognize that there is need to introduce minimum prices. We cannot protect ourselves because someone prosecutes us at once”¹.

“Attracting clients by offering lower remuneration represents a particularly glaring case of unfair competition”².

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 - (a) Administrative sanctions
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¹ From the article entitled “Skazani na zmowę” [“Condemned to collude”] published in the business newspaper *Drogowskaz* after the owners of 24 driving schools in Bydgoszcz were fined for price fixing, as quoted in *Zmowy cenowe*, UOKiK, Warszawa 2009, p. 15.

² A clause from the Notary’s Public Code of Professional Ethics (*sic!*) declared by the Supreme Court as manifestly infringing the principles of the free market, non-ethical and non-compliant with the binding legal order; see judgment of 7 April 2004, III SK 28/04, UOKiK Official Journal 2004 No. 3, item 315; M. Król-Bogomilska, “Praktyka Krajowej Rady Notarialnej ograniczająca konkurencję” (2007) 4 *Glosa* 112–132.

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Abstract

This paper presents the basic elements of the Polish anti-cartel regime and suggests what potential changes would be likely to improve it. Considered here are: the legal framework of anti-cartel enforcement in Poland as well as the performance of the Polish antitrust authority in its fight against cartels. Special attention is devoted to the substantive provisions of the cartel prohibition, investigatory powers of the antitrust authority, including the leniency programme, and the arsenal of sanctions available in cartels cases. The paper will show that Poland has sound anti-cartel laws and an antitrust authority determined to enforce them effectively. Notwithstanding its generally positive conclusions, the paper will conclude with some suggestions *de lege ferenda* which are likely to improve the Polish anti-cartel regime making its fight against cartels more dynamic.

Classifications and key words: cartels, cartel prohibition, investigatory powers, leniency programme, anti-cartel sanctions, anti-cartel enforcement.

I. Introduction

Cartel³ agreements are a direct assault on the principles of competition and universally recognised as the most harmful form of anti-competitive conduct⁴. As stressed in the 1998 OECD Recommendation, cartels are “the most egregious violations of competition law”. Today, the world’s antitrust

³ In this article, the term “cartel” means “hard core cartel”, as defined in the 1998 OECD Recommendation Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL, OECD 1998 (hereafter, the 1998 OECD Recommendation), i.e. “an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce”.

⁴ *Building Blocks for Effective Anti-Cartel Regimes*, Report prepared by the ICN Working Group on Cartels, ICN 4th Annual Conference, Bonn 6–8 June 2005, p. 1.

agencies are united in agreement that combating cartels, “the supreme evil of antitrust”, should be their top enforcement priority⁵.

Considering that the potential for anti-competitive harms associated with cartels is significantly higher in emerging economies than in developed countries⁶, one could argue that Poland should implement an even stricter cartel policy than the EU or the US. Yet, rather than combating anti-competitive activities, the removal of their sources was the focus of the implementation of antitrust law and policy at the beginning of Poland’s transition period, because that seemed the more pressing issues for an economy in transition. At that time, the Polish antitrust authority was mainly concerned with the development of competition rather than with its protection and so most of early enforcement concentrated on dominance, while restrictive agreements were of lower priority⁷. All the more so, since the antitrust authority was required by law until 2007 to formally review all received complaints, most of which concerned unilateral conduct.

Moreover, antitrust enforcement was initially rather lenient. Sanctioning of anti-competitive practices was not particularly restrictive, seeing as undertakings were still adapting to the new market conditions. Many companies were only just “learning” how to compete, hence the imposition of strict penalties was aimless. As the Polish economy had grown and matured and its market players got accustomed to competition and more familiar with antitrust rules, the time for a more vigorous antitrust law enforcement has come, especially with regard to most harmful violations. Indeed, there are reasons to believe that intensifying the fight against cartels is becoming one of the top priorities not only in declarations, but also in the enforcement practice of the President of the Office of Competition and Consumer Protection (UOKiK). It is true however, that the vast majority of antitrust proceedings in Poland still concerns abuse (see Table 1 in section III).

According to the Polish Competition Policy for 2008–2010⁸, adopted by the Council of Ministers and confirmed in the announcement of the UOKiK President⁹, one of its main objectives is to improve the effectiveness of the activities of the antitrust authority. Its effectiveness should improve, *inter alia*, in the context of finding, remedying and punishing of anti-competitive

⁵ *Building Blocks...*, p. 2, 5, 9.

⁶ See M.M. Shed, “Formulating Antitrust Policy in Emerging Economies” (1997) 86 *Georgetown Law Journal* 470.

⁷ M. Wise, “Review of Competition Law and Policy in Poland” (2003) 5 *OECD Journal of Competition Law and Policy* 91.

⁸ *Polityka konkurencji na lata 2008 - 2010*, Warszawa 2008, p. 77–85

⁹ See Competition Policy 2008-1010, UOKiK – Press release of 15 July 2008, available at http://www.uokik.gov.pl/en/press_office/press_releases/art121.html

practices, assuming that it is possible to fight them effectively on the basis of existing antitrust rules. That declaration may translate into more frequent inspections (“dawn raids”) and stiffer penalties for antitrust infringements, cartels in particular. Threatening undertakings violating antitrust law with higher fines, greater emphasis is also to be placed on the leniency programme.

The purpose of this article is to present and evaluate the basic elements of the Polish anti-cartel regime as well as to offer some suggestions *de lege ferenda* that would be likely to improve it. The article is based on the analysis of relevant Polish regulations, case law, enforcement data and doctrine, supplemented by comparative references to antitrust regimes of the EC and some other jurisdictions.

II. Legal framework of anti-cartel enforcement in Poland

1. Substantive provisions for cartel prohibition

The legal basis for anti-cartel enforcement in Poland lies in the Act of 16 February 2007 on Competition and Consumer Protection¹⁰ (hereafter, the Competition Act) and a number of implementing regulations including, in particular, Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of undertakings’ applications to the President of the UOKiK for immunity from or reduction of fines¹¹ (hereafter, the Leniency Regulation) and three regulations on the exemption from the prohibition of agreements restraining competition concerning: R&D agreements¹²; technology transfer agreements¹³ and agreements between insurance companies¹⁴ (the remaining two block exemptions relate to vertical agreements). Binding laws are supplemented by two important soft law Guidelines: 1) on setting fines for competition restricting practices¹⁵ (hereafter,

¹⁰ Journal of Laws No. 50, item 331, as amended.

¹¹ Journal of Laws No. 20, item 109.

¹² Journal of Laws of 2007 No. 30, item 1692.

¹³ Journal of Laws of 2007 No. 137, item 963.

¹⁴ Journal of Laws of 2007 No. 137, item 964. On block exemptions from the prohibition of anti-competitive agreements under the EC and Polish law see A. Jurkowska, T. Skoczny (eds.), *Wylączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce*, Warszawa 2008.

¹⁵ UOKiK Official Journal 2008 No. 4, item 33.

the Fining Guidelines), and 2) on the leniency programme¹⁶ (hereafter, the Leniency Guidelines), applied from the beginning of 2009.

None of the aforementioned laws or guidelines contains the term “cartel”, as occasionally used by the doctrine and case law. Instead, Article 6 of the Competition Act speaks of “agreements restricting competition”, while Article 4.5 contains a broad definition of “agreements”. Similar to Article 81 EC, Article 6 of the Competition Act prohibits agreements the purpose or effect of which is to eliminate, restrict or cause any other infringement of competition in the relevant market.

Polish antitrust law, while establishing a general prohibition of agreements restricting competition, does not contain a general definition of such an agreement or practice although the Competition Act contains a list of practices infringing its Article 6 prohibition. The list is not exhaustive, nor does it expressly distinguish between horizontal and vertical agreements or practices. It covers all hard core violations of antitrust law, including cartels. Similar to EU case law, Polish courts clarified that to establish an infringement of the cartel prohibition (Article 6 of the Competition Act or Article 81 EC) the UOKiK President does not usually have to prove that an agreement had anti-competitive effects, where he/she has evidence that it had an anti-competitive “object”¹⁷.

Article 7 and 8 of the Competition Act contain three important exemptions from the prohibition of anti-competitive agreements: (a) the *de minimis* exemption; (b) the rule of reason, and (c) block exemptions. The only exemption which might sometimes apply to cartels is the rule of reason. The *de minimis* test, pertaining to agreements of minor importance, excludes from its ambit all horizontal and vertical agreements containing hard core restrictions (price fixing, output restrictions, market allocation and bid rigging), irrespective of the market shares of their parties¹⁸. Similarly, none of the block exemptions currently in force exempts cartels – while creating a “safe harbour” for groups of agreements fulfilling the criteria of the rule of reason, each of them contains a list of “black clauses” – hard core restraints including cartel practices – disqualifying them from the benefit of the block exemption.

The Polish approach to the rule of reason is similar to that associated with Article 81 EC. Article 6 of the Competition Act contains no *per se* prohibitions

¹⁶ Accessible at http://www.uokik.gov.pl/en/press_office/press_releases/art147.html

¹⁷ See e.g. judgment of the Court of Competition and Consumer Protection of 5 September 2005, XVII Ama 63/04, unpublished; judgment of the Court of Appeal in Warsaw of 4 December 2007, VI ACa 848/07, unpublished.

¹⁸ See decision of the UOKiK President of 7 April 2008, DOK 1/2008, unpublished, and decision of the UOKiK President of 29 December 2006, DAR-15/2006, UOKiK Official Journal 2007 No. 1, item 5.

because all agreements are theoretically susceptible to exemption based on the rule of reason¹⁹. Nevertheless, both case law and most of Polish commentators are sceptical and unsympathetic to the legalisation of cartel practices under the rule of reason in the form of the so-called “crisis cartels”²⁰. “Defensive cartels” on the other hand, constitute an example of an otherwise illegal cartel activity, which might be exempted on this basis²¹.

The jurisdictional reach of the cartel prohibition is based on the pure “effects doctrine” (see Article 1(2) of the Competition Act)²². While no provision of Polish law explicitly exempts export cartels, such rule can be inferred, provided that they do not cause effects in Poland. If exposed to extraterritorial interventions of foreign antitrust authorities, participants of export cartels cannot seek protection in “blocking” or “claw-back” statutes, because Polish law, similar to EC law, does not contain such rules²³.

2. Investigatory powers

According to Articles 47-49 of the Competition Act, an investigation in a cartel case may be conducted in the form of explanatory proceedings or, if necessary, full antitrust proceedings, instituted on an *ex officio* basis. Explanatory proceedings may (and often do) precede the institution of a formal investigation. They allow the authority to initially determine whether an infringement took

¹⁹ See e.g. D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 460; K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 306–307; R. Wesseling, *The Modernisation of EC Antitrust Law*, Oxford 2000, p. 103.

²⁰ See e.g. decision of the UOKiK President of 18 September 2006, DOK-107/2006, UOKiK Official Journal No. 4, item 53; judgment of the Court of Competition and Consumer Protection of 10 September 2003, XVII Ama 136/02, (2004) 7–8 *Wokanda*, item 95; A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 406; D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 460.

²¹ See A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 431.

²² See judgment of the Antimonopoly Court of 24 January 1991, XV Amr 19/90 (1992) 5 *Wokanda*, item 37; 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; R. Molski, “Eksterytorialne stosowanie prawa ochrony konkurencji” (2002) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 28–29; 28–29; D. Miąsik, T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 64–67; B. Fuchs, *Prawo kartelowe a prawo prywatne międzynarodowe*, Katowice 2006, p. 110–114.

²³ “Blocking” provisions were provided for in the second (actually first serious) Polish after-war Antimonopoly Act of 1990; see S. Gronowski, *Ustawa antymonopolowa. Komentarz*, Warszawa 1996, p. 373–376; T. Ławicki, *Ustawa o przeciwdziałaniu praktykom monopolistycznym. Komentarz*, Warszawa 1998, p. 128–130.

place that would justify the initiation of full proceedings against, for instance, cartel participants. Explanatory proceedings are not conducted against a particular undertaking – they have no parties. Only procedural infringements may be sanctioned in the course of explanatory proceedings. A violation of the cartel prohibition can be established and financial penalties imposed only after the conclusion of full antitrust proceedings.

The fight against cartels is a legally and practically demanding task, particularly because their members are by definition secretive²⁴. Antitrust authorities, also in Poland, must therefore undertake great efforts to detect concealed cartels. In practice, of particular difficulty is the localisation and retrieval of evidence necessary to establish cartel participation. Inspired by the experiences of the Commission and the US Department of Justice, the UOKiK President applies two particular techniques of evidence detection in cartel cases. The first is a technique of stealth: surprise inspection of business premises – “dawn raids”. The second technique is one of cunning – the offer of leniency²⁵. Dawn raids rely upon an element of surprise exploiting an unavoidable level of human carelessness. Leniency relies upon an element of uncertainty exploiting the natural nervousness inherent to a cartel conspiracy. Both can trigger the information flow and “bust” a cartel²⁶.

Unannounced inspections are a key investigative tool in cartel cases in light of the seriousness and clandestine nature of cartel conduct, and the possibility that evidence could be altered, hidden or destroyed²⁷. Dawn raids are especially useful when used in the course of explanatory proceedings²⁸. Their legal basis lies in Articles 91 and 105a-105(l) of the Competition Act which supports a distinction being made between a routine inspection, based on the consent and cooperation of the inspected company, and a search. The latter can be performed in specific circumstances only, in particular, in cases of suspicion that an undertaking (or other entity) would be more likely to conceal or destroy the requested documents rather than present them, or

²⁴ See *Building Blocks...*, p. 1.

²⁵ C. Harding, J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford 2003, p. 165.

²⁶ *Ibidem*.

²⁷ C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 868.

²⁸ Dawn raids are most often performed during this type of proceedings, yet before institution of antitrust proceedings, and such inspections are recognised as most effective, in terms of quality and quantity of evidence collected, see E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 235; K. Kohutek [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 802; M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1533; C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 870.

in cases where an undertaking refuses to cooperate (e.g. denies access to evidence)²⁹.

To illustrate, during a routine inspection, inspectors are only entitled to request documents rather than actually search for them. Typical dawn raids (without a search) can be carried out on the UOKiK President's authorisation (without a court order). Inspectors are entitled, *inter alia*, to: 1) enter the premises and means of transportation belonging to the inspected undertaking, 2) demand access to files, books and all kinds of documents or data carriers related to the subject of the inspection, 3) make notes and require oral explanations. Upon a special ruling of the UOKiK President, inspectors are also allowed to seize, for up to 7 days, any objects that may represent evidence in the case.

A search in the course of an inspection may be performed only with the permission of the Court of Competition and Consumer Protection issued upon a request of the UOKiK President. The court warrant cannot be challenged. A search may also be conducted separately from an inspection. More generally, it may take place prior to antitrust proceedings (a search on *ad hoc* basis), in the event of a justifiable suspicion of a serious breach of antitrust rules (no doubt cartels can be qualified as such an infringement) and, in particular, whenever the obliteration of evidence may occur (not an unusual scenario in cartel cases). While the scope of an inspection is limited to business premises or company property, a search may also cover private residences or cars, if there are justifiable grounds to assume that they might hold relevant evidence. A search of non-business premises can be carried out only by the police, accompanied by an authorised employee of the UOKiK and/or other authorised persons (e.g. individuals having special knowledge).

Pursuant to Article 50 of the Competition Act, undertakings are obliged to provide "all necessary information and documents" upon request of the UOKiK President. This is a widely used mandatory version of a request letter (Article 18(2) of Regulation No 1/2003³⁰). During cartel investigations, the UOKiK President may summon witnesses or even experts in cases requiring special information. Generally, the UOKiK President has at his/her disposal investigative powers comparable to those conferred on the Commission under Regulation No 1/2003.

²⁹ See judgement of the Supreme Court of 7 May 2004, III SK 34/04, UOKiK Official Journal 2004 No. 4, item 330; judgement of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02, UOKiK Official Journal 2004 No. 1, item 281; D. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1546, 1548, 1552; C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 765, 838, 873; E. Modzelewska-Wąchal, *Ustawa...*, p. 228.

³⁰ Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1, as amended.

It seems fair to say that under the Competition Act (see various Articles in Title VI, Chapter 1 and 2) due process and key rights of defence are generally ensured in cartel investigations. However, due to the vagueness of the law and lack of case law concerning the applicability of legal professional privilege rules to cartel cases, this issue (especially relevant to searches) remains controversial. Although there are both legal and rational arguments supporting the position that limited legal privilege should be respected at least in relation to certain documents (e.g. legal opinions of external lawyers)³¹, some authors are of the opinion that this concept is not recognized in Poland³². However, at least in one case reported to date in the literature UOKiK's inspectors applied similar standard, confirmed afterwards by the Court of Competition and Consumer Protection³³.

3. Armoury of sanctions

Under the Competition Act, all sanctions for violating the cartel prohibition are of administrative or civil nature. Two categories of sanctions are available: monetary and non-monetary ones both of which are corporate in nature. Individuals (natural persons) cannot be sanctioned for cartel offences unless they can be qualified as an “undertaking” (e.g. liberal professions). They can be fined however for procedural infringements in the course of a cartel investigation.

3.1. Administrative sanctions

An order to terminate all cartel activities represents the most straightforward legal instrument in the repertoire of sanctions available to the UOKiK President. If the authority declares that a practice is restricting competition, it may order an undertaking charged with cartel conduct (violating Article 6 of the Competition Act or Article 81 EC) to refrain from it. An order to terminate cartel practices cannot require anything further from its addressee than to desist from that conduct (it is not possible to require positive action such as the implementation of an “antitrust compliance programme”)³⁴.

³¹ See B. Turno, “Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji”, [in:] C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji*, UOKiK, Warszawa 2006, p. 184–189.

³² See e.g. M. Sendrowicz, M. Szwał, *Prawo konkurencji. Podstawowe pojęcia*, UOKiK, Warszawa 2007, p. 15.

³³ See order of the Court of Competition and Consumer Protection of 4 April 2007, XVII Ama 8/06, unpublished, as quoted in C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 878–879.

³⁴ See judgment of the Court of Appeal in Warsaw of 22 June 2007, VI ACa 8/07, unpublished; A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 725–726; C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 298.

The imposition of administrative fines, coupled with the leniency programme, constitutes the most efficient weapon in the Polish anti-cartel arsenal. According to Article 106 of the Competition Act, the UOKiK President may impose – on an undertaking involved in a cartel – a financial penalty (fine) of up to 10% of its revenue in the accounting year prior to the year of the penalty. In order to protect the integrity and effectiveness of cartel investigations, separate fines may be imposed on undertakings as well as executives, employees and other individuals related to them, if they fail to meet various procedural obligations (eg. falsify, conceal or destroy documents or information) seeking to obstruct efforts of antitrust enforcers³⁵. These fines can amount to the maximum of 50 million EURO (for an undertaking) or fifty-fold the average salary³⁶ (for an individual). The liable undertakings or individuals may face these sanctions even if they were not aware of the antitrust violation. However, financial penalties imposed on employees, former or current, can be compensated by the undertaking.

Subject to certain limits, the UOKiK President enjoys notable discretion when imposing fines for cartel infringements although he/she remains bound by the statutory maximum imposed for this violation. When setting the amount of the fine, the duration, gravity and circumstances of the infringement as well as past antitrust violations are to be taken into account first of all (Article 111 of the Competition Act). However, these general statutory criteria are rather vague and not comprehensive. Additional clarification can be found in case law which instructs the UOKiK President to consider in this context also issues such as: fault (whether the infringement was intentional or negligent)³⁷; extent to which the infringement harmed the public interest³⁸; economic potential of the fined undertaking³⁹ and financial benefits obtained from the infringement⁴⁰.

³⁵ These penalties are consistent with broad consensus that obstruction of cartel investigations is a roadblock to successful anti-cartel enforcement and that punishment for impeding a cartel investigation should be on par with punishment for the original infringement; see *Obstruction of Justice in Cartel Investigations*, Report to the ICN Annual Conference, Cape Town, May 2006, p. 2.

³⁶ I.e. an average monthly salary within the enterprise sector in the last month of the quarter preceding the day of issuance of a decision by the UOKiK President, published by the President of the Central Statistical Office (see Article 4.16 of the Competition Act).

³⁷ See judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 3/97, unpublished; judgment of the Court of Competition and Consumer Protection of 24 May 2006, XVII Ama 17/05, UOKiK Official Journal 2006 No. 3, item 48.

³⁸ See judgment of the Supreme Court of 27 June 2000, I CKN 793/98, unpublished.

³⁹ See judgment of the Antimonopoly Court of 14 November 2001, XVII Ama 111/00, UOKiK Official Journal 2002 No. 1, item 46; judgment of the Supreme Court of 24 April 1996, I CRN 49/96, (1996) 9 *OSNCP* 1996, item 124.

⁴⁰ See judgment of the Supreme Court of 24 April 1996, I CRN 49/96, (1996) 9 *OSNCP*, item 124.

Further clarifications are available in the soft law rules contained in the Polish Fining Guidelines. While not legally binding, the UOKiK President declared that she will follow them which effectively means that the authority imposed a limit on the exercise of its own discretion. The UOKiK President must therefore observe the Fining Guidelines, otherwise it could be found to be in breach of general principles of law such as equal treatment or the protection of legitimate expectations. In practice, the act not only promotes transparency in respect to the methodology of setting fines but also ensures impartiality. It allows businesses to make a preliminary estimation of the fine which they may face should they breach antitrust law, including the cartel prohibition. However, as the Court of First Instance stated with respect to the EC Fining Guidelines, an observation that can be related to their Polish counterpart, “[t]he objective of the Guidelines is [...] transparency and impartiality, and not the foreseeability of the level of the fines”⁴¹. The Fining Guidelines may contribute to the development of the Polish leniency scheme because they help potential applicants to estimate the gain associated with whistleblowing. No doubt, the UOKiK President also hopes that increased transparency will make his/her decisions less vulnerable to challenges in courts.

According to the Fining Guidelines, the UOKiK President takes into account the harmfulness and duration of the infringement as well as relevant mitigating and aggravating factors. In line with the Competition Act, the Fining Guidelines refers the fine to the revenue in the year prior to the year of the imposition of the fine (up to the statutory limit of 10% revenue). As a result, the Polish fining system differs therefore from the method used by the Commission, who bases fines upon the value of the sales of the goods/services related to the infringement in the relevant geographic area within the EEA (sales of the last business year of the participation in the infringement)⁴².

Under the Fining Guidelines cartels are qualified as a very serious violation, which translates into the highest level of the basic amount of fine (above 1% but not more than 3% of revenue). Mitigating and aggravating circumstances, listed non-exhaustively in the Fining Guidelines, may increase or decrease the amount of the fine for cartel infringement. The list of mitigating circumstances comprises e.g.: passive role in the infringement, acting under

⁴¹ Judgment of the Court of First Instance of 15 March 2006 in Case T-15/02 *BASF v Commission (Vitamins)*, [2006] ECR II-497, para. 250; see also W. P. J. Wils, “The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis” (2007) 30 *World Competition* 207-208 (arguing that a degree of discretion in fining policy has to be retained, all the more so because attempts to achieve full foreseeability would inevitably lead to under-deterrence in some instances or disproportionately high fines in other instances).

⁴² See Point 1 of the Fining Guidelines and Points 12, 13 and 17 of the Guidelines on the method of setting fines imposed pursuant to Article 23(a) of Regulation No. 1/2003, OJ [2006] C 210/2.

coercion, abandonment of the anti-competitive practice before institution of the antitrust proceedings. Aggravating factors are, for instance: performing as the leader or initiator of the infringement, using coercion, recidivism. The application of the Fining Guidelines is likely to result in a significant increase in the level of fines imposed on cartelists, which may be close to or even reach the statutory limit.

3.2. Criminal sanctions

According to Polish antitrust law, cartel behaviour does not constitute a criminal offence – the Competition Act does not provide criminal sanctions for violating the cartel prohibition. However, under Article 305 of the Act of 6 June 1997 – the Penal Code⁴³, bid rigging in a public tender is a crime that is subject to an imprisonment period of up to three years. In addition, under Article 286 of the Penal Code, bid rigging in a private tender could potentially be qualified as fraud⁴⁴ although, to the best of the author’s knowledge, this supposition has not been confirmed in case law⁴⁵. If collusive conduct constitutes a criminal violation, the UOKiK President conducts his/her proceedings against corporate cartel participants. Independently, the public prosecutor conducts his/her criminal proceedings against individuals. Immunity (full or partial) granted to a corporate informant has no bearing on the individual’s possible criminal liability. For instance, the Penal Code (Articles 39.2 and 41) provides that a person may be prohibited from holding a specific position, performing a specific profession or conducting a specific economic activity as penalty for bid rigging.

The fact that only one category of cartels was criminalized in Poland suggests that the legislator⁴⁶ considers cartels affecting public institutions to be the most reprehensible, and thus deserving of much stiffer sanctions. On the other hand, lack of criminal sanctions for other types of cartels may be perceived as a symptom of a generally hesitant attitude in Poland (more generally, Europe) to actively prosecute and severely punish “white collar” crimes.

⁴³ Journal of Laws 1997 No. 88, item 553, as amended.

⁴⁴ See e.g. A. Wróbel, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz*, Vol. III, Kraków 2006, p. 846, 848.

⁴⁵ Interestingly, German courts have upheld the application of the general offence of fraud under German law to deal with a case of bid rigging; see T. Lampert, S. Götting, “Opening Shot for Criminalisation of German Competition Law?” (2003) 24 *European Competition Law Review* 30–31.

⁴⁶ Also in Austria and Germany.

3.3. Civil sanctions

Polish antitrust law provides for only one direct civil sanction for cartel practices. According to Article 6(2) of the Competition Act, agreements identified as cartels are *ex lege* null and void. The sanction of nullity is presumed to be absolute with *erga omnes* effect – every entity (including cartel participant) may refer to it⁴⁷. It has to be noted that the sanction of nullity affects only agreements and decisions, which constitute legal (juridical) acts. Concerted practices (having by nature no underlying legal instrument that can be said to be null and void) are therefore not covered by this sanction⁴⁸. Still, the sanction of nullity generally lacks bearing in the context of cartels seeing as members of a naked cartel would not normally consider trying to enforce it in a court⁴⁹. Thus, nullity is not a deterrent to those that should be deterred.

The Competition Act does not contain a direct legal basis for private enforcement of the cartel prohibition. Such legal basis can be found in the provisions of the Act of 23 April 1964 – the Civil Code⁵⁰. Compensation in cartel cases may be pecuniary or non-pecuniary. Pecuniary compensation, which has the most deterrent potential of all civil sanctions in cartel cases, can comprise: 1) “typical” damages, granted pursuant to general rules, and 2) *restitutio in integrum*. It is very difficult to assess the manner in which Polish courts might calculate damages in cartel cases since there are no specific provisions (or even non-binding guidelines) or case law on that subject. Accordingly to the basic rules of Polish civil law, compensation in such cases will likely cover all losses incurred (out-of-pocket losses or *damnum emergens*), benefits that could have been obtained (lost profits or *lucrum cessans*) and due interest⁵¹. For instance, the calculation of damage in a price-fixing cartel would be based on the difference between fixed and market prices. Still, assessing damages can be difficult.

Polish civil law contains no statutory rules on the concept of “passing on defence” and the closely linked issue of “indirect purchasers” even though they could be potentially employed pursuant to general rules on awarding damages. A defendant is entitled to invoke various arguments to demonstrate that the plaintiff has not incurred losses due to the contested practice. Thus, in proceedings brought by direct purchasers (e.g. wholesalers of cartelised

⁴⁷ See decision of the UOKiK President of 30 April 2007, DOK-53/07, unpublished.

⁴⁸ See T. Skoczny, W. Szpringer, *Zakaz porozumień ograniczających konkurencję*, Warszawa 1996, p. 45; P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 189–190; A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 432.

⁴⁹ See A. Jones, B. Sufrin, *EC Competition Law: Text, Cases, and Materials*, Oxford 2007, p. 125.

⁵⁰ Journal of Laws 1964 No. 16, item 93, as amended.

⁵¹ A. Jurkowska, “Antitrust Private Enforcement – Case of Poland” (2008) 1 *YARS* 67, 69.

goods), the defendant could escape liability by showing that they escaped loss because the overcharge was passed on to downstream buyers. Similarly, there are no formal legal obstacles for indirect purchasers (such as end-distributors or end-customers) to bring anti-cartel actions before the court, provided that they were impaired by the infringement – they must be able to show the chain of adequate causation. However, in the absence of relevant case law, it is very difficult to predict the effectiveness of actions brought about by indirect purchasers, as well as of the “passing on defence”.

Damages awarded in cartel cases cannot exceed the amount of loss incurred – compensation cannot enrich the injured party. Punitive (exemplary) damages or damages multiplied (such as American treble damages) are not available because, in principle, they are not recognised by Polish law. The lack of economic incentives to pursue competition based damages claims (damages are only compensatory in nature) and the time-consuming and costly nature of court proceedings (excessively high court fees) discourage injured parties from pursuing their rights in Poland.

A private anti-cartel case can be initiated following a final decision of the UOKiK President or before the authority’s ruling – the closure of antitrust proceedings is not a requirement for filing a civil claim. However, in “follow on” actions, the administrative decision affirming an infringement is binding for the civil court – it has a prejudicial character – constituting proof of the infringement. In “stand alone” cases, where no final decision of the UOKiK President exists declaring that a breach of antitrust law took place, the court is free to decide for the sake of the plaintiff⁵².

At the moment, Polish civil procedure does not recognise collective claims or class actions⁵³. However, the Polish Sejm on 5 November 2009 passed legislation introducing the institution of “group proceedings” (collective redress). The bill, sent to the Senat, provides an opportunity for a group of at least 10 entities to file a single action, if factual circumstances justifying the demand are common to them. While members of the group would need to consent to an action being taken in their name (opt-in model), contingency fee arrangements, where lawyers are paid out of the awarded damages, are to be allowed – up to 20% of the award (currently deontological rules are against such arrangements). The bill will take effect six months after it is signed into law. Once in force, the new act is likely to strengthen the position of indirect

⁵² See judgment of the Supreme Court of 2 March 2006, I CSK 83/05, unpublished; judgment of the Supreme Court of 4 March 2008, IV CSK 441/07, unpublished; resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7–8 *Orzecznictwo Sądów Polskich*, item 86; A. Jurkowska, “Antitrust...”, p. 72–73.

⁵³ Some forms of collective redress can be identified in the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws 1964 No. 43, item 296, as amended).

purchasers (notably consumers) in private cartel enforcement in Poland and, consequently, improve its effectiveness⁵⁴. Especially in cases where the value of individual claims is low and when more complex hearing of evidence is required. Consumers will have incentive to file a group action as the costs of proceedings (2% of the value of a claim compared to 5% in individual suits) will be incurred by all members of the group proportionally, while at present each aggrieved person has to file a claim, pay a court fee, appoint and pay for a legal representative individually.

Not unlike most other European countries, private enforcement is still greatly underdeveloped in Poland, lagging far behind its public counterpart. Although the Polish legal system does not create a barrier for private actions concerning cartels and additional efforts are being made in legislature and case law to facilitate private pillar of antitrust enforcement, private antitrust enforcement is still far from established.

4. Leniency programme

4.1. Background

In line with current trends, Polish anti-cartel enforcement is no longer only based on sanctions but embraces also an increasingly pragmatic dialogue that weakens the structure of cartel arrangements. The leniency programme (hereafter, Polish Leniency) – a kind of “fair’s fair” contract between the UOKiK President and cartel participants – has become a crucial tool in the fight against cartels. Nevertheless, its effectiveness is still less than satisfactory particularly compared to its EU counterpart, not to mention the US. Its lacking can be attributed primarily to the legal structure of the scheme that offered, at least until recently, a rather anaemic “carrot” for prospective confessors and no real “stick” for those involved in cartel activities.

Polish Leniency was introduced in 2004. It is governed by Articles 109 and 110 of the Competition Act together with the Polish Leniency Regulation and Leniency Guidelines. The Polish scheme largely reflects the EC Leniency Programme⁵⁵ (hereafter, EC Leniency) and conforms to the ECN Model

⁵⁴ A. Jurkowska, “Antitrust...”, p. 67, 69; see also *Private Remedies*, DAF/COMP(2006)34, OECD 2006, p. 16–17 (arguing that class actions or other forms of actions that allow the aggregation of a large number of small claims for damages can be a useful form of deterrence in particular with respect to hard core cartels).

⁵⁵ See Commission notice on immunity from fines and reduction of fines in cartel cases, OJ [2006] C 298/17.

Leniency Programme⁵⁶ (hereafter, Model Leniency). It is based upon the conviction that it is in the public interest to grant favourable treatment to undertakings involved in cartel activities provided they help the antitrust authority in the detection and prosecution of cartels. Polish Leniency is based on two basic principles: the sooner an informant approaches the UOKiK, the higher the reward (a waiver or a fine reduction) which, in turn, depends on the value and timeliness of the evidence supplied.

4.2. Scope of programme

In line with EC Leniency, the Polish scheme applies to undertakings only seeing as under Polish antitrust law only companies can be penalised for the infringement of the cartel prohibition. Hence, leniency granted to an undertaking does not cause any direct consequences to its employees. In particular, it does not prevent the UOKiK President from imposing an administrative fine upon an applicant's representative for lack of cooperation in the course of an investigation. Moreover, Polish Leniency does not preclude criminal enforcement where, according to the Polish Penal Code, individuals, such as managers or employees of the undertaking, are criminally liable for bid rigging or fraud. Indeed, in cases of collusion in public procurement, the UOKiK President must refer the proceedings against individuals to the public prosecutor's office. In consequence, one should not hold one's breath waiting for leniency applications from companies involved in bid rigging⁵⁷.

As opposed to the majority of other leniency schemes, including the EC programme and the ECN Model Leniency, Polish Leniency is not limited to classic cartels only (secret horizontal agreements among competitors). Instead, it applies to all agreements prohibited by Article 6 of the Competition Act or Article 81 EC that are not exempted, including vertical agreements without hard core restrictions⁵⁸. However, similar to virtually all its counterparts, Polish Leniency does not apply to unilateral anti-competitive conduct. Finally, contrary to the US Corporate Leniency Policy⁵⁹ and similar to EC Leniency, Polish Leniency does not protect from civil law consequences associated with the participation in a cartel but also does not contain any conditions on restitutions being made, where possible, to injured parties as a condition of leniency.

⁵⁶ Accessible at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf

⁵⁷ R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsiki (eds.), *Ustawa...*, p. 1668.

⁵⁸ For favourably comments on the wide scope of the Polish Leniency see S. Sołtysiński, "Z doświadczeń programu *leniency* w Brukseli i w Warszawie" [in:] C. Banasiński (ed.), *Prawo konkurencji – stan obecny i przewidywane kierunki zmian*, UOKiK, Warszawa 2006, p. 41.

⁵⁹ Accessible at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>

The Polish legal system, similarly to the EU and most EU countries, does not contain a “leniency plus” policy, which allows an undertaking under investigation for one cartel, to potentially gain substantial leniency as to that cartel if it uncovers another cartel. There is also no “penalty plus” policy, where undertakings risk harsh sanctions if they fail to expose a second cartel, of which they knew, if that other cartel is discovered and prosecuted.

4.3. Full immunity

Under the “first-come first-served” principle, full immunity from fines is available to the undertaking which, on its own initiative⁶⁰, is the first to submit to the UOKiK President: 1) information which allows the launch of antitrust proceedings into the confessed violation; or 2) evidence which allows the issuance of a decision concerning an infringement, provided that the applicant: (a) has withdrawn from the anti-competitive agreement not later than on the date of its application; (b) was not the initiator of the agreement and did not induce others to participate in the agreement as well as; (c) fully cooperates with the authority during the proceedings.

4.4. Fine reduction

Applicants that do not qualify for full immunity may benefit from a reduction of the fine (partial immunity). A fine reduction is possible if: 1) the evidence provided substantially contributes to the issuance of a decision finding an infringement, and 2) participation in the anti-competitive agreement was ceased at the latest by the time the application was submitted. Although the Competition Act does not explicitly impose an obligation to fully cooperate with the UOKiK President for those qualifying for partial immunity, such an obligation should also apply to them⁶¹.

According to Article 109(3)(4) of the Competition Act, the statutory maximum level of a fine (10% of the undertaking’s revenue in the last financial year) is progressively reduced to 5%, 7% and 8% of the undertaking’s revenue, depending on the „place in line” for a fine reduction. In case of undertakings that gained no revenue in the last year (e.g. associations of undertakings), the maximum statutory fine (two hundred-fold the average salary⁶²) is reduced

⁶⁰ Polish Leniency does not allow for the „affirmative leniency”, that is the possibility of the UOKiK President approaching potential leniency applicant.

⁶¹ See R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1677 and decision of the UOKiK President of 7 April 2007, DOK 1/08, unpublished (applying in practice such an obligation to the applicant for a reduction of a fine).

⁶² See footnote 37.

to fifty-fold, seventy-fold and eighty-fold the average salary, respectively. The least 8%, or eighty-fold the average salary reduction, can be awarded to an unlimited number of undertakings that fulfil the criteria. Contrary to common standards therefore, fine reductions set in the Competition Act are relative to the maximum fine available by law, rather than to the amount of the fine, which would normally be imposed. As a result, the level of the potential reward associated with the leniency scheme was difficult to predict on the basis of the Competition Act only. This unpredictability was a significant contributor to the low attractiveness of Polish Leniency and, in consequence, its unsatisfactory effectiveness. Not surprisingly, it was often criticised⁶³. The new Leniency Guidelines (see Point 31 and footnote 6) seems to remedy this weakness.

Fine reductions on the basis of Polish Leniency are considered differently in the Competition Act and the Leniency Guidelines. Unlike the Competition Act, the Leniency Guidelines refer the level of reduction (maximum 50%, 30% and 20% for the second, the third and subsequent applicants, respectively) to the amount of the fine that would be imposed in accordance with the Guidelines if the leniency applications were not submitted. Admittedly, even though the Leniency Guidelines are only an instrument of *soft law*, the UOKiK President cannot freely depart from them⁶⁴. They cannot regulate the subject matters contrary to provisions of the Competition Act and the Leniency Regulation, nor be implemented in such a manner. As a result, the level of reduction applied in a given case cannot in any way exceed the statutory limits. It remains to be seen whether this combination of different statutory provisions and soft law rules concerning fine reduction will improve the effectiveness of Polish Leniency. Leaving aside the question of its effectiveness, such non-coherent combination seems to be far from a model of legal transparency and certainty.

4.5. Procedure

An application for leniency can be submitted before or during proceedings conducted by the UOKiK President. The new Leniency Regulation that entered into force in February 2009 provides details concerning the required elements of a standard leniency application. The new procedural rules are designed to bring the Polish programme closer to the ECN Model Leniency. The adoption of the Polish Leniency Regulation complements the first ever domestic Leniency Guidelines, which constitute an “instruction manual” addressed to

⁶³ See e.g. A. Stefanowicz-Barańska, “The importance of being lenient”, (2005) 2 *International Business Voice* 38; R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1678.

⁶⁴ See earlier comments on the legal status of the Fining Guidelines.

businesses helping them understand the institution of leniency and informing potential confessors of their duties and rights under the programme.

The leniency application may be submitted in writing or orally (the latter form may, in particular, be used during an inspection). The standard leniency application must meet all the prerequisites for granting full or partial immunity. Besides a normal application, the Leniency Regulation makes it also possible to submit a somewhat incomplete application, which enables the applicant to take “a position in the queue” – “marker”. If an agreement affects the territory of at least four EU Member States including Poland, an undertaking submitting a leniency application to the Commission may also, at the same time, file a simplified, summary application for total immunity with the UOKiK President. Such a submission allows the applicant to “save itself a place in the queue”, in the event that the Commission takes no action but the UOKiK President decides to pursue the case.

Besides the leniency scheme, Polish antitrust law does not contain any other formal settlement or plea bargaining procedures applicable in cartel cases. By comparison, under a novel settlement procedure in cartel cases introduced by the EC in 2008, undertakings may choose to acknowledge their involvement in a cartel and their liability for it, in exchange for a reduction of fines by 10%. In contrast to the cooperation within the leniency programme, this procedure is not aimed at collecting evidence, but is a device for simplifying cartel procedures⁶⁵. The so-called “commitment decisions” that impose an obligation to exercise commitments undertaken voluntarily by an undertaking with the aim of bringing an illegal practice to an end without imposing a penalty (see Article 12 of the Competition Act) are not, in principle, relevant to cartel conduct. Decisions of this type are not appropriate in cases of serious, clear-cut infringements, since in such cases, the main enforcement objectives should be deterrence and public censure, through the finding of the infringement and the imposition of penalties⁶⁶.

⁶⁵ See Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ [2008] L 171/3; Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ [2008] C 167/1; M. L. Tierno Centella, “The New Settlement Procedure in Selected Cartel Cases” (2008) 3 *EC Competition Policy Newsletter* 30–35.

⁶⁶ W. P. J. Wils, “The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles” (2008) 31 *World Competition* 325. The UOKiK President’s commitment decision practice reveals that at least in some cases she is inclined to accept commitments even in cases of hard core restrictions, such as e.g. vertical price fixing – see decision of 4 July 2008, DOK-3/2008, unpublished (however, in the justification of this decision reservation was made about the exceptional nature of the case, as well as declaration was expressed that in case of hard core restrictions the UOKiK President is, in principle, far from taking decisions under Article 12).

III. Enforcement performance

Since the UOKiK President does not provide comprehensive data on anti-cartel enforcement in Poland, it is difficult to fully evaluate the authority's performance in this area. Nevertheless, some observations can be made based on the available information.

As can be seen from Table 1, the number of cases concerning horizontal agreements significantly declined in 2008, contrary to the number of vertical cases, and remains vastly lower than unilateral conduct. In the reviewed period a great number of vertical agreement cases referred to minimum resale price maintenance (RPM), particularly in the construction sector. Most cartel cases related to the activities of trade associations (architects, driving school owners, notaries, pharmacists, tax advisers and taxi drivers) and undertakings active in the communal sector. Curiously at first sight, but typically for an inexperienced economy, some blatantly collusive arrangements were undertaken quite overtly by: inserting minimum price clauses in the resolutions of trade associations (e.g. the National Council of Notaries⁶⁷), publishing price lists for tax advisory services in a business magazine (e.g. the associations of tax advisers) or even announcing a price fixing scheme during a press conference (e.g. billboard advertising companies). It seems that the Polish businesses world still lacks proper antitrust law awareness, or more generally, competition culture in Poland is still weak.

Unfortunately, relatively few proceedings relating to bid-rigging were carried out in Poland so far and no extraterritorial investigations concerning

Table 1. Antitrust proceedings carried out by the UOKiK President in respect of anti-competitive practices*

Year	Horizontal agreements cases reviewed**	Vertical agreements cases reviewed	Unilateral conduct cases reviewed
2004	32	27	295
2005	34	26	260
2006	27	30	293
2007	26	21	201
2008	14	30	152

* Source: UOKiK annual reports

** UOKiK does not specify how many of those cases concerned cartels

⁶⁷ See footnote 2 above and accompanying text.

cartel activities occurring outside Polish jurisdiction that had an effect on Poland. The latter observation can be confronted with comments arguing that Poland has found it difficult to address an international market-division problem. It appears, according to M. Wise, that firms bidding in privatisation proceedings in different countries of Central-East Europe are declining to compete against each other. The result is lower bids for the privatised firms and no competition through trade from the privatised companies in the neighbouring countries⁶⁸. This assertion sounds worrying, particularly in the context of massive privatisation programme that the Polish government is going to undertake⁶⁹.

The start of the leniency programme in Poland has been sluggish, as illustrated by Table 2, though the number of leniency applications increased noticeably in the last two years. However, the majority (10) of the 16 applications submitted until 2009 related to vertical agreements (RPM) rather than classic (secret) cartels. So far, there have been only two successful applications (in RPM cases), both of which lead to a reduction of fines.

Table 2. Leniency applications submitted to the UOKiK President

Year	2004	2005	2006	2007	2008
No of applications	1	2	2	6	5

An analysis of the UOKiK President's fining policy shows a general tendency to impose higher fines than in the past. This in itself is consistent with the thesis that a policy of imposing strong sanctions for cartel conduct as well as obstruction of cartel investigations is an indispensable part of a successful anti-cartel regime⁷⁰. To illustrate, the highest ever fine of 2 million PLN was imposed in 2007 on Cementownia Ozarów allegedly involved in a price-fixing and market-partitioning cartel of 11 cement producers. The fine was imposed for the non-disclosure of documents and attempts to mislead the authority during a dawn raid. The scale of this raid, the largest in the history of the UOKiK (simultaneous searches in 13 locations all over Poland by about 150 investigators including policemen and highly qualified criminology technicians), illustrates the investigatory potential of the Polish antitrust authority.

⁶⁸ M. Wise, "Review...", p. 116.

⁶⁹ See "Privatization plan for the years 2008-2011", available at: http://www.msp.gov.pl/portal/en/6/554/Privatization_plan_for_the_years_20082011.html

⁷⁰ See *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation*, OECD 2005, p. 39; *Obstruction of Justice...*, p. 2.

Table 3. Total fines imposed and collected by the UOKiK President*

Year	Total fines imposed (mln PLN)	Total fines collected (mln PLN)
2004	174.2	2.1
2005	38.0	2.0
2006	339.0	10.2
2007	171.0	15.2
2008	95.4	35.8
Total	817.6	65.3

* Average fine collection efficiency: cir. 8%

The figures in Table 3 show the effectiveness of fine collection, which clearly remains far from satisfactory, though some progress in the total amount of fines collected per year is present.

Unlike public enforcement that seems to be working in a moderately successful manner, private enforcement of the cartel prohibition is totally underdeveloped. To the best of the author's knowledge, no such cases were lodged before Polish courts as yet.

Finally, it is worth noting that the overall performance of the UOKiK is now being assessed within the well regarded annual surveys undertaken by the *Global Competition Review* journal (hereafter, GCR)⁷¹. In the 2009 edition of GCR's Rating Enforcement of the world's leading competition authorities, the Polish antitrust authority shared the 30–35 position with 5 other agencies, ranked at 2.5 stars⁷². According to the Rating's experts, its performance improved last year.

IV. Recommendations

Substantive anti-cartel laws in Poland conform to familiar European models. At least where powers and enforcement tools are concerned, the UOKiK President seems to be well equipped to apply them effectively. Even if there are places where the fight against cartels is more efficient, anti-cartel

⁷¹ Available at <http://www.globalcompetitionreview.com>

⁷² Ranks are based on a star rating of 1 to 5,5 being outstanding. A low ranking does not mean an authority is dreadful. Indeed, an appearance in Rating Enforcement is itself an achievement.

enforcement in Poland is steadily getting more successful. Nonetheless, some improvements deserve consideration.

The institutional status of the UOKiK President should be strengthened. While his/her decisional independence is not under dispute, it is not clearly guaranteed by the authority's institutional design because the appointment procedure, effective 24 March 2009, does not specify the term of office nor provide an exhaustive list of dismissal causes. Indeed, the UOKiK President can be dismissed by the Prime Minister at any time for any reasons. Therefore, in order to preserve the integrity of antitrust law enforcement, a tenure of the UOKiK President should be restored and secured against arbitrary removals. *Prima facie* this argument is hardly relevant to the subject of this article. However, the lesson of history is that large and powerful cartels can have strong political influence with the governments, therefore, antitrust authority should be free of such influence to the extent possible⁷³. Further, it would be advisable to consider the establishment, within the antitrust authority, of a special unit for combating cartels. As part of the UOKiK, it could support the other (sectorial) units in uncovering cartels by offering specialised personnel and material resources. In particular, the cartel unit could assist in the preparation, conduct and result analysis of inspections and searches in cartel proceedings. It could be also the main contact for all those considering application for leniency. Additionally, this unit would be responsible for anti-cartel cooperation with foreign antitrust authorities. An increasing number of antitrust agencies have set up dedicated cartel branches with very positive results⁷⁴.

As regards Polish Leniency, its scope should be limited to cartels only (including horizontal joint boycotts as defined in the Point 13 of the Explanatory Notes to the Model Leniency). Alternatively, in line with the Swiss scheme, the programme could comprise vertical agreements but only those that contain hard core restrictions (minimum fixing prices or allocating markets). Other types of vertical or horizontal agreements restraining competition are generally less harmful and difficult to detect or investigate, and therefore do not justify being dealt with under a leniency programme⁷⁵. Cooperation with the antitrust

⁷³ See D.J. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford 2001, p. 254–255, 286–287.

⁷⁴ See *Building...*, p. 30–34

⁷⁵ See R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1669–1670; W. P. J. Wils, *The Optimal Enforcement of EC Antitrust Law 2002*, the Hague 2002, p. 54. One should keep in mind that leniency programmes does not serve altruistic purposes. Providing lenient treatment to participants of anti-competitive agreements that are easy to detect and punish can even stimulate cartel activities and hence be counter-productive.

authority concerning this type of restrictive agreements could benefit from a fine reduction under the Fining Guidelines.

Furthermore, in line with the latest version of EC Leniency, the Competition Act should explicitly impose an obligation of continuous cooperation on all applicants for leniency including applicants for a fine reduction. Another amendment, inspired by EC Leniency, should require the applicant to continue its involvement in the alleged cartel following the application, if in the UOKiK President's view, it is reasonably necessary to protect the effectiveness of cartel proceedings (the extent of any continued participation by the applicant would always need to be agreed with this authority). It seems also that it would be more practical if leniency applicants could use a standard (non-obligatory) application form, prepared by the UOKiK (such as offered within e.g. Austrian, Danish and Swiss leniency programmes).

There is currently no urgent need or pressure to find ways to resolve cartel cases more quickly because the effectiveness of Polish Leniency is only moderately successful and the UOKiK does not seem to be overloaded with cartel cases. Thus, cartel settlements are not at the forefront of discussions in Polish antitrust forums. Nevertheless, it would be worthwhile to consider introducing negotiated cartel settlements. As an enforcement tool complimenting the leniency scheme, negotiated cartel settlements can greatly benefit all parties involved (creating a "win-win" situation for antitrust authorities and cartel members) ultimately benefiting consumers through increased anti-cartel enforcement⁷⁶. Speaking for the adoption of such procedure is the fact that negotiated settlements tend to be, where available, the procedure of choice for resolving cartel cases without conducting a full investigation or trial⁷⁷.

In order to avoid controversies concerning the applicability of legal privilege in cartel investigations, it would be advisable to regulate this issue comprehensively in the Competition Act and preferably in line with the relevant EC case law⁷⁸.

Overwhelming research and studies point out that criminal sanctions are the ultimate weapon (*ultimum remedium*) against cartels⁷⁹. However, no signs of an intention to expand criminal sanctions for cartels can be found

⁷⁶ On benefits of cartel settlements see *Cartel Settlements*, Report to the ICN Annual Conference, Kyoto April 2008; *Bargaining/Settlement of Cartel Cases*, DAF/COMP(2007)38, OECD 2008.

⁷⁷ See *Plea Bargaining/Settlement of Cartel Cases...*, p. 9.

⁷⁸ See judgment of the ECJ of 18 May 1982 in Case 155/79 *Australian Mining & Smelting Europe Limited (AM&S) v Commission* [1982] ECR 1575; judgment of the CFI of 17 September 2007 in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission* [2007] ECR II-03523.

⁷⁹ See in particular P. Whelan, "A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law" (2007) 4 *Competition Law Review* 7-40; W. P. J. Wils, "Is Criminalization of EU Competition Law the Answer?" (2005) 28 *World Competition* 117-159.

in Poland even in light of the outside trend to criminalise cartel conduct⁸⁰. There is compelling rationale for moving toward a system that provides for a combination of corporate and individual criminal sanctions in all cartel cases, provided there is adequate certainty and protection of the rights of individuals. Reliance on corporate sanctions alone cannot ensure adequate deterrence, an issue that has to be addressed in a comprehensive way. Properly implemented individual criminal sanctions (with custodial sentences), can represent the difference between viewing cartels on a cost/benefit basis as a reasonable risk-taking exercise, and serious deterrence that prevents unlawful cartel arrangements. Besides deterring cartel conduct, criminal sanctions against individuals can be a useful tool during a cartel investigation itself, potentially increasing the effectiveness of the leniency programme⁸¹.

However, the experiences of some countries show that expanding criminal sanctions upon all cartel cases would not necessarily improve enforcement of the cartel prohibition as such. Indeed, banning cartel activity, even on pain of criminal sanctions, is only symbolic if the ban is not relentlessly and comprehensively enforced. If the introduction of criminal (custodial) sanctions to punish individuals for all types of cartel conduct is not likely to take place in Poland (at least in the near future), the introduction of personal anti-cartel sanctions of an administrative nature (fines and disqualification orders) could prove the second best option.

Effective private enforcement, especially in the form of actions for damages, is clearly needed as an essential counterpart for public enforcement of the cartel prohibition. Permitting indirect purchaser suits, notably in the form of group (class) action, is a must because otherwise, as one commentator aptly observed, antitrust enforcement in the name of consumer welfare becomes “a cruel parody”⁸². Still, the role of the UOKiK President will continue to be of critical importance for detecting and punishing (*ergo* deterring) cartels. His/her compulsory investigative and sanctioning powers will likely remain the key to the discovery, proof and punishment of cartels. Private damage actions should be perceived as a superior instrument for the pursuit of corrective justice through compensation, complementing therefore, rather than replacing or jeopardising, public enforcement⁸³.

⁸⁰ Australia, the Czech Republic, Estonia, Ireland and the United Kingdom are examples of jurisdictions that recently introduced criminal sanctioning of individuals involved in all categories of cartel conduct.

⁸¹ More on arguments for introducing individual sanctions in cartel cases see *Cartels: Sanctions against Individuals*, DAF/COMP(2004)39, OECD 2005.

⁸² S. W. Waller, “Towards a Constructive Public-Private Partnership to Enforce Competition Law” (2006) 29 *World Competition* 381.

⁸³ This approach seems to be compatible with the Commission’s *White paper on Damages actions for breach of the EC antitrust rules*, COM(2008)165 of 2 April 2008; see also W. P. J. Wils,

Bearing in mind that collusive tendering poses especially grave threats in transition economy, where public purchasing accounts for a substantial part of national economic activity and public projects, such as transportation infrastructure development⁸⁴ (accentuated by the fact that Poland co-hosts the European Football Championship in 2012), it would be advisable to strengthen the cooperation of the UOKiK with procurement officials in an effort to fight bid rigging more effectively. In particular, the construction industry, recognized as a “critical component of every OECD economy”⁸⁵ should be one of the priorities in the UOKiK enforcement activities.

Finally, the fact must be stressed that one of the biggest problem of the Polish anti-cartel enforcement regime is the ineffectiveness of its sanctioning system⁸⁶. The long gap between the imposition and the collection of fines lowers the effectiveness of sanctions both in terms of nullifying the gains from the violation and preventing future infringements. Still, the problem of the lagging fine collection can be attributed mostly to the inefficiency of the Polish judicial system as a whole seeing as the lengthy appeals process makes it possible to postpone payments even in cases of very serious violations such as cartels⁸⁷. To remedy this problem, the entire procedural system should be reformed.

Literature

- Banasiński C., Piontek E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Dorabialski W., “Can competition protection in Poland become more effective?” (2008) 1 *Baltic Rim Economies*.
- Fuchs B., *Prawo kartelowe a prawo prywatne międzynarodowe [Cartel Law and Private International Law]*, Katowice 2006.

“The Relationship between Public Antitrust Enforcement and Private Actions for Damages” (2009) 32 *World Competition* 3–26.

⁸⁴ W.E. Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement” (2001) 77 *Chicago-Kent Law Review* 294. In 2008 public procurement in Poland accounted for 8,6 % of GDP; see Sprawozdanie z funkcjonowania systemu zamówień publicznych w 2008 roku [Report on functioning of public procurement in 2008], Urząd Zamówień Publicznych, Warszawa 2009, p. 20, available at <http://www.uzp.gov.pl>

⁸⁵ *Competition in the Construction Industry*, DAF/COMP(2008)36, OECD 2008, p. 17 (also noting that “the construction industry has acquired a certain degree of notoriety. It is well-known that the [construction] sector has been plagued by cartel activity for decades”).

⁸⁶ See Table 3 above.

⁸⁷ W. Dorabialski, “Can competition protection in Poland become more effective?” (2008) 1 *Baltic Rim Economies* 29.

- Gerber D.J., *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford 2001.
- Gronowski S., *Ustawa antymonopolowa. Komentarz [Antimonopoly Act. Commentary]*, Warszawa 1996.
- Harding C., Joshua J., *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford 2003.
- Jones A., B. Sufirin B., *EC Competition Law: Text, Cases, and Materials*, Oxford 2007.
- Jurkowska A., "Antitrust Private Enforcement – Case of Poland" (2008) 1 *YARS*.
- Jurkowska A., Skoczny T. (eds.), *Wylączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce [Group Exemptions from the Prohibition of Agreements Restricting Competition in EC and Poland]*, Warszawa 2008.
- Kohutek K., Sieradzka M., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2008.
- Kovacic W.E., "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement" (2001) 77 *Chicago-Kent Law Review*.
- Król-Bogomilska M., "Praktyka Krajowej Rady Notarialnej ograniczająca konkurencję" ["Competition-restraining Practice of the National Council of Notaries"] (2007) 4 *Glosa*.
- Lampert T., Götting S., "Opening Shot for Criminalisation of German Competition Law?" (2003) 24 *European Competition Law Review*.
- Ławicki T., *Ustawa o przeciwdziałaniu praktykom monopolistycznym. Komentarz [Act on Counteracting of Monopolistic Practices. Commentary]*, Warszawa 1998.
- Modzelewska-Wąchal E., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection]*, Warszawa 2002.
- Molski R., "Eksterytorialne stosowanie prawa ochrony konkurencji" ["Extraterritorial Application of Competition Law"] (2002) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny*.
- Podrecki P., *Porozumienia monopolistyczne i ich cywilnoprawne skutki [Monopolistic Agreements and Their Civil Law Effects]*, Kraków 2000.
- Sendrowicz M., Szwaj M., *Prawo konkurencji. Podstawowe pojęcia [Competition law. Main terms]*, UOKiK, Warszawa 2007.
- Shed M. M., "Formulating Antitrust Policy in Emerging Economies" (1997) 86 *Georgetown Law Journal*.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Skoczny T., Szpringer W., *Zakaz porozumień ograniczających konkurencję [Prohibition of Agreements Restricting Competition]*, Warszawa 1996.
- Sołtysiński S., "Z doświadczeń programu leniency w Brukseli i w Warszawie" ["From experiences of Leniency Programme in Brussels and in Warsaw" [in:] C. Banasiński (ed.), *Prawo konkurencji – stan obecny i przewidywane kierunki zmian [Competition Law – Current State and Expected Directions of Changes]*, UOKiK, Warszawa 2006.
- Stefanowicz-Barańska A., "The importance of being lenient" (2005) 2 *International Business Voice*.
- Tierno Centella M. L., "The New Settlement Procedure in Selected Cartel Cases" (2008) 3 *EC Competition Policy Newsletter*.

- Turno B., "Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji" ["Problem of Advocate-client Privilege under Competition Law" [in:] C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji* [*Actual Problems of Polish and European Competition Law*], UOKiK, Warszawa 2006.
- Waller S. W., "Towards a Constructive Public-Private Partnership to Enforce Competition Law" (2006) 29 *World Competition*.
- Wesseling R., *The Modernisation of EC Antitrust Law*, Oxford 2000.
- Whelan P., "A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law" (2007) 4 *Competition Law Review*.
- Wils W. P. J., "Is Criminalization of EU Competition Law the Answer?" (2005) 28 *World Competition*.
- Wils W. P. J., "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis" (2007) 30 *World Competition*.
- Wils W. P. J., *The Optimal Enforcement of EC Antitrust Law 2002*, the Hague 2002.
- Wils W. P. J., "The Relationship between Public Antitrust Enforcement and Private Actions for Damages" (2009) 32 *World Competition*.
- Wils W. P. J., "The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles" (2008) 31 *World Competition*.
- Wise M., "Review of Competition Law and Policy in Poland" (2003) 5 *OECD Journal of Competition Law and Policy*.
- Zoll A. (ed.), *Kodeks karny. Część szczególna. Komentarz* [*Penal Code. Special part. Commentary*], Vol. III, Kraków 2006.

Civil Law Actions in the Context of Competition Restricting Practices under Polish Law

by

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Abstract

This paper's aim is to describe the rules governing the assertion of civil law liability in the event of a competition law infringement. Given the planned adoption and implementation of a new EU legislative package concerning private enforcement, it is useful to determine what legal instruments and procedures are already available under Polish civil law that serve the protection of market players. This paper will specify the legal basis for the assertion of civil claims associated with competition law infringements and present its particularity. Considered will be the provisions of the Polish Civil Code as well as the provisions of the law on combating unfair competition and the law on unfair market practices. Discussed will be the full catalogue of civil law claims that can be asserted in relation to antitrust infringements as well as the specific purposes of civil law liability in this context. The paper will also assess the model of determining the effects of competition law violations and analyse whether private law principles for the calculation of loss can be applied in antitrust infringement cases. Finally, the paper will discuss the issue of settling the convergence of liability problem and the proposal concerning the introduction into the Polish legal system of class actions.

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

I. Introduction

Not only are civil law rules necessary for the institutional protection of competition, they should also ensure the protection of the individual interests of all market participants. The purpose of civil law is to limit the effects of competition restricting practices in the area of private law. By lodging a civil law claim, market participants can individually and directly obtain an enforced protection of their personal interests. That is the function of the provisions of the Polish Civil Code (KC), which govern civil liability.

The possibility of asserting civil law claims based on an infringement of the prohibition of competition restricting practices is a form of competition law enforcement by means of private law. Proceedings before civil courts are related to the protection of substantive rights of the parties and their private interest¹. The legal basis for the assertion of civil law liability for competition law infringements derives from their "illegal" character, which is a direct result

¹ See A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 359; Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7 *Biuletyn Sądu Najwyższego* 6.

of the fact that Article 6(2) and Article 9(3) of the Polish Competition and Consumers Protection Act (hereafter, Competition Act)² contain an explicit prohibition of competition restricting practices.

Public courts are competent to apply the rules of civil law liability. They may declare the “invalidity” of a practice and decide other related civil law claims. Where competition restricting practices take place: damages claims, cessation claims and rulings guaranteeing the enforcement of due conduct should be deemed to be admissible. Nothing stands in the way of the application of other civil law instruments to competition law infringements such as, for example, measures serving the purpose of the conservation of claims.

Into civil law, common courts can declare an action contrary to the provisions of the Competition Act to be invalid or adjudicate compensation irrespective of whether the antitrust authority has already decided on the case. Legal proceedings relating to competition law infringements are autonomous with regard to their administrative counterparts. However, a decision of the President of the Competition and Consumer Protection Office (UOKiK) is prejudicial (or even binding if it is final) on a court in the same case³. The principles of public and private liability have a complementary character in the context of competition law⁴.

Furthermore, under the provisions of Regulation No 1/2003, common courts are also obligated to rule on potential infringements of EC antitrust rules contained in Article 81 and 82 TEC. The possibility of private enforcement of EC law under domestic civil law regimes is a consequence of the fact that EC rules apply directly within the framework of national legal orders of its Member States⁵.

² Competition and Consumers Protection Act of 16 February 2007 (Journal of Laws 2007 No. 50, item 331, with amendments).

³ See A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 359. See: judgement of the Supreme Court of 4 March 2008, IV CSK 441/07, unpublished; Resolution of the Supreme Court of 23 July 2008, III CZP 52/08.

⁴ See The Government’s standpoint on the Green Paper concerning the assertion of claims for damages in connection with a breach of competition rules adopted by the European Committee of the Council of Ministers on 24 March 2006.

⁵ See M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, Warszawa 2008, p. 336. See judgements of the ECJ in following cases: C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, combined cases C-295-298/04 *Vinzenzo Manfredi vs. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito vs. Fondiaria Sai SpA and Nicolo Tricarico and Pasqualina Murgolo vs. Assitalia SpA* [2006] ECR I-6619. See also: White Paper on Damages Actions concerning breach of antitrust rules (2008), 165 final, SEC (2008) 404, (2008) 405, (2008) 406.

II. Legal basis for civil actions and their assessment

1. Polish Civil Code

Polish competition law does not contain any provisions providing the means to directly protect individual interests of market participants harmed as a consequence of competition restricting practices. In other words, it is impossible to demand or adjudge compensation under the Polish Competition Act itself. The absence of such instruments within the framework of competition law is compensated by the provisions of the KC. Liability rules stemming from civil law are to be applied if the provisions of competition law are violated in the area of private law. The rules contained in the KC form the basis that guarantees the protection of individual interests of market participants in the event of a competition restricting practice taking place.

Liability rules in tort may form a practical basis for damages and cessation claims related to antitrust infringements. However, an effective assertion of civil law claims depends on whether the general premises of liability in tort are demonstrated. On their basis it is subsequently possible to consider which claims can be asserted (their premises can be inferred from civil law rules). As far as antitrust cases are concerned, it is fair to assume that injunctive relief of the prohibitive type is likely to be raised first – cessation requests are of key importance here since they make it possible to put a stop to an infringement. Later, demands for financial compensation may be considered. A complete settlement of the conditions resulting from an infringement may be reached once claims for damages or the return of unjust benefits are lodged (see: Article 415 and Article 405 KC).

When deciding on private law relationships within the framework of private enforcement of competition law, common courts do not act directly in favour of the public interest. However, extending the scope of competition law enforcement into the area of private law should help improve the effectiveness of the UOKiK. Still, resorting to general civil law rules may prove insufficiently effective in relation to property-related claims aimed at the protection of antitrust rules. It can be suggested therefore, that, as far as claims based on civil law are concerned, it is appropriate to explore competition law for specific rules.

2. Law on Combating Unfair Competition

Those affected by the consequences of competition restricting practices may enjoy individual protection provided by a court under the law on unfair competition. The Act of 16 April 1993 on Combating Unfair Competition⁶ (hereafter, Unfair Competition Act) is primarily aimed at the protection of the public interest. However, it also protects the interests of business entities and customers. Its provisions are intended to create the means necessary to eliminate conduct that adversely affects competition relations. Article 18(1) lists the applicable claims: damages and cessation claims, claims to hand over unjust profits and to remove the effects of an illegal action, claims to make a single or repeated statement of a given content and in a given form as well as claims to pay an adequate sum of money to benefit a specific social purpose related to the support of Polish culture or protection of national heritage. Where the protection into civil law rules converges with the protection under the law on combating unfair competition, the entitled entity may choose which claim serves best the protection of his or her private interests.

A civil law structure of tort-based liability is applied to the infringements of the provisions of the Unfair Competition Act. Article 3(1) declares that an act of unfair competition consists of an activity contrary to the law or good practice which threatens or infringes the interest of another business entity or customer. This definition is supplemented by an exemplary list of specific unfair competition acts contained in Articles 5-17 of the Unfair Competition Act. The premise of being “contrary to the law”, set in Article 3(1), is fulfilled with regard to activities meeting the statutory characteristics of unfair competition acts – they may include, in particular, competition law infringements. Thus, the concept of being “contrary to the law” should be understood as covering infringements of the prohibition of competition restricting practices specified in Article 6(2) and Article 9(3) of the Competition Act. Thus, a competition restricting practice can be qualified as an act of unfair competition which gives civil law protection to those injured by an antitrust violation. As a result, it is possible to apply the sanctions listed in Article 18 of the Unfair Competition Act to competition law infringement. Specific acts of unfair competition, as described in Article 15 of the Unfair Competition Act, may also serve as a legal basis for the aforementioned claims. Article 15 contains a catalogue of unfair competition acts that impede other business entities access to the market (entry barriers).

⁶ Consolidated text: Journal of Laws 2003 No. 153, item 1503 with amendments.

Among those relevant to antitrust, the impediments may include prohibited price practices, discrimination and boycotts⁷.

3. Law on Counteracting Unfair Trade Practices

Considering the scope of competition restricting practices, it is also possible that consumer interests might be infringed as a consequence of their application in the private law area. The protection of consumers may now be carried out in proceedings initiated against a business entity in connection with competition restricting practices and practices infringing upon the collective interests of business entities, the latter being a form of conduct that prevents the development of competition⁸. Legal rules intended to provide a high level of consumer interest protection were introduced into the legal systems of EU Member States on the basis of Directive No. 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning Unfair Business-to-Consumer Practices in the Internal Market⁹. In Poland, it was implemented by the Law on Counteracting Unfair Market Practices (hereafter, Unfair Market Practices Act)¹⁰.

The structure of the prohibition of unfair market practices should be stressed. It is expressed through the premises of the general clause contained in Article 4 of the new Act. According to the statutory definition, a market practice of a business entity is deemed to be unfair to consumers if it is inconsistent with good practice and materially does, or may, distort the market behaviour of an average consumer prior to, in the course of, or after the entry into a product-related agreement. They are exemplified by misleading and aggressive market practice and the use of an illegal best practice code.

⁷ See T. Skoczny (in:) J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, 2nd ed., Warszawa 2006, p. 553 and subs.

⁸ Pursuant to its Article 23a, a practice violating the collective interests of consumers is understood as an illegal practice of a business entity infringing upon that interest. A sum of individual interests of consumers does not equal their collective interest. Among practice deemed to violate the collective interest of consumers are: infringements upon the obligation of providing consumers with correct, accurate and complete information, unfair or misleading advertisement. The defence provided by the Unfair Market Practices Act does not preclude the protection of collective interests of consumers under other legislation such as the Unfair Competition Act.

⁹ OJ 2005 L 149/22.

¹⁰ Counteracting Unfair Market Practices Act of 23 August 2007 (Journal of Laws 2007 No. 171, item 1206).

It should also be noted that while intended to guarantee effective enforcement of consumers' rights, Article 12(1) of the Unfair Market Practices Act authorizes a consumer to file individual claims only. A consumer may submit a claim to cease the given practice, to remove its effects, to make a single or repeated statement of a given content and in a prescribed form and to repair the damage inflicted in accordance with general principles. A consumer can also request the invalidation of the agreement with an obligation of mutual return of conducted acts and the refund of the costs related to the acquisition of the product. Finally, consumers can submit a claim to adjudicate a given sum of money to a specific social purpose related to the support of the Polish culture or the protection of the national heritage or consumers. The Unfair Market Practices Act also contains a legal instrument that shifts the burden of proof onto the business entity charged with the use of misleading market practices. Its introduction, correct in principle seeing as it is meant to help consumers take advantage of the protection provided by the law, may however encourage them to submit many unsubstantiated claims.

III. Types of pecuniary claims in the event of a competition law infringement

1. Injunctive relief

Civil law instruments, the purpose of which is to elevate the effects of an infringement, are covered by civil law liability. The assertion of claims related to antitrust infringements is based on a choice between actions of a negative character and compensatory instruments.

Injunctive relief may include cessation claims and claims for the removal of the effects of the unlawful practice. The claim to make a given statement holds a special position and, due to its nature, should be treated as a specific type of claim. The basic purpose of injunctive relief is to stop the infringement and remove its effects by way of a specific action of the obligor. It is therefore different to compensatory claims that are meant to settle the legal situation that occurred as a consequence of an infringement. Undoubtedly, a claim to cease an infringement and a claim to remove its effects are intended to create a legal situation consistent with the law. In the case of negative claims, it is sufficient to determine which event constituted an infringement and show the premises of its illegality. Not taken into account are subjective circumstances concerning the incorrectness of the actions of the infringer such as, in particular, his guilt.

1.1. Cessation claims

In competition law, cessation claims contain a request to issue a prohibition to continue an illegal activity. The request may pertain to a situation where an unlawful act was committed, where there is a risk of repetition or in cases of a real risk that an illegal act will be committed in the future. A cessation claim is a typical prohibitive claim in relation to competition law. It should specify the method of the prohibition such as, for instance, a ban on trading of goods that were illegally labelled or the price of which was determined in violation of antitrust rules. No general ban on conduct may be requested – the prohibition should be related to particular activities only. A direct relationship exists between a precise specification of a ban and enforcement proceedings where its effects can only be examined in relation to the forms of activities specified in the cessation request¹¹.

A cessation order cannot attempt to make it impossible for its addressee to conduct business activities – the purpose of a cessation order is limited to stopping illegal practices only¹². In particular, jurisprudence has expressed the view that cessation claims cannot contain a request to liquidate the competitive operations of an infringer¹³. Furthermore, prohibitive claims cannot contain positive obligations (the purpose of a prohibitive claim is not to compensate loss) – a cessation request only pertains to the abandonment of unlawful activities. It is based on the demonstration of the capacity to sue and so the plaintiff must demonstrate the substantive basis for the cessation claim. The entitled person lodges a request at the point when the infringement occurred. Already the determination of the very events of which the infringement consists may be important for the legal situation of the parties. In particular, such determination may form the basis for further damages claims. The moment of making a request for protection may influence the scope of the injunction granted. It should also be demonstrated that the infringement continues or that a repeated infringement is possible¹⁴.

¹¹ See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 835–836 and subs.

¹² See judgment of the Supreme Court of 26 February 2004, I KZP 47/03, (2004) 3 *Orzecnictwo Sądu Najwyższego – Izba Karna i Izba Wojskowa*, item 35.

¹³ See judgment of the Administrative Court in Gdańsk of 12 January 1996, I ACr 950/95, (1996) 6 *Orzecnictwo Sądów Administracyjnych*, item 26, p. 21. See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 836.

¹⁴ As a comparison, it is useful to refer to the principle of *equity* applicable in the US where, in order to obtain a cessation order, the following circumstances must be substantiated the fact that: 1) the plaintiff will suffer non-compensable loss if the defendant does not cease the violation; 2) other means available will not compensate the loss; 3) the consideration of affliction on the entitled person and the perpetrator, speaks in favour of a cessation order; 4) no

1.2. Claim to remove the consequences of an infringement

A claim to remove the consequences of an unlawful practice falls into the category of restitutive measures (*restitutio ad integrum*). It can be associated with claims to make a statement, to redress loss and to return unjust profits. It can be asserted independently or jointly with other claims and, in particular, it can supplement a cessation request. Cumulating claims depends on the factual status of the case. The purpose of this claim is to remove the actual effects of an infringement – it is not aimed at other goals such as the plaintiff gaining an unreasonable competitive advantage thanks to the litigation. Article 363 § 1 KC can be used to try to determine the relationship between individual claims¹⁵. A claim to remove the effects of a violation of an exclusive right is not a compensatory measure. Submitting a claim to remove the effects of a violation, the plaintiff should prove that the defendant committed an infringement the results of which persist. He must also demonstrate a nexus between the violation and the negative consequences in the area of the operation of the infringement. Most of all, the plaintiff should describe the character of the violation and its effects on the plaintiff's market situation.

Polish law does not contain a catalogue of activities and measures intended to remove the effects of an infringement and thus, any form of a permitted order can be applied provided that its purpose is to restore lawful conditions and that it bears a factual relationship with the contested conduct. The removal of the effects of an infringement should apply to its normal and direct consequences. When analysing such a claim, the effects of the violation of the sphere of the plaintiff's interests should be assessed. They may take the form of an infringement of the interests of the injured business entity and, as a result, potential loss of clients. This sort of claim can address effects such as: a drop in production, the liquidation of all or part of the injured party's operations and a reduction of the number of employees etc.

According to Article 187 § 1(1) of the Polish Code of Civil Procedures (KPC), the plaintiff must precisely specify in the statement of the claim what activities must the defendant perform in order to remove the effects of the unlawful activity and enable the enforcement of the judgment in the enforcement proceedings (Article 1050 KPC)¹⁶.

public interest speaks against such verdict. See: M. du Vall, *Prawo patentowe*, Warszawa 2008, p. 410 and the ruling of the Supreme Court of the United States of America in the legal position issued for the Federal Court of Appeals (Ceriorari) dated 15 May 2006 in re: E-bay Inc. Et.al. v. Mercexchange, LLC – Fed.Circ.2006, No. 05-130, available at <http://www.supremecourts.gov/opinions/05pdf/05-150.pdf>.

¹⁵ See J. Jakubecki, *Restitutio ad integrum w sądowym postępowaniu cywilnym*, Lublin 1993.

¹⁶ See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 842.

1.3. Claim to make a statement

In light of the law on unfair competition, a claim to issue a statement or publish the content of a judgment may be asserted as a specific form of an action to remove the effects of an unlawful activity or as an independent claim as referred to in Article 18(1)(3) of the Unfair Competition Act. Statement claims are meant to restore the conditions that existed prior to the infringement. Making a statement of a given content is also a special method of regulation of the effects of an infringement. Legal doctrine emphasizes that statement claims may perform a compensatory, instructive and preventive function¹⁷.

The examination of the range of the defendant's activities should be of essential guidance when formulating statement claims. It should be assessed, in particular, whether the contested practice took place in the entire or only a given part of the country, whether it affected all or only a group of clients, what effects it had on consumers, how long the infringement lasted and what consequences it had (e.g. in the press or mass media). When adjudicating an obligation to make a statement, the court has the right to determine the form of the statement on the basis of an assessment of the conduct of the perpetrator. If the defendant is found guilty, the content of the statement may include the announcement of that guilt.

Aside from statement claims to be made by the defendant, the plaintiff may also request the publication of the judgment in whole or in part. This type of request seems to fall into the category of statement claims or claims to remove the effects of an infringement. An intentional publication of a verdict without the consent of the court is not permitted, where it may pose a risk to the interests of the parties to the legal proceedings (also the defendant). In such a case, the principle of proportionality should be applied, which delineates the limits of the activities that should be taken in order to remove the effects of an infringement.

2. Compensatory claims

Compensatory claims constitute another category of civil law claims relevant to private enforcement of competition law. They include damages claims and claims to return unjust profits gained in relation to the unlawful practice. As far as damages claims are concerned, it is appropriate to use the tort regime of

¹⁷ Ibidem, p. 846; E. Nowińska, M. du Vall, *Prawo własności przemysłowej*, Warszawa 2005, p. 191. See E. Wojcieszko-Głuszko, "Roszczenie o złożenie oświadczenia w prawie nieuczciwej konkurencji" (2004) 88 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej* 220 and subs.; I. Mika, "Roszczenie o ogłoszenie oświadczenia w prawie wynalazczym" (1997) 67 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej* 40–41.

the KC. In compensatory claims, the change in the financial situation resulting from a competition law infringement may be assessed in the context of the assets of the entitled person or the infringer or both. Depending on which point of view is adopted, either damages claims or claims to return unjustified profits may be used.

2.1. Damages claims

Damage repair claims constitute the basic means of compensation that protects those affected by the results of an unlawful conduct into civil law. The general principles of the KC may be applied to claims to redress damages under competition law including: liability for damages (Article 361 KC) and liability in tort (Article 415 KC). The extent of the liability for damages is generally determined with regard to a specific entity that is part of the group that can participate in the legal proceedings as a defendant (passive legitimacy). According to Article 422 KC, this group includes abettors and accessories. Joint and several liability of cooperators is the rule in industrial property law (Article 441 KC)¹⁸. Damages claims and their individual forms are based on general principles of damage liability, as well as on Article 363 § 1 KC. Pursuant to this provision, loss should be redressed at the injured party's discretion, either through the restoration of pre-infringement conditions or through the payment of a given sum. However, if restoration is impossible or entails excessive burdens or costs for the obligor, the injured party's claims are limited to pecuniary solutions only.

Among the fundamental issues relating to the specification of damages claims lies the method used to determine the extent of the loss and the amount of the unjustified benefits subject to return. Damages claims are based on the general structure of civil law liability that makes it necessary to show the loss that follows from the infringement and its amount as well as the infringer's guilt and their nexus.

¹⁸ When determining the liability of more than one infringer, it should be indicated that an entrepreneur is accountable for his own conduct which constitutes an act of unfair competition as well as those of his subordinates. Liability is based on the tort regime under Article 430 KC. The determination of accountability for the conduct of subordinates is facilitated by un-named guilt – liability is not precluded by the anonymity of the one who caused loss within organizational structure of the business organisation. It is only the nexus between the perpetrator and the business entity that has to be substantiated. The basis for the nexus may be employment or a civil law relationship. It should also be demonstrated that the activity of the perpetrator resulted from an activity he or she was entrusted with. In accordance with the general rules of the KC, liability for an act of unfair competition also includes the form of tort based on guilt in choice (*culpa in eligendo*).

Under the law on combating unfair competition, general principles of the KC should be applied to claims to redress loss (Article 18(1)(4) of the Unfair Competition Act)¹⁹. The concept of loss is construed in an analogue way in the law on combating unfair competition and in civil law, in particular, within the scope of liability in tort. Therefore, one may maintain that the model of liability pertinent to the commitment of an act of unfair competition is convergent with the model of liability in tort.

2.2. Effects of a competition law infringement – calculation of loss

The determination of the amount of loss under competition law constitutes a very difficult task directly related to evidence hearings. The amount of damages claims is determined in accordance with general principles – neither the KC nor the Unfair Competition Act provide a possibility to redress loss in case of liability in tort in accordance with alternative principles²⁰. Thus, antitrust damages are calculated in accordance with general principles on the basis of the principle of full compensation. As a result, the method should be emphasised that considers the adverse economic effects of the given event to be a relevant consequence to the entire financial situation of the injured party. The method also takes into account the calculation of loss in accordance with the differentiating method²¹.

The differentiating method of determining the amount of damages is based on a comparison between the current financial condition of the injured party and its hypothetical situation likely to have existed had no infringement occurred. A hypothetical course of events must be presented in each specific case that would illustrate likely events.²² The differentiating method is a basic theory of compensative law which has been adopted in many legal systems which can be applied to its full extent in relation to the calculation of financial loss as part of liability under competition law. Clearly, one should consider

¹⁹ See J. Szwaia [in:] J. Szwaia (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 853 and the above-referred literature.

²⁰ Claims for lump-sum compensation are possible under the intellectual property law; See: Directive enforcement.

²¹ See A. Koch, *Związek przyczynowy jako podstawa odpowiedzialności w prawie cywilnym*, Warszawa 1975, p. 59.

²² See: judgment of the Supreme Court of 11 October 2001, II CKN 578/00, (2002) 6 *Orzecnictwo Sądu Najwyższego* 2002, item 83, (2002) 6 *Orzecnictwo Sądów Polskich*, p. 310, with an annotation by M. Kępiński; see comments to the above judgment: J. Jastrzębski [in:] (2003) 4 *Przegląd Prawa Handlowego* 50; J. Piś-Barganowska [in:] (2003) 2 *Przegląd Sądowy* 89; A. Kołodziej [in:] (2003) 7–8 *Przegląd Sądowy* 168. B. Gadek, “Szkoda wyrządzona czynem nieuczciwej konkurencji – zagadnienia wybrane” [in:] *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara*, Kraków 2004, p. 637.

certain difficulties following from this method. They derive primarily from the problems associated with the determination of the factual background of a case (hypothetical conditions that would have existed had no loss-inflicting event occurred), which is based on probable approximations. In practice, the credibility of particular scenarios is verified by economic experts²³.

The method of structuring damages claims should not generally be called into question in the field of competition law. Critical comments pertain to the way it is carried out in practice. It is often extremely difficult, if not even impossible, to prove the exact amount of loss specified in the request. Thus, there is frequently the need to rely on judicial assessment and the rules of equity. However, the latter approach should have a subsidiary function – it should be applied only where the evidence offered in connection with an infringement turns out to be insufficient to precisely judge the loss incurred.

The particularity of the assertion of claims under competition law might also be a reason to supplement substantive law, within the framework of general principles of damages liability, with the application of procedural rules that support the legal situation of the entitled person. For instance, if the amount of a damages request cannot be exactly substantiated, Article 322 KPC offers judges the possibility to adjudicate a sum, according to their own assessment, based on the examination of all the facts of a case. This provision should be applied very prudently – even if the plaintiff has indeed great difficulties in presenting the necessary evidence, he is not released from the obligation to substantiate his loss and its amount in accordance with general principle specified in Article 6 KC.

That method of adjudging damages is purposeful – the method of calculating compensation associated with competition law infringements is characterized by the absence of exact and unambiguous sums. Concurrently, the application of Article 322 KPC does not give unlimited discretion to judges²⁴ – the burden of proof regarding the substantiation of the amount of loss cannot be shifted to the infringer. Under Polish law, the principle *ex aequo et bono* cannot be applied in a discretionary fashion to the basis on which the loss is established and its amount determined. However, the way in which Article 322 KPC is applied may vary as far as the determination of the amount of loss is concerned, depending on the function attributed to civil law liability.

²³ See A. Duży, “Dyferencyjna metoda ustalania wysokości szkody” (1993) 10 *Państwo i Prawo* 57.

²⁴ See T. Dybowski, *System prawa cywilnego* (Vol. III Zobowiązania), Ossolineum 1986, p. 282 and judgment of the Supreme Court of 16 December 1963, I CR 412/62, (1964) 10 *Orzecznictwo Sądu Najwyższego*, item 212.

2.3. Proposal for new principles for the calculation of loss

If the effects of an infringement are not easily identifiable in the assets of the injured party, then the application of the differentiating method might not lead to a specific determination of loss incurred and its extent. Instead, the application of “objective criteria” for the determination of compensation under competition law can be contemplated considering the characteristics of infringements that may be qualified as such. This method of calculating compensation is characterized by its partial detachment from the individual situation of the injured entity and the attempt to determine the amount of loss in abstract terms. The objective criteria of calculating loss are based on neutral measurement factors such as the normal value of the object of the right or an average market value of the transaction. Indeed, in some cases the actual amount of loss is not being determined at all in light of the major difficulties, or even impossibility, of the application of traditional loss-calculating methods.

Although the adoption of objective criteria (essentially abstract) may yield practical benefits, it also raises many problems. Among them lies the question of whether the basis for liability is found in the amount of loss or whether the decision concerns compensation only? Doubts raised in this context include also the question of whether this is a method of calculating the amount of loss or a regulation of “objective loss”? The abstract method ignores the need to show a nexus between the infringement and the loss of a specific amount, it is based on the fictional assumption that profits generated by the infringer correspond to the amount of profits that would have been generated by the entitled person. For that reason, the abstract method of calculating loss is deemed to be a neighbouring institution that does not fall within the general framework of damages liability, rather than a method of compensating loss.

The objective method of calculating loss also includes the determination of the amount of loss on the basis of a license fee and the calculation of loss in relation to the amount of profits generated by the infringer. Civil law liability may include models different from its general principles such as lump sum compensation, repeated compensation or punitive compensation. Introduced may also be principles limiting the obligation to redress damages or the possibility of determining loss without considering the question of guilt, that is, based solely on objective criteria (e.g. the very fact of finding a law infringement)²⁵. The said solutions are generally justified by the type of legal relationships under assessment and, in particular, the type of infringements

²⁵ See T. Dybowski, *System...*, p. 197. It is worthwhile mentioning that Article 361 § 2 of the KC provides for an option of departure from the general principles of redressing loss. Pursuant to the said standard: “unless otherwise provided by the statutes”, different principles for determination of liability for damage may be introduced as a specific solution.

(e.g. in consumer turnover or the specific character of relationships with the participation of a professional)²⁶. Thus, other relationships falling within the scope of competitive relations may also be open to different solutions due to difficulties in evidence presentation and the scale of infringements. Changes to general principles are undoubtedly meant to reinforce the protection given to market participants.

The aforementioned comments should be considered in the pending discussion concerning the system of competition law protection, in particular, with regard to the structuring of claims vested in the entitled person. The extensive catalogue of available claims could, in theory, provide strong protection for market participants. However, the question of whether they are actually effective depends on which claims are used, on their mutual relationship and their assertability in a lawsuit.

2.4. Claim to hand over unjust benefits

In an event of a competition law violation, the assertion of a claim to return unjustified profits should be considered in addition to actions for damages. The law on unfair competition expressly accepts the application of the provisions on unjust enrichment contained in the KC. Article 18(5) of the Unfair Competition Act deals with the return of benefits generated unjustly pursuant to “general principles”, in other words, according to the provisions of Article 405 and subsequent of the KC²⁷.

A claim to hand over unjustified profits makes it possible to request the return of benefits generated in kind or, should this be impossible, refund of their value in cash. The premises for such a claim consist of the enrichment of one party and the impoverishment of another, provided there is a nexus between the enrichment and the impoverishment and the former is unjust²⁸. The burden of proof of the premises pursuant to Article 6 KC rests with the party seeking the return of unjustified benefits. Hand over claims entail significant evidentiary difficulties in practice, which are comparable to the assertion of damages claims. In specific circumstances, it should be precisely specified that subject to return are not the entire proceeds (gross amount) or whole income (net amount) generated by the unjustly enriched party, but only

²⁶ See the regulations concerning insurance, transport, mail; see Article 849 of KC.

²⁷ The view that Article 405 KC and subsequent may be applied under the law on unfair competition finds approval of J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 869.

²⁸ See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 869, and the referrals quoted therein.

that portion which is related to the infringement²⁹. Asserting a hand over claim jointly with a damages claim (or other financial claim) brings about a risk of excessive compensation to the injured party and thus, must to be avoided in accordance with the dictum *ne quis damo sup lucrum faciat*³⁰.

3. Other claims

3.1. Claim to determine a legal relationship or right

In addition, an action may also be lodged with the aim to determine a legal relationship or right. Lodging a determination claim is possible in light of the invalidity sanction contained in the Competition Act. The invalidity sanction is a civil law consequence of the violation of the prohibition of practices restricting competition. It is the only civil law norm that is *expresis verbis* contained in the Competition Act³¹. It follows from the content of its Article 6(2) and Article 9(3), that their violation results in the invalidity of the relevant practice in whole or in part. The invalidity pertains substantially to effects under private law, the very concept of invalidity is regulated into civil law. Jurisprudence and doctrine confirm³² that the sanction contained in Article 6(2) and Article 9(3) of the Competition Act has an *erga omnes* character – any entity may claim invalidity. In particular, the parties to an agreement as well as third parties may claim invalidity if they have an interest in challenging its legality³³.

²⁹ See *ibidem*, p. 872; E. Łętowska, *Bezpodstawne wzbogacenie*, Warszawa 2000, p. 53 and 72; A. Kołodziej, Annotation to judgment of the Supreme Court of 11 October 2001, II CKN 578/99 (2003) 7-8 *Przegląd Sądowy* 168.

³⁰ See: J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 873; W. Dubis, “Zbieg roszczeń a skarga z bezpodstawnego wzbogacenia” (2002) 1 *Przegląd Sądowy* 33; E. Łętowska, *Zbieg norm w prawie cywilnym*, Warszawa 2002, p. 99 and subs.

³¹ See P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 220.

³² See Decision of the President of the Office of Protection of Competition and Consumers of 30 April 2007, DOK-53/2007; see also resolution of the Supreme Court of 23 July 2008, III CZP 52/08; judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 44/93, (1994) 6 *Wokanda*.

³³ See E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 87, S. Gronowski, *Ustawa antymonopolowa – komentarz*, Warszawa 1999, p. 170: “in addition to civil law sanctions, the entry into an arrangement prohibited under Article 5(1), which has not been legalized under Article 6 or 7, always entails simultaneous administrative and legal consequences. They include, in particular, that the UOKiK President declares it to be a competition restricting practice and issues an order to cease it (See: Article 9(1) and Article 11a of the Law) or the imposition of a fine (See: Article 101(1)(1) of the Law).

Invalidity is always an immediate sanction with respect to the parties to an illegal agreement.

Only a common court, acting pursuant to Article 189 KPC while declaring the existence or non-existence of a legal relationship or right, or examining a case of execution of an invalid agreement, is competent to deliver a verdict. Claims to determine a legal relationships are not regulated by specific provisions of substantive laws – they are based on Article 189 KPC instead. From its content, a general division of claims can be inferred: “positive actions”, where the existence of a right or legal relationship is ascertained and “negative actions”, where the absence thereof is claimed by the plaintiff. In antitrust cases, a request to determine that an agreement is invalid is considered to be a negative action because the plaintiff requests in the content of the claim that the court declares that no legal relationship exists between the parties in the light of an antitrust infringement. It is not generally possible to demand the finding of a factual status or fact in such proceedings³⁴.

An action to determine a legal relationship or right may be preventive under the assumption that the proceedings are meant to remove uncertainty with regard to a legal relationship or right³⁵. In the context of Article 189 KPC, prevention seems to be understood as a possibility to clarify the legal situation of the plaintiff before financial claims are filed. A verdict delivered under Article 189 KPC performs then the function of a preliminary ruling. Still, determination claims continue to be independent actions aimed at a clear determination of a legal situation from the point of view of the plaintiff’s legal interests.

3.2. Payment of an adequate sum of money to a social goal

Pursuant to Article 18 Sec.6 of the Unfair Competition Act, an entitled person may demand the adjudication of an adequate sum of money to a specific social purpose related to the support of Polish culture or protection of national heritage, provided that the act of unfair competition was deliberate. In theory therefore, such an action may be lodged in connection with competition law

³⁴ See: judgment of the Supreme Court of 22 May 1953, I C 22/53, (1954) 3 *Orzecznictwo Sądu Najwyższego* 58. However, jurisprudence accepts the admissibility of requesting that a fact of a lawcreating character is established if it is aimed at the determination of a right or legal relationship. See: judgment of the Supreme Court of 8 October 1952, I C 1514/52, (1953) 8–9 *Państwo i Prawo* 369 and judgment of the Supreme Court of 11 September 1953, I C 581/53, (1954) 3 *Orzecznictwo Sądu Najwyższego* 65.

³⁵ See: E. Nowińska, M. du Vall, “Powództwo o ustalenie z zakresu własności przemysłowej” (2007) 100 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej* 337 and subs. and the judgment of the Supreme Court of 14 July 1972, quoted therein, III CRN 607/71, (1973) 4 *Orzecznictwo Sądu Najwyższego* 64.

infringements. The function and significance of this provision needs to be discussed in the context of all the other legal rules guaranteeing civil law protection. First, a general question needs to be answered concerning the function of claims where a payment is demanded to be made by the infringer in favor of a social organization or institution acting in the public interest? Second, is such solution needed in the competition protection system?

The function of this type of action is clearly to impose an additional sanction on the infringer. Under the assumption that it has a repressive character – the amount of the adjudicated payment influences the scope of the infringer's external operation. As a result, the action's aim is general prevention. Even if it falls within the ambit of civil law claims, a request to pay "punitive and exemplary damages" (*nawiązka*) has the character of a penal sanction. In this case, the civil law character of liability is combined with penal repression. The mixed character of this type of action is comparable to the institution of punitive and exemplary damages and the so-called "*pokutne*" (claim to pay a specific sum of money in favor of a specific organization for its statutory purposes, if the infringement was deliberate).

Literature has criticised such actions due to their unwanted repressive role and the penal character of measures offered in civil law provisions³⁶. A request of that type is based on the demonstration of the infringer's guilt, a fact which suggests its close relationship to the damages liability regime. However, the adjudication of such a claim is not meant to compensate the loss of the injured party. The claim to make an adequate payment (in favor of a social goal) is also independent from hand over of unjust benefits claims (in favor of the injured party). This is a measure disproportionate to antitrust infringements of property-related rights because its scope goes far beyond the basic compensatory function of civil law.

3.3. Class actions

Polish law does not contain the possibility of class actions. The provisions of the KPC permit a court to jointly examine actions lodged by several different plaintiffs only if their claims are based on an identical factual and legal basis (formal joint participation, see also: Article 72 § 1(2) KPC). Pursuant to Article 73(1) and Article 74 KPC, each plaintiff acts in his or her own name and has the right to individually support the case. Summoned to the trial are all joint participants with respect to whom the case has not been yet completed.

It can be assumed, based on the general provisions of the KPC, that anyone affected by the consequences of the prohibition of competition restricting

³⁶ See: J. Szwajca [in:] J. Szwajca (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 873; E. Nowińska, *Prawo własności przemysłowej*, Warszawa 2005, p. 163.

practices should have the option to initiate legal proceedings. In addition to business entities and parties devoid of such status, the possibility of the initiation of proceedings by a consumer or a social organization permitted to act under applicable provisions even if it has no legal personality (Article 64 and 65 KPC) should also be considered.

Authorizing consumers to sue will only be an effective contribution to the effectiveness of antitrust enforcement if class actions are permitted. The possibility of filing a single combined lawsuit may indeed greatly improve the effectiveness of private enforcement of competition law. Among the main legal and economic reasons why class actions should be permitted is the possibility of asserting civil law liability in cases where the value of the object of dispute is very low. That is true, in particular, where legal costs discourage individual consumers from taking legal actions. The possibility of filling class actions effectively eliminates that obstacle.

Class actions are frequent in the US whereby an individual plaintiff brings an action as a representative of a whole grope of injured parties that do not need to participate in the procedural activities. Ultimately, the court distributes the adjudged compensation among all members of the group. A professional attorney-*ad-litem*, who organizes and conducts the proceedings, plays a key role in such proceedings.

No equivalent solution exists within the normative framework of EC law. However, the establishment of such an institution is by no means precluded by the rule that every person entitled to claim that an infringement of Article 81 TEC took place is thus entitled to claim invalidity of an activity prohibited by this provision³⁷. This was confirmed in April 2008 in the Commission's White Paper concerning claims for compensation of loss resulting from competition law infringements.

IV. Purpose of civil law liability in connection with competition law infringements

The success of private enforcement of competition law depends on finding the right balance between its compensatory and preventive function. When adjudicating claims, one should balance the risk of unjust enrichment of the injured party (at the expense of the infringer) with the guarantee of sufficient compensation at the very least.

³⁷ See: C-295-298/04 *Manfredi and others*, para. 59 and 60; D. Waelbroeck, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules - Comparative Report*, Brussels 2004, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

The restoration of the conditions prior to the infringement and compensation belong to fundamental rules of civil law. All claims raised into civil law should be treated as a means to restore the pre-infringement property status of the injured party. Literature often quotes the *ne quis ex damno suo lucrum faciat dictum*. In its light, one should avoid adjudicating damages in an amount causing that the injured party is better off than he or she would have been had the event that was the source of the loss not occurred – compensation may neither exceed the extent of the loss nor perform punitive functions³⁸. Thus, damages liability should be separated from liability serving different purposes including, in particular, financial repression³⁹. Clearly, one may exceptionally depart from the compensatory character of civil law damages. However, the principle of full compensation may only be limited by restrictions stemming from legislation or a contract.

In competition law, the character of claims is financial but their economic value is calculated with respect to what would be lost if the infringement is not discontinued. A question may be asked whether the entity injured as a result of a competition law infringement, which may request adjudication under the provisions of civil law, will not obtain more than that which resulted from the illegal act. Depending on the scope of claims and their mutual relationships, it may turn out that the asserted claims may perform different functions and have a different character in specific circumstances.

First, the compensatory function plays a fundamental role in civil law, which should lead to the restoration of the property balance violated by an illegal practice. Moreover, this very function guarantees protection against illegal property shifting. Such understanding of the function of civil law liability is noticeable in most EU countries⁴⁰.

Second, in the private law area, claims based on an antitrust infringement may also fulfill a repressive function. Repression takes place where it is assumed that it is needed provided that it is justified because the means of private law need to be used for the protection of the public interest. In the civil law area, repressive functions are associated with the method of determining

³⁸ See W. Czachórski, A. Brzozowski, M. Safjan, W. Skowrońska-Bocian, *Zobowiązania*, Warszawa 2008, p. 98.

³⁹ See: W. Warkalfo, *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice*, Warszawa 1972, p. 85.

⁴⁰ A departure from adjudicating punitive damages has also been taken into account in Article 24 of the Draft Proposal of the Regulation of the European Parliament and of the Council concerning the Law Governing Non-Contractual Obligations (Rome II), Document COM (2003) 427 final, which explicitly forbids the application of rules that may cause the adjudication of non-compensatory damages. Also, the application of the law of a third-party state containing provisions on non-compensatory damages (e.g. exemplary damages or punitive damages) is contradictory to EU public policy.

the amount of the hand over of unjust benefits. If the amount is determined separately from the assessment of the financial situation of the entitled person, a specific burden may be placed on the infringer (as a result of the refund of the property value) that the entitled person would not have generated. Aside from its compensatory function, repressive liability is meant to establish the means of legal protection based on the illegal conduct alone. However, this entails a risk of abuse of the repressive function of liability. The repressive purposes of liability, noticeable in different legal systems such as the US, may justify the adjudication of damages in higher amounts than the loss incurred, provided that it can be demonstrated that the infringer can bear the risk of uncertainty the source of which was his own illegal activity. Such reasoning is based on the concepts of justice and public order⁴¹.

Third, civil liability might fulfill a preventive function through the application of such rules or means that will prevent future infringements. If effective models of asserting liability can be found that do not go beyond its compensatory functions, then the effectiveness of civil liability can show the market that violating competition rules does not pay off.

Civil law measures intended to compensate for the consequences of an infringement fall within the scope of civil law financial liability. The assertion of claims under competition law consists of a selection of claims with a negative or compensatory character.

Literature

- Czachórski W., Brzozowski A., Safjan M., Skowrońska-Bocian W., *Zobowiązania [Obligations]*, Warszawa 2008.
- Duży A., “Dyferencyjna metoda ustalania wysokości szkody” [“Differentiating Method of Setting an Amount of a Damage”] (1993) 10 *Państwo i Prawo*.
- Dubis W., “Zbieg roszczeń a skarga z bezpodstawnego wzbogacenia” [“Concurrence of Claims and Unjust Enrichment Claim”] (2002) 1 *Przegląd Sądowy*.
- Dybowski T., *System prawa cywilnego*. Tom III. *Zobowiązania [System of Civil Law. Vol. III. Obligations]*, Ossolineum 1986.
- Gadek B., “Szkoda wyrządzona czynem nieuczciwej konkurencji – zagadnienia wybrane” [“Damage out of unfair competition actions – selected problems”] [in:] *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara [Civil Liability. Anniversary Book Dedicated to Professor Adam Szpunar]*, Kraków 2004.
- Gronowski S., *Ustawa antymonopolowa – komentarz [Antimonopoly Act. Commentary]*, Warszawa 1999.

⁴¹ See T.P. Ross [in:] T. P. Ross (ed.), *Intellectual Property Law, Damages and Remedies*, New York 2000, p. 4–14.

- Jakubecki J., *Restitutio ad integrum w sądowym postępowaniu cywilnym [Restitutio ad integrum in Court Civil Proceeding]*, Lublin 1993.
- Koch A., *Związek przyczynowy jako podstawa odpowiedzialności w prawie cywilnym [Causal Nexus as the Basis for Liability in Civil Law]*, Warszawa 1975.
- Łętowska E., *Zbieg norm w prawie cywilnym [Concurrence of Norms in Civil Law]*, Warszawa 2002.
- Mika I., “Roszczenie o ogłoszenie oświadczenia w prawie wynalazczym” [“Claim for an Announcement of a Declaration in Innovative Law”] (1997) 69 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej*.
- Modzelewska-Wąchal E., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2002.
- Nowińska E., du Vall M., “Powództwo o ustalenie z zakresu własności przemysłowej” [“Declaratory Action in Industrial Property”] (2007) 100 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej*.
- Nowińska E., du Vall M., *Prawo własności przemysłowej [Industrial Property Law]*, Warszawa 2005.
- Podrecki P., *Porozumienia monopolistyczne i ich cywilnoprawne skutki [Monopolistic Agreements and Their Civil Law Effects]*, Kraków 2000.
- Ross T.P. (ed.), *Intellectual Property Law, Damages and Remedies*, New York 2000.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Szpunar M., *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego [Liability of Private Entity for a Breach of EC Law]*, Warszawa 2008.
- Szwaja J. (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz [Act on Combating Unfair Practices. Commentary]*, Warszawa 2006 or 2008.
- Warkańko W., *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice [Liability for Damages. Functions, Types, Limits]*, Warszawa 1972.
- Wojcieszko-Głuszko E., “Roszczenie o złożenie oświadczenia w prawie nieuczciwej konkurencji” [Claim for Making a Statement in Unfair Competition Law] (2004) 88 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej*.
- du Vall M., *Prawo patentowe [Patent law]*, Warszawa 2008.

Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law

by

Ewelina Rumak and Piotr Sitarek*

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Abstract

This paper is devoted to the Polish leniency programme, including the conditions of obtaining lenient treatment and the applicable procedure. The type, scope and form of information that must be submitted are commented on as well as the marker system and summary applications. The intersection of the leniency scheme with private enforcement of antitrust rules is discussed in detail. Special attention is devoted to the possible ways in which private antitrust plaintiffs might access information submitted to the UOKiK by leniency applicants. Thoroughly analysed are the rules regulating the possibility of obtaining relevant documents from the UOKiK and from the defendant in the course of civil proceedings as well

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as the status of the administrative decision in subsequent civil litigation. The paper covers also the scope of the leniency recipient's civil liability and touches upon the possible ways in which it could be limited to enhance the effectiveness of the leniency scheme. Some suggestions *de lege ferenda* are also provided concerning the means of increasing this effectiveness without prejudice to the private parties' right to compensation.

Classifications and key words: competition law, leniency, whistle-blowing, cartels, private enforcement, discovery, protection of applications, follow-on actions, scope of damages

I. Introduction

Polish competition law has evolved fully in line with European trends, at least since Poland's accession to the EU. In particular the modernisation process of EC antitrust rules, started by the 2004 legislation package, made a large impact on Poland. Its main features included: a decentralized application of EU competition law by National Competition Authorities (NCAs) and national courts as well as the strengthening of the fight against the gravest forms of antitrust infringements – cartels, in particular. One of the crucial elements of the enforcement reform has been the Commission's initiative to strengthen private enforcement of antitrust law, so that all parties injured by anti-competitive practices could seek redress of their grievances in national courts. The increased importance of private enforcement is supposed to enable the Commission and the NCAs to concentrate their resources on the fight against cartels. Since US and EU experiences clearly demonstrate that the most effective tool for cartel detection is a leniency scheme ("corporate amnesty"), a successful modernisation of competition law needs both: a successful leniency policy and effective private enforcement. It is thus important to examine their relationship determining, in particular, whether the key features of the reform will complement each other or whether they might clash.

The paper will commence with a short overview of the Polish leniency programme (the current state of private enforcement of Polish competition law has been described in detail elsewhere¹). The following analysis will focus on three crucial problems in this field: the use of corporate leniency statements as evidence in civil proceedings, the effect of decisions taken by the President of the Polish Office of Competition and Consumer Protection (hereinafter,

¹ A. Jurkowska, "Antitrust Private Enforcement – Case of Poland" (2008) 1(1) *YARS* 59–80.

UOKiK) on subsequent private lawsuits and, the scope of civil liability of a successful leniency applicant. However, to the best of the authors' knowledge, there have been no judgments of Polish courts in cases related to the leniency programme yet. As a result, the assessment presented in this paper is based on the interpretation of relevant provisions of Polish law, on literature, on case law indirectly related to this issue and on a comparative analysis of US and EU experiences. When no satisfying answers *de lege lata* seem possible, some suggestions *de lege ferenda* shall be made.

II. Polish leniency programme

1. General information

Literature defines leniency as “the granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities”². In Poland, these penalties may take the form of administrative fines only³, since no criminal liability for antitrust violations exists in the Polish legal system⁴. The UOKiK President may impose pecuniary sanctions of up to 10% of the undertaking's revenue obtained in the year prior to the year in which the decision is issued⁵.

The Polish leniency programme was introduced in 2004 by an amendment to the Act of 15 December 2000 on Competition and Consumer Protection⁶. It is currently regulated by Article 109 of the Act of 16 February 2007 on

² W. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Oxford and Portland, Oregon 2008, p. 113.

³ See S. Dudzik, P. K. Rosiak, “Poland” [in:] D. Cahill (ed.), *The Modernisation of EU Competition Law Enforcement in the EU. FIDE 2004 National Reports*, Cambridge 2004, p. 477.

⁴ A minor exception is the criminal liability for bid-rigging on the basis of Articles 286 and 305 of the Penal Code (Journal of Laws 1997 No. 88, item 553 with amendments); R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1668. Polish leniency programme does not provide for immunity from criminal prosecution, therefore it is to be expected that it will not become effective in detecting bid-rigging agreements.

⁵ Office of Competition and Consumer Protection, Guidelines on Setting Fines for Competition-Restricting Practices (hereinafter referred to as: Fining Guidelines), UOKiK Official Journal 2008 No. 4, item 33.

⁶ Journal of Laws 2004 No. 93, item 891.

Competition and Consumer Protection⁷ (hereinafter, Competition Act). Although the new provision is an exact copy of Article 103a of the former Act of 2004, the shape of Polish corporate amnesty has in actual fact substantially changed since 2004. Key new procedural rules⁸ were recently introduced by the Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines⁹ (hereinafter, the Regulation) and by the Guidelines of the President of the Office of Competition and Consumer Protection concerning the leniency programme¹⁰ (hereinafter, Leniency Guidelines). However, while the Competition Act and the Regulation are acts of universally binding law (see Article 87 of the Constitution of the Republic of Poland of 2 April 1997¹¹), the Guidelines are an act of soft-law only which is not formally binding on the UOKiK President. The purpose of the Guidelines is to increase transparency of the provisions of the two binding acts serving as a guide for entrepreneurs (see point 2 of the Leniency Guidelines). Nevertheless, it is very likely that the authority will respect legitimate expectations of the addressees of the Guidelines, even if their language is not as definite as paragraph 4 of the Fining Guidelines, where the UOKiK President unequivocally promises to apply the latter act.

The Polish leniency scheme is generally in line with the Model Leniency Programme of the European Competition Network (hereafter, ECN)¹² although some discrepancies exist. One of the specific features of the Polish scheme is its scope – it is available to parties to every anti-competitive agreement which infringes Article 6(1) of the Competition Act or Article 81 of EC Treaty, irrespective of whether the agreement is horizontal or vertical (see Article 109(1) of the Competition Act). That makes the scope of the Polish leniency programme wider than the Commission's Leniency Notice (hereinafter, Commission Leniency Notice)¹³, the Model Leniency Programme of the ECN (point 4) or the leniency policy of the Office of

⁷ Journal of Laws 2007 No. 50, item 331, amendments: Journal of Laws 2007 No. 99, item 99; Journal of Laws 2007 No. 171, item 1206.

⁸ They include summary applications and marker system, which will be further discussed below.

⁹ Journal of Laws 2009 No. 20, item 109.

¹⁰ They can be downloaded from UOKiK's website: <http://www.uokik.gov.pl>, although regrettably only in Polish version.

¹¹ Journal of Laws 1997 No. 78, item 483.

¹² Available at <http://ec.europa.eu/competition/ecn/documents.html>.

¹³ See Commission notice on immunity from fines and reduction of fines in cartel cases, point 1, OJ [2006] C 298/17.

Fair Trading¹⁴ and the Bundeskartellamt¹⁵, all of which concern cartels only. Leniency for all types of anti-competitive agreements, but not for the abuse of dominance, is possible also in France¹⁶. The UOKiK President may reduce the fines in cases falling outside the scope of the Leniency Notice, by treating the cooperation with the authorities as a mitigating factor as prescribed in point 4.1(e) of the Fining Guidelines. It can be expected however that, due to the special importance of the fight against cartels, possible reductions on that ground shall be significantly smaller than the 50% which is the maximal reduction available under the leniency programme.

2. Conditions and procedure for obtaining leniency

The UOKiK President shall grant total immunity from fines to the undertaking, which has been the first to provide the authority with information sufficient for instituting antitrust proceedings or with proof rendering it possible to issue a decision asserting the practice as anti-competitive. In both cases, certain additional conditions must be met (see Article 109(1) of the Competition Act) and the relevant information or proof cannot be in the possession of the UOKiK at the moment of filing the motion for immunity. The condition of “information being sufficient for instituting antitrust proceedings” should be understood here, in the context of the Commission’s Leniency Notice, as enabling the authority to carry out a targeted inspection¹⁷. The additional conditions include: full cooperation with the UOKiK and the fact that the applicant cannot be the initiator or a coercer of other undertakings to participate in the practice. A company seeking immunity must also cease its participation in the agreement on the day of filing the application at the very latest (Competition Act Article 109(1)(2-4)). Still, literature argues¹⁸ that an inflexible approach to latter condition of “ceasing participation” is ineffective

¹⁴ See OFT’s Guidance as to the appropriate amount of penalty, p. 12, available at OFT’s website <http://www.of.gov.uk>.

¹⁵ See Notice no 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases- Leniency Programme of 7 March 2006, available at Bundeskartellamt’s website <http://www.bundeskartellamt.de>.

¹⁶ See art. L 464 – 2 point 4 of Code de Commerce, available at <http://www.legifrance.gouv.fr>.

¹⁷ S. Sołtysiński, “Z doświadczeń programu Leniency w Brukseli i w Warszawie” [in:] C. Banasiński (ed.) *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian*, Warszawa 2006, p. 47.

¹⁸ D. Piejko, “Leniency w polskich i europejskich przepisach prawa ochrony konkurencji” [in:] *Amerykański i europejski system ochrony konkurencji*, Warszawa 2007, s. 56–57. Similarly R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1672–1673.

because it may alert other members of the agreement, enabling them to destroy or conceal relevant evidence. In the authors' view, as a suggestion *de lege ferenda*, the precise moment of abandoning all anti-competitive activities by the leniency applicant should be set by the competition authority. This would bring the Polish scheme further in line with the Model Leniency Programme of the ECN¹⁹ and the Commission's Leniency Notice²⁰.

Abolishing the "ringleader exception", which excludes instigators and coercers from the possibility of using the Polish leniency programme, can also be suggested²¹. While this proposal is certainly more controversial, its aim is to increase the deterrent effect of the scheme which, apart from being an investigatory tool, should stop undertakings from entering into and remaining in anti-competitive agreements by incentivising them to distrust each other. A ringleader that is unable to confess is more trustworthy for other present or future participants. This effect is especially striking in duopolistic markets, when the one approaching the only competitor with a proposal of a market-allocating or price-fixing agreement, would be considered the instigator that is unable to apply for leniency. The other duopolist could then safely enter into the cartel and would have no incentive to confess since its partner would be precluded from doing so. Precluding immunity for ringleaders might therefore lead to perpetuating cartels in highly concentrated, especially duopolistic, markets²².

Additional problems could arise in situations of difficulty in identifying the ringleader. The possibility of fraud on the part of a ringleader, who could approach other undertakings with a cartel offer and then "betray" them to the authority, could only add to the deterrent effect of the leniency programme, since distrust is natural between competitors and double so between competitors who contemplate entering into an illegal agreement²³. In addition, since the leniency programme itself necessitates some sacrifices on the part of the competition authority's determination to punish all wrongdoers, argumentation based on natural justice should not lead to the creation of a scheme which is neither just nor effective. Seeing as it was decided that the interest in detecting and deterring cartels outweighs the interest in punishing

¹⁹ Part V point 13 section 1.

²⁰ Point 12 letter b.

²¹ For example, immunity for ringleaders is available in France, the Netherlands and the UK. Polish exclusion is compatible with EC Notice and ECN Model Programme, as well as the US and German models. See A. Schwab, Ch. Steinle, "Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed" (2008) 29(9) *European Competition Law Review* 525.

²² See Ch. R. Leslie, "Antitrust Amnesty, Game Theory and Cartel Stability" (2006) 31 *Journal of Corporation Law* 478-481.

²³ *Ibidem*.

every infringer of antitrust law²⁴, a leniency programme should be as effective as possible in order to justify the basic departure from the rules of natural justice that lie at its roots²⁵.

A reduction of fines is available for undertakings which are not eligible for full immunity²⁶ but have provided the UOKiK President with evidence which will, to a substantial degree, contribute to issuing a decision asserting the practice as anti-competitive²⁷ and which have ceased participating in the agreement at the aforementioned time (Competition Act Article 109(2)). The size of the reduction is dependent on the applicant's place in the "queue" – up to 50% for the first undertaking to apply for reduction, up to 30% for the second and up to 20% for subsequent applicants (see Leniency Guidelines, point 31).

According to paragraph 2(2) and (3) of the Regulation and point 8 of the Leniency Guidelines, an application for leniency can be filed either in writing (it may be brought directly to the UOKiK or it may be sent by post, electronic mail or by fax²⁸) or orally. An oral application is submitted for the official record, which is prepared by a member of staff of the UOKiK who puts the date and time of submission onto the document²⁹. The applicant is required to sign the record in accordance with Art. 68(2) of the Administrative Procedure Code (KPA)³⁰. When the application is submitted in writing, the UOKiK President provides the undertaking with the confirmation of the date and time of its receipt³¹. There are no provisions regarding the possibility of submitting applications and evidence

²⁴ See point 3 of Commission Leniency Notice.

²⁵ See R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1669–1670, 1674. This Author supports the exclusion of ringleaders from the benefits of leniency in light of arguments relating to moral reasons and the rule of retribution, stating that serious wrongdoers should be punished not only by a heavy fine but also by exclusion from the benefits of leniency programmes. It remains to be seen whether moral and retributive reasons justify making leniency programmes less effective than they could be and, in effect, allowing larger number of cartels to exist and flourish without detection and any kind of punishment.

²⁶ Including ringleaders.

²⁷ For example, the statements of the company's employees relating to the functioning of the cartel, were considered to constitute such evidence in the decision of the UOKiK President of 18 September 2006, DOK 107/06, available at <http://www.uokik.gov.pl>. See C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów*, Warszawa 2009, p. 1010.

²⁸ When the application is sent by e-mail or by fax, it is necessary to submit the original or duly certified documents to the UOKiK in three days time. If the deadline is met, the application shall be deemed to have been submitted at the moment of sending the e-mail or fax. See point 9 of the Leniency Guidelines. This requirement does not concern e-mails signed with certified electronic signature, see Leniency Guidelines, footnote 4.

²⁹ Paragraph 2(3) of the Regulation.

³⁰ Journal of Laws 2000 No. 98, item 1071 with amendments.

³¹ Paragraph 2 section 1 of the Regulation.

in hypothetical terms.³² According to point 7 of the Leniency Guidelines, an entrepreneur may however call a dedicated phone line to present the facts of the case to an employee of UOKiK in hypothetical terms in order to get a preliminary assessment as to the possibility of obtaining lenient treatment.

The application should contain a description of the agreement and, in particular, specify: the undertakings, products or services and the territory covered by the agreement, its purpose, duration and circumstances of its conclusion, the roles of particular participants³³ as well as the names and official posts of individuals playing a significant role in the agreement. The applicant must also specify whether a similar submission was made to a NCA of another EU Member State or to the Commission³⁴ (paragraph 3(2) of the Regulation). Finally, two additional statements are necessary: one concerning the fact that the applicant ceased its participation in the agreement (specifying the exact date of the cessation) and another, stating that it was not the instigator of the agreement and that it was not inducing others to join it (paragraph 3(3) of the Regulation). Attached should be all relevant evidence in the possession of the applicant such as: minutes of meetings held in relation to the agreement, e-mails, photographs of sms messages, relevant notes, restaurant or hotel bills, airplane tickets, market data from trade associations' reports etc.³⁵. The attached documents should be either originals or duly certified copies³⁶. When relevant documents or their parts are drawn in foreign language, a duly certified translation into Polish should also be attached³⁷.

3. New forms of applications

Since 2009, the Polish leniency scheme contains two simplified forms of leniency applications. First, by submitting some basic information about the alleged anti-competitive agreement, companies can now obtain a marker³⁸ – a

³² Compare point 16 letter b and point 19 of the Commission Leniency Notice, see also R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1687.

³³ Especially the identity of the instigator and undertakings coercing others, see point 13.6 of the Leniency Guidelines.

³⁴ If so, the name of the authority and the date of the application should also be submitted (point 13.8 of the Guidelines).

³⁵ C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 1001.

³⁶ Art. 51(1) of Competition Act; point 15 of Leniency Guidelines.

³⁷ Art. 51(3) of Competition Act. UOKiK requires the applicant to attach an official copy of applicant's data from National Court Register and, in case of submitting the application by the attorney, the power of attorney. See C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 1001.

³⁸ On the nature of markers in leniency programmes, see e.g. R. Molski, "Programy łagodnego traktowania – panaceum na praktyki kartelowe?" (2004) 1 *Kwartalnik Prawa Publicznego* 198;

“place in the queue” – gaining additional time for gathering enough evidence to submit a full application. The information which has to be provided in order to secure a marker include: list of participants, duration and purpose of the agreement, products/services and territory covered by the agreement and information, whether a leniency application has also been submitted to another NCA or to the Commission. The application should include “preliminary” information or evidence sufficient for instituting antitrust proceedings or issuing a decision asserting the agreement as anti-competitive as well as the statements as to the cessation of participation in the agreement and the fact, that the applicant was not its ringleader³⁹. The term “preliminary information or evidence” is unclear; its interpretation is in practice left to the discretion of the competition authority⁴⁰. The UOKiK President confirms the date and time of the receipt of the application and specifies what additional information must be submitted to complete the process as well as the deadline for providing it. If the submission is completed within the specified date, it is deemed to have been received at the moment of filing the first “shortened” application⁴¹.

Second, after submitting a leniency application to the Commission (when a cartel covers the territories of more than three Member States), a company can secure for itself “the first place in the queue” in Poland. Filing a “summary application”⁴² is possible only for companies applying for full immunity (not when the applicant wishes to apply for a fine reduction)⁴³. It allows the applicant to save time and effort necessary to file a full application but, at the same time, gives the company the certainty of being able to submit a full application to the UOKiK if the domestic authority chooses to take up the case⁴⁴. A summary application must contain the same information

R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1690–1693; J. S. Sandhu, “The European commission’s Leniency Policy: a Success” (2007) 28(3) *European Competition Law Review* 150–152; M. J. Reynolds, “Immunity and Leniency in EU Cartel Cases: Current Issues” (2006) 27(2) *European Competition Law Review* 82–85.

³⁹ Paragraph 5 of the Regulation.

⁴⁰ R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1691.

⁴¹ Paragraph 5(4) of the Regulation; point 17 of the Leniency Guidelines.

⁴² See paragraph 11 of the Regulation and point 32 of Leniency Guidelines.

⁴³ Paragraph 11(1) of the Regulation. This solution is consistent with point 46 of ECN Model Leniency Programme.

⁴⁴ The possibility of filing summary applications brings the Polish leniency programme in line with the ECN Model Leniency Programme, see point 22. The question of case allocation in the ECN is dealt with in the Commission Notice on cooperation within the Network of Competition Authorities, Official Journal C 101, 27.04.2007, p. 43–53. On problems related to this issue and leniency, see e.g. A. Schab, Ch. Steinle, “Pitfalls...” p. 523–531. On the cooperation within the ECN, see also S. Dudzik, “Wpływ członkostwa Polski w Unii Europejskiej na administrację rządową na przykładzie kooperacyjnego modelu stosowania wspólnotowego prawa konkurencji” [in:] S. Biernat, S. Dudzik, M. Niedźwiedź (eds.), *Przystąpienie Polski do Unii Europejskiej*.

as an application for a marker as well as, additionally, a list of the Member States where evidence of the cartel exists⁴⁵. Summary applications must be complemented by statements relating to the cessation of the participation in the agreement, to the fact that the applicant was not its ringleader and information about submissions to the Commission or other NCAs⁴⁶. Unlike other submissions, the summary application does not have to be accompanied by information or evidence necessary to institute antitrust proceedings or to issue a decision asserting the practice as anti-competitive. A deadline for the completion of the application is specified only if the UOKiK President actually decides to institute proceeding concerning the agreement covered by the summary application. When the deadline is met, the application is deemed to have been received at the moment of the submission of the summary application.⁴⁷ The summary application may be submitted either in writing or orally for the record⁴⁸.

4. Decision by the President

Having analysed a leniency application, the UOKiK President notifies the submitting party in writing whether the conditions for obtaining immunity or a fine reduction are met. However, this notification has only a preliminary nature – its permanence depends on the applicant's further cooperation with the authority. At this point, the applicant is also informed of the order in which its submission was received⁴⁹ (the order is established without consideration of these applications which were dismissed⁵⁰). An application can be withdrawn at any moment before the President issues his/her decision ending the proceedings. The withdrawal does not affect the already assigned place in the queue of the remaining applications⁵¹. The final determination as to the granting of immunity or fine reduction is made by the UOKiK President in a decision concerning the agreement referred to in the application⁵².

Traktat akcesyjny i jego skutki, Kraków 2003, p. 231–259; J. Bazylińska, “Współpraca w ramach Europejskiej Sieci Konkurencji” (2007) 11 *Przegląd Ustawodawstwa Gospodarczego* 2–12.

⁴⁵ Paragraph 11(2) of the Regulation.

⁴⁶ Paragraph 11(3) and (4) of the Regulation.

⁴⁷ Paragraph 11(5) and (6) of the Regulation.

⁴⁸ Point 35 of the Leniency Guidelines

⁴⁹ Paragraph 8 of the Regulation.

⁵⁰ Paragraph 9 of the Regulation.

⁵¹ Paragraph 10 of the Regulation.

⁵² R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1695.

According to Article 107(1) and (3) of KPA, administrative decisions must be reasoned concerning the facts and the law of the case. Public authorities must specify the facts which were considered proven in the course of the proceedings, the evidence considered persuasive and the reasons for denying credibility to other pieces of evidence. Thus the leniency application and any other evidence submitted by the applicant must be mentioned in the decision of the UOKiK President. They are usually used to justify the authority's findings as to the existence and functioning of the agreement and the level of fines imposed (in particular, when the applicant is granted immunity or receives a major reduction). The fact of the applicant's participation in the agreement and its subsequent cooperation with the authority is explicitly mentioned⁵³. Decisions of the UOKiK President are published on the authority's official website⁵⁴. Some of them are also published in its Official Journal⁵⁵. The decisions of the UOKiK President can be appealed to the Court of Competition and Consumer Protection in Warsaw⁵⁶. Its judgments are subject to appeal to the Court of Appeals⁵⁷ whose judgments are, in turn, subject to cassation by the Supreme Court⁵⁸. The decisions of the UOKiK President become final if no appeal is lodged within two weeks from the moment of their delivery or if a decision was sustained by the court.

16 leniency applications were submitted to the UOKiK President between 2004 and the end of 2008. The number of applications per year seems to have started raising in 2007 (2 received in 2006, 6 in 2007, 5 in 2008)⁵⁹ but the scheme can still not be said to be working in a fully satisfactory manner. It remains to be seen whether the procedural changes of 2009 will improve the situation.

⁵³ A good example can be found in the decision mentioned in footnote 15 (DOK 107/06) declaring as anti-competitive an agreement on minimal prices between a producer of paints and lacquers and several large construction supermarkets. The cooperation of Castorama sp. z o.o., the first to benefit from the Polish leniency scheme, is often mentioned in the text of the decision, the letters and documents it submitted are referred to as evidence and the dates on which those documents were sent are given. While some data was removed from the decision (business secrets), the content of the submitted documents can easily be inferred from the argumentation of the decision.

⁵⁴ Available at <http://www.uokik.gov.pl>.

⁵⁵ Art. 32 of Competition Act. Published version of a decision does not contain information qualified as business secrets.

⁵⁶ Art. 81 of Competition Act.

⁵⁷ Art. 367 § 1 of Civil Procedure Code (KPC), Journal of Laws 1964 No. 43, item 296 with amendments.

⁵⁸ Art. 479³⁵ § 2 of KPC. See K. Weitz, "Postępowanie w sprawach z zakresu ochrony konkurencji i konsumentów", [in:] T. Wisniewski (ed.), *Postępowanie sądowe w sprawach gospodarczych*, Warszawa 2007, p. 156–160.

⁵⁹ See UOKiK Report on Activities 2008, p. 19, available at <http://www.uokik.gov.pl>.

III. Access to leniency statements

1. General rules on documentary evidence

One of the most important points on intersection between private antitrust enforcement and leniency schemes is the possibility of using an application for immunity or fine reduction (and potentially also other documents submitted by the applicants) as evidence in civil litigations. On the one hand, such a possibility would certainly strengthen the position of those seeking remedies for antitrust violations, since evidentiary difficulties are often listed amongst the gravest obstacles of private antitrust enforcement⁶⁰. On the other hand, it might significantly reduce the attractiveness of leniency programmes, adopted at both domestic and EU level, resulting in fewer and/or less comprehensive submissions⁶¹. For the sake of preserving the effectiveness of leniency schemes, considered to be an important public enforcement tool, the Commission suggests that all leniency applications should receive special protection against disclosure⁶². For the same reason, it has intervened, as *amicus curiae*, in American civil proceedings, arguing that European leniency statements should not be subject to discovery in the US⁶³.

The Polish legal system does not contain an equivalent of “pre-trial discovery”, a procedure typical for common law countries⁶⁴. As a result, parties are not obliged to exchange documents or other types of evidence at the pre-trial stage. A litigant may induce its adversary to submit a certain document only by obtaining a court order to that effect⁶⁵. Motions of that kind can be included in the statement of claims or filed at a later stage. They are generally admissible until the closure of the hearing⁶⁶, with one important exception applicable to proceedings in commercial matters, conducted pursuant to

⁶⁰ See, e.g., Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final (hereinafter: Green Paper), point 2.1; White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final (hereinafter: White Paper), point 2.2.

⁶¹ See Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, point 272.

⁶² See White Paper, point 2.9.

⁶³ See, e.g., K. Nordlander, “Discovering Discovery – US Discovery of EC Leniency Statements” (2004) 25(10) *European Competition Law Review*, p. 646.

⁶⁴ A. Sánchez Graells, “Discovery, Confidentiality and Disclosure of Evidence Under the Private Enforcement of EU Antitrust Laws” (September 8, 2006), *Instituto de Empresa Business School Working Paper No. WPED06-05*, p. 7, available at SSRN: <http://ssrn.com/abstract=952504>

⁶⁵ There are no rules in the Polish civil procedure that would specify how detailed the description of the requested document must be.

⁶⁶ Art. 224 § 1 KPC.

art. 479¹–479²² of the KPC. In private antitrust cases the abovementioned provisions apply when both plaintiff and defendant are entrepreneurs, whereas if the claim is filed by a consumer, the proceedings are conducted under general rules. In the former case, a rule of preclusion provided for in art. 479¹² KPC requires the plaintiff to specify all its assertions, as well as the evidence supporting them, already in its statement of claims. A similar time limitation binds the defendant who is obliged to include its assertions, as well as indicate all relevant evidence, in the reply to the statement of claims, which is mandatory (Art. 479¹⁴ § 2 KPC)⁶⁷. Evidentiary motion submitted at a later stage will be dismissed unless the moving party shows that it was impossible to file the motion earlier or, that the need to file it did not occur before. The preclusion rule has been criticized by some authors as a serious burden for plaintiffs in antitrust suits⁶⁸.

The court may (acting upon a motion or *suo motu*) oblige anyone to submit a document (which is in that entity's possession) that constitutes proof of a material fact relevant to the case. This applies to the litigants as well as third parties, including public authorities⁶⁹. An addressee can decline to produce the requested document only in specified instances: when it contains state secrets or when the person has the right to refuse to testify as a witness on circumstances referred to in that document (alternately – if he/she possesses the document on behalf of a third party whose refusal to submit it would be justified for the same reason)⁷⁰.

Finally, it should be mentioned that the Polish Civil Procedure Code provides for a possibility of securing evidence, including documents which can be easily destroyed. Such a possibility exists also before the commencement of the court proceedings (before the statement of claims is filed). In order to have a certain piece of evidence secured, it must be shown that its presentation might be impossible/excessively difficult in the future or, due to other reasons, the actual state of affairs needs to be verified⁷¹.

⁶⁷ For further details see T. Szanciło, “Prekluzja w postępowaniu gospodarczym” (2007) 6 *Przegląd Prawa Handlowego* 14.

⁶⁸ See M. Bernatt, “Prywatny model ochrony konkurencji oraz jego realizacja w postępowaniu przed sądem krajowym” [in:] E. Piontek (ed.), *Nowe tendencje w prawie konkurencji UE*, Warszawa 2008, p. 340; A. Jurkowska, “Antitrust Private Enforcement...”, p. 77.

⁶⁹ See T. Ereciński [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz*, vol. 1, Warszawa 2006, p. 573.

⁷⁰ Art. 248 KPC.

⁷¹ Art. 310 KPC.

2. Obtaining documents from the UOKiK President

The wording of general procedural rules might suggest that civil courts can oblige the UOKiK President to submit almost any document for the purpose of evidentiary proceedings. The Competition Act provides, however, for special protection of documents collected by the authority. Pursuant to its Article 73(1): “Information received in the course of the proceedings [carried out by the UOKiK President – authors’ note] may not be used in any other proceedings based on separate provisions” but for the exceptions exhaustively listed in subsequent paragraphs. The list contains two types of proceedings conducted, in part, before the courts, both of which are penal in nature⁷². It follows from the above that the legislator did not provide any explicit exceptions applying to civil lawsuits. In this respect, some authors have considered a possibility of relying on Article 73(2)(5) of the Competition Act but rightly rejected the idea.

The aforementioned provision authorizes the UOKiK President to “provide competent authorities with information which may indicate that any separate regulations have been infringed”. It should be assumed that the term “competent authorities” should be understood as referring to public bodies which may institute proceedings *ex officio* – civil courts do not have such power⁷³. Therefore, in civil lawsuits, courts cannot oblige the UOKiK President to submit a leniency application or any other documents collected during antitrust proceedings – if a party moves for such an order, the motion should be dismissed. This solution has been criticized by advocates of private antitrust enforcement⁷⁴ as incoherent with the legislator’s intention to increase the number of civil lawsuits brought against antitrust law infringers⁷⁵. It was

⁷² I.e. penal proceedings exercised by a public-complaint procedure and fiscal penal proceedings.

⁷³ C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 689.

⁷⁴ See M. Bernatt [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1298.

⁷⁵ This intent was manifested by the elimination of public (administrative) antitrust proceedings initiated upon a motion. Under the previous Act of 15 December 2000 on Competition and Consumer Protection (Journal of Laws 2005 No. 244, item 2080, with amendments) private parties could formally request the UOKiK President to take actions; such a possibility no longer exists – proceedings are currently commenced only *ex officio*, except for merger cases. See A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, “Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia podstaw publicznoprawnej ochrony konkurencji w Polsce”, (2007) 4 *Przegląd Ustawodawstwa Gospodarczego* 4; A. Jurkowska, “Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej” (2008) 1 *Przegląd Ustawodawstwa Gospodarczego* 25.

pointed out in comparison⁷⁶ that the Commission assists national courts in their application of EC competition law by passing on information that it holds⁷⁷. However, while the transmission of information is generally permitted in the EU, certain kinds of data enjoy special protection⁷⁸. In contrast, Article 73 of the Polish Competition Act applies to all information obtained by the UOKiK President⁷⁹.

Additional protection is given to leniency statements. Art. 70 par. 1 of the Competition Act states that: “Any information and evidence received by the President of the Office under the procedure of Article 109 [i.e. leniency procedure – authors’ note], including information on the undertaking’s request for renouncement of imposing a financial penalty or reducing thereof (leniency), shall not be rendered accessible, subject to Paragraphs 2 and 3.” This provision substantially limits procedural rights of those subject to proceedings before the UOKiK President⁸⁰ in comparison to general procedural rules of the Administrative Procedure Code (KPA) which state that every party has a right to inspect files, receive information from public authorities and actively participate in the proceedings⁸¹. As a result of the abovementioned limitation, parties to antitrust proceedings will not have access to any information or evidence submitted by a leniency applicant until prior to passing a decision by the President of UOKiK (Art. 70(2) of the Competition Act). However, no provision of Polish law specifies the exact moment when the UOKiK President should make the said information and evidence accessible⁸², although it is generally agreed, that parties must be given enough time (and a real possibility) to inspect and comment on all the evidence before the decision is issued⁸³. The scope of protection against disclosure, set out in Art. 70, is very broad

⁷⁶ M. Bernatt [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1299.

⁷⁷ See art. 15 para. 1 of the Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ [2003] L 1/1) and paras 21-26 of the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ [2004] C 101).

⁷⁸ These include information voluntarily submitted by a leniency applicant – see para. 26 of the Commission Notice referred to above.

⁷⁹ See M. Bernatt [in:] T. Skoczny, A. Jurkowska, T. Skoczny (eds.), *Ustawa...*, p. 1299.

⁸⁰ *Ibidem*, p. 1279. Pursuant to Art. 88(1) of the Competition Act: “The party to the proceedings shall be every person against whom the proceedings on the application of competition restricting practices are instituted.”

⁸¹ See art. 73, 9 and 10 of KPA.

⁸² According to the Leniency Guidelines, it should take place not later than when the UOKiK President calls upon the parties to finally inspect all evidence gathered in a given case (point 29).

⁸³ C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 677; M. Bernatt [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1282.

covering accepted as well as rejected leniency applications⁸⁴. Information obtained in the course of leniency proceedings can be revealed neither to the parties (subject to Art. 70(2)) nor to third persons⁸⁵ including victims of antitrust violations who could file a lawsuit against the infringers. Nevertheless, if an undertaking applying for leniency gives its written consent, the UOKiK President may (but is not obliged to⁸⁶) grant access to the submissions of that particular applicant.

3. Obtaining documents from the defendant

Theoretically, an antitrust victim who sues a leniency applicant could try to obtain a copy of a leniency application directly from its adversary and not from the authority. Under general rules of civil procedure⁸⁷, a motion to the court for ordering the submission of a document by the defendant may be included in the statement of claims (Art. 187 § 2(3) of KPC) or filed later (unless the rule of preclusion applies). Nevertheless, in the authors' opinion, that possibility does not seriously threaten the attractiveness of the Polish leniency programme.

First, leniency applications can be made orally⁸⁸ in which case the applicant is left with no official document describing its statement. Second, the court is not bound by evidentiary motions so it lies within its discretion to decide whether a certain document should be submitted. While making such a decision in relation to leniency statements, civil courts ought to consider a number of factors – including public interest in maintaining the effectiveness of the leniency scheme. Unfortunately, to the authors' best knowledge, there are no Polish judgements concerning this issue. It seems highly unlikely, however, that Polish courts would generously grant a motion for the submission of a leniency application. Finally, even if such a motion was granted, the disobedient defendant would not be subject to any major sanctions since the Polish Code of Civil Procedure (KPC) does not contain solutions similar to the US, where a failure to comply with a discovery order may have far-reaching consequences for the defendant including a default judgement against it or

⁸⁴ R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1694.

⁸⁵ C. Banasiński, E. Piontek (eds.), *Ustawa ...*, p. 678.

⁸⁶ For the sake of the effectiveness of the scheme, the UOKiK President should be able to protect gathered evidence against disclosure even when leniency applicants waive the protection – see *ibid.*, p. 678. In this respect, compare the Commission's proposal in the White Paper (point 2.9) concerning voluntary disclosure of leniency statements.

⁸⁷ See point III. 1. above

⁸⁸ See point II above.

holding it in contempt⁸⁹. Unlike third parties, litigants cannot be fined for an unjustified refusal to produce requested documents⁹⁰ and so risk only that the court would interpret their disobedience unfavourably while assessing the evidence⁹¹.

IV. Effect of the UOKiK President's decisions on subsequent civil lawsuits

It would be inappropriate to limit this discussion only to the protection received by leniency applications directly, seeing as the substance of the submission gets published in the UOKiK President's decision. Possible private plaintiffs could make good use of these administrative acts, considering that they clearly state the fact that the applicant participated in an antitrust infringement. It is thus necessary to discuss the legal status of UOKiK President's decisions in civil proceedings. If defendants were unable to question their findings in response to follow-on damages suits, the attractiveness of the leniency programme would decrease⁹². Still, when the defendant was found to have infringed competition law, a mechanism that would ease the burden placed on private plaintiffs could greatly incentivise the development of private enforcement. A good example of such solution exists in the US where a final judgment in civil or criminal proceeding brought by or on behalf of the US, declaring that the defendant has violated antitrust laws, is *prima facie* evidence in any proceedings brought by a third party against this defendant under antitrust laws⁹³.

Polish jurisprudence contains varying answers to the question whether administrative decisions have a binding effect on civil courts – the issue must be treated as not unequivocally resolved yet⁹⁴. As a rule, courts are not bound by administrative decisions as to the assessment of the facts. Judicial freedom in evaluating evidence⁹⁵ can be limited on specific legal grounds only. In Poland, this is possible exclusively in relation to the binding effect of a judgment of

⁸⁹ Federal Rules of Civil Procedure, Rule 37(b)(2)(A).

⁹⁰ See Art. 251 KPC.

⁹¹ Art. 233 § 2 KPC.

⁹² See K. Nordlander, "Discovering Discovery ..." , p. 655.

⁹³ Clayton Act §5 (a), U.S.C. §16 (a).

⁹⁴ The discussion of the Polish Supreme Court jurisprudence concerning a related problem – whether a decision by the UOKiK President is a necessary prerequisite for filing a civil action for damages for antitrust infringement – can be found in A. Jurkowska, "Antitrust Private Enforcement...", p. 70-74.

⁹⁵ See Art. 233 of KPC.

a criminal court finding that a crime was committed⁹⁶. Therefore, civil courts are not bound by an administrative decision as to the evaluation of the facts of a case⁹⁷. However, the Polish constitutional order is based on the separation of powers principle (Art. 10 of the Constitution). Courts are therefore precluded from adjudicating upon a matter reserved by the law for administrative bodies. Hence, courts must respect legal situations created by final administrative decisions⁹⁸.

Nevertheless, a decision of the UOKiK President classifying an agreement as restrictive of competition is declaratory in nature⁹⁹. Anti-competitive practices contrary to the prohibitions contained in Art. 6 of the Competition Act (and possibly Art. 81 of EC Treaty) are void *ex lege*¹⁰⁰. It would seem therefore, that courts should be able to decide if an agreement is anti-competitive independently of the UOKiK President. A similar position was taken by the Supreme Court in its resolution of 23 July 2008¹⁰¹. The resolution states that if a final administrative act declares the assessed conduct as anti-competitive, the court is bound by this conclusion but, in the absence of a UOKiK President's decision, civil courts can decide the matter independently. Current jurisprudence seems to point in the direction of civil courts being bound by final decisions of the UOKiK President, even though, there is no specific legal basis for such a restriction of judicial discretion. There is no *stare decisis* doctrine in Poland and the Supreme Court does not create law. In practice however, its resolutions and judgments are followed by lower courts. It is therefore likely that courts will accept the fact of a defendant's participation in an unlawful agreement on the basis of an administrative decision to that effect¹⁰².

⁹⁶ Art. 11 of KPC.

⁹⁷ See W. Siedlecki, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu*, Warszawa 2004, p. 45–46.

⁹⁸ See the resolution of the seven judges of the Supreme Court of 9 September 2007, III CZP 46/07, (2008) 3 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 30.

⁹⁹ K. Kohutek [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Wolters Kluwer, Warszawa 2008, p. 421–425. It should be noted that the part of a decision where the President orders the addressee to do or refrain from doing something has a constitutive character.

¹⁰⁰ See Art. 6(2) of Competition Act.

¹⁰¹ The resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7–8 *Orzecznictwo Sądów Polskich*, item 86.

¹⁰² See A. Jurkowska, "Antitrust Private Enforcement...", p. 74. The plaintiff would still have to prove the damage sustained, fault on part of defendant and the normal causal link between the unlawful act and the damage, see Art. 415 of Civil Code.

This conclusion, even though reasonable in terms of uniform application of antitrust law¹⁰³, is still controversial seeing as it lacks direct legal basis. The Supreme Court has relied on Article 16 of Regulation 1/2003 to justify the binding effect of UOKiK President's decisions on civil courts, even though this provision applies to decisions issued by the Commission only¹⁰⁴. This conclusion is also called into doubt by an analysis of relevant literature from the period prior to the resolution. At that time, Polish doctrine predominantly believed that, even though a binding effect of administrative decisions finding an antitrust violation on civil courts adjudicating private claims seemed a rational and wanted solution, it was not yet introduced in any provision of Polish law¹⁰⁵.

Hence, a small possibility exists that a court might allow the defendant, who was an addressee of a final UOKiK President's decision, to question its findings. The administrative act would then be treated like any other official document subject to free evaluation by the court¹⁰⁶. Even so, it would be extremely unlikely for the defendant to be able to rebut such evidence considering that the decision was based on its own leniency statement. To conclude, leniency applicants should be ready to concentrate their defence in possible follow-on damages suits on the question of the amount of damage sustained by the plaintiff and the causal link between the execution of the agreement and the damage. Whether or not the court finds itself bound by the UOKiK President's decision, it would certainly treat it as the most important piece of evidence in the civil case. Considering, in particular, the confessional nature of leniency statements, a UOKiK President's decision is likely to be practically binding as to the fact that the defendant infringed antitrust rules¹⁰⁷. So far, the negative impact of this state of affairs on the incentives to "blow the

¹⁰³ The binding effect of Commission's decisions on Member State courts is stipulated by art. 16 of the Regulation 1/2003. Even before the enactment of his provision, such a rule existed by virtue of the case-law of the European Court of Justice – see *C-344/98 Masterfoods Ltd v. HB Ice Cream Ltd* [2000], ECR 2000 I-11369.

¹⁰⁴ See commentary to Art. 16 of Regulation 1/2003 in K. Kohutek, *Komentarz do rozporządzenia Rady (WE) nr 1/2003 z dnia 16 grudnia 2002 r. w sprawie wprowadzenia w życie reguł konkurencji ustanowionych w art. 81 i 82 Traktatu (Dz.U.UE.L.03.1.1)*. *Stan prawny: 2005.12.01*, LEX/el 2006 and R. Whish, *Competition Law*, London 2003, p. 285–286.

¹⁰⁵ See M. K. Kolasiński, "Odpowiedzialność cywilna za szkody powstałe w wyniku naruszenia wspólnotowych zakazów stosowania praktyk ograniczających konkurencję i nadużywania pozycji dominującej" (2007) 11 *Przegląd Prawa Handlowego* 20–21; A. Jurkowska „Perspektywy...”, p. 28; *Biuletyn prawo konkurencji na co dzień 6/2007*, UOKiK, Warszawa 2007, p. 16.

¹⁰⁶ M. K. Kolasiński, "Odpowiedzialność...", p. 21.

¹⁰⁷ See B. Nowak-Chrzęszczak, „Roszczenie odszkodowawcze w postępowaniu w sprawie o naruszenie wspólnotowego prawa konkurencji” [in:] E. Piontek (ed.) *Nowe tendencje w prawie konkurencji UE*, Warszawa 2008, p. 447.

whistle” has been limited seeing as it is fair to describe private enforcement of competition law in Poland as underdeveloped¹⁰⁸.

V. The scope of leniency recipients’ civil liability

The US is a good example of how the participation in a leniency scheme may affect the scope of the infringer’s civil liability and thus impact private antitrust enforcement. A statute enacted in 2004¹⁰⁹ (with a five-year sunset clause, recently extended by one year¹¹⁰) introduced major changes to the federal enforcement scheme, strengthening both types of incentives for applying for leniency – the “carrot” as well as the “stick”¹¹¹. As far as the former is concerned, successful applicants are now offered a rebate on damages and removal of joint and several liability, if they provide “satisfactory cooperation” with claimants in follow-on civil lawsuits¹¹². If the court determines that this condition was met, immunity recipients are held liable only for actual (rather than treble) damages attributable to their own share in the commerce affected by the violation. A similar limitation of the liability of a successful leniency applicant to its direct and indirect contractual partners, was suggested, although extremely cautiously, by the Commission in its White Paper on Damages Actions for breach of the EC antitrust rules (point 2.9).

Under Polish law, cooperating with the UOKiK President does not result in any change in the scope of the infringers’ liability towards private parties. Undertakings which obtain immunity or reduction of fines can receive no rebates on civil damages in subsequent lawsuits. They remain jointly and severally liable for the whole damage caused by their anti-competitive behaviour though with a right to contribution¹¹³. At the same time, none of the rules governing the Polish leniency scheme mentions redress, or any kind of assistance to antitrust victims as an additional requirement for whistleblowers. It is fair to say that in the US, interdependence between corporate amnesty and private enforcement is much closer – apart from the obligation to cooperate with the plaintiff

¹⁰⁸ See A. Jurkowska, “Antitrust Private Enforcement...”, p. 75.

¹⁰⁹ Antitrust Criminal Penalty Enhancement and Reform Act (hereinafter: Antitrust Reform Act), Public Law No. 108-237, 118 Stat. 665 (2004).

¹¹⁰ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Public Law No. 111-30, signed by the US President on 19 June 2009.

¹¹¹ Pursuant to sec. 215 of the Antitrust Reform Act, sections 1, 2 and 3 of the Sherman Act were amended to substantially increase the penalties for antitrust violations.

¹¹² See sec. 213 of the Antitrust Reform Act.

¹¹³ Art. 441 of the Polish Civil Code (the Act of 23rd April 1964 – Civil Code, Journal of Laws 1964 No. 16, item 93 with amendments).

(a condition of obtaining a rebate), corporations applying for immunity are expected to make restitution to injured parties “where possible”¹¹⁴. Despite the lack of a comparable solution in the Polish scheme, the question of redress might nevertheless be taken into account as a factor for determining the amount of the fine. According to the Fining Guidelines, voluntarily removing the effects of the infringement shall be treated as a mitigating circumstance. When it exists, the amount of the fine, set at earlier stages, can be decreased by up to 50%¹¹⁵. It seems fairly clear that restitution to injured parties can be considered a “removal of the effects” of antitrust infringements.

In terms of *de lege ferenda* considerations, the chances of introducing a limitation on the recovery from successful leniency applicants are scarce in the Polish legal system. The prevailing opinion in the doctrine is that civil liability’s primary function has always been compensatory¹¹⁶ – any departure from the principle of full compensation will cause a dispute. Still, in the opinion of the Constitutional Tribunal the said principle cannot be derived directly from the Polish Constitution. Instead, it was said to derive from a “regular” statute – the Civil Code. Consequently, it could be at least somewhat limited by another “regular” statutory provision¹¹⁷.

Such a provision applying to damages for antitrust infringements, if ever drafted, would certainly have many opponents. One author points out that a legislative act depriving antitrust victims of their right to seek redress from a leniency recipient would be similar to expropriation and thus require some form of state compensation¹¹⁸. However, the same author accepts the idea of limiting the scope of damages recoverable from a successful leniency applicant to *damnum emergens* only. Nevertheless, some commentators disagree because compensation for *lucrum cessans* often constitutes a substantial part of damages awarded in commercial cases¹¹⁹. Moreover, when the application of EC antitrust rules comes into play, limiting recovery to *damnum emergens* would be incompatible with the jurisprudence of the European Court of Justice¹²⁰.

¹¹⁴ See point A. 5. of the US Corporate Leniency Policy, available on Department of Justice Antitrust Division website: <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

¹¹⁵ See point 4. 1 c) of the Fining Guidelines.

¹¹⁶ See J. Kuźmicka-Sulikowska, “Funkcje cywilnej odpowiedzialności odszkodowawczej” (2008) 9 *Przegląd Sądowy* 13.

¹¹⁷ Judgement of the Constitutional Tribunal of 2 June 2003, SK 34/01, (2003) 6A *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy*, item 49.

¹¹⁸ S. Sołtyśński, “Z doświadczeń...”, p. 47.

¹¹⁹ M. K. Kolasiński, “Wspólnotowa polityka zwalniania z grzywien i zmniejszania ich wysokości w sprawach kartelowych po reformie z 2006 r.” (2008) 6 *Europejski Przegląd Sądowy* 29.

¹²⁰ See para. 100 of the ECJ judgement of 13 July 2006 in joined cases C-295/04 to C-298/04 *Vincento Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-06619.

In an official comment to the Commission's White Paper, the Polish Government expressly opted against using limits on damage liability as an incentive for the participation in a leniency scheme¹²¹. It stressed that public antitrust enforcement and private lawsuits should remain independent considering that they serve very different aims. The official statement concludes that providing the UOKiK with information revealing an infringement of antitrust law can be taken into account by civil courts as a fact justifying a moderation of the damages awarded against the whistleblower potentially because the defendant has contributed to minimizing the harm caused by the anti-competitive conduct. In the authors' view however, such a suggestion *de lege lata*, finds no support in general rules of civil liability. In particular, informing the UOKiK of an antitrust violation contributes to the prevention of future damage, rather than to harm already done for which the plaintiff may seek redress. The whistleblower remains jointly and severally liable for damages caused by an anti-competitive agreement from the moment it entered into it, to the moment it ceased participation.

Having considered the above, one might wonder whether the "full compensation versus an attractive leniency policy" problem could be solved by the introduction of multiple damages for, at least some, antitrust infringements. Although ultimately abandoned, such a proposition was put forward by the Commission in its 2004 Green Paper with respect to horizontal cartels¹²². Its clear advantage would be the possibility to grant a conditional rebate on damages to a successful leniency applicant without leaving any part of the plaintiff's harm uncompensated. In the authors' view, there are no serious obstacles against introducing double, or even treble, damages for antitrust violations in Poland especially, because such legal institution already exists in the Polish legal system¹²³. Nevertheless, to the author's best knowledge, no such reform is to be expected, at least not in the nearest future.

¹²¹ Uwagi Rządu Rzeczypospolitej Polskiej dotyczące Białej Księgi Komisji Europejskiej z dnia 2 kwietnia 2008 r. w sprawie roszczeń odszkodowawczych wynikających z naruszenia wspólnotowych reguł konkurencji [COM(2008) 165 wersja ostateczna], available on the Commission's website: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/rzad_pl.pdf

¹²² See Option 16

¹²³ On the basis of art. 105 of the Polish Copyright Act (the Act of 4 February 1994 on copyright and related rights, consolidated text: Journal of Laws 2006 No. 5, item 31), an author whose economic rights have been infringed may, instead of seeking recovery under general rules, sue for "double or, where the infringement is culpable, **triple** the amount of the appropriate remuneration in the moment of its claiming" (emphasis added).

VI. Concluding remarks

It is still difficult to draw definite conclusions about the intersection between the leniency scheme and private antitrust enforcement in Poland. Both of those instruments of deterring anti-competitive conduct are relatively new to the domestic legal system and civil actions, in particular, have so far been barely used in the area of competition law. In its current state, private enforcement is not a serious threat to the attractiveness of the leniency programme. Applications for immunity or a reduction of fines submitted to the UOKiK President are well protected against disclosure and, basically, cannot be used by private claimants without the applicant's consent. The only possibility of gaining access to them against the applicant's will is via a court order¹²⁴ and, in the authors' view, the chances of obtaining such an order seem weak. While it is true that this solution does not facilitate redress for antitrust victims, special protection of leniency statements seems fully justified considering that its lack could undermine the effectiveness of the whole scheme. That, in turn, would be disadvantageous to the injured parties as well since the existence of a final decision declaring an antitrust infringement makes civil litigation a lot less burdensome. Irrespective of whether or not UOKiK President's decisions formally bind civil courts – and in the authors' opinion this question still needs clarification – the perspective of follow-on actions may prevent some undertakings from applying for lenient treatment. That will be true however only if private enforcement actually gains popularity. Still, it might be necessary to consider introducing additional incentives for possible leniency applicants in the future, including the removal of joint and several liability or even a rebate on damages (the latter, however, would be highly controversial) but as for the present, any radical reforms of that kind do not seem necessary.

Literature

- Banasiński C. (ed.), *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian [Competition Law – Present State and Envisaged Directions of Changes]*, Warszawa 2006.
- Banasiński C., Piontek E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.

¹²⁴ See point III.3 above.

- Bazylińska J., “Współpraca w ramach Europejskiej Sieci Konkurencji” [“Cooperation within the European Competition Network”] (2007) 11 *Przegląd Ustawodawstwa Gospodarczego* 2.
- Biernat S., Dudzik S., Niedźwiedź M. (eds.), *Przystąpienie Polski do Unii Europejskiej. Traktat akcesyjny i jego skutki* [Poland’s Accession to the European Union. Accession Treaty and its Consequences], Kraków 2003.
- Cahill D. (ed.), *The Modernisation of EU Competition Law Enforcement in the EU. FIDE 2004 National Reports*, Cambridge 2004.
- Erciński T. (ed.), *Kodeks postępowania cywilnego. Komentarz*, vol. 1 [Civil Procedure Code. Commentary, vol. 1], Warszawa 2006.
- Jurkowska A., “Antitrust Private Enforcement – Case of Poland” (2008) 1(1) *YARS*.
- Jurkowska A., “Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej” [“Perspectives of Private Antitrust Enforcement in Poland in the context of the European Community’s experience”] (2008) 1 *Przegląd Ustawodawstwa Gospodarczego*.
- Jurkowska A., Miąsik D., Skoczny T., Szydło M., “Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia podstaw publicznoprawnej ochrony konkurencji w Polsce” [“New Act on Competition and Consumer Protection – Next Step in the Direction of Improving the Basis of Public Protection of Competition in Poland”] (2007) 4 *Przegląd Ustawodawstwa Gospodarczego*.
- Kohutek K., *Komentarz do rozporządzenia Rady (WE) nr 1/2003 z dnia 16 grudnia 2002 r. w sprawie wprowadzenia w życie reguł konkurencji ustanowionych w art. 81 i 82 Traktatu (Dz.U.UE.L.03.1.1). Stan prawny: 2005.12.01*, [Commentary to the Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty], LEX/el 2006.
- Kohutek K., Sieradzka M., *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on Competition and Consumer Protection. Commentary], Warszawa 2008.
- Kolasiński M. K., „Odpowiedzialność cywilna za szkody powstałe w wyniku naruszenia wspólnotowych zakazów stosowania praktyk ograniczających konkurencję i nadużywania pozycji dominującej” [“Civil Liability for Damages Incurred as a Result of an Infringement of Community Bans on Competition Restricting Practices and Abusing of Dominant Position”] (2007) 11 *Przegląd Prawa Handlowego*.
- Kolasiński M. K., “Wspólnotowa polityka zwalniania z grzywnien i zmniejszania ich wysokości w sprawach kartelowych po reformie z 2006 r.” [“Community Policy of Granting Amnesty from Fines and Reducing them in Cartel Cases after the Reform of 2006”] (2008) 6 *Europejski Przegląd Sądowy*.
- Kuźmicka-Sulikowska J., “Funkcje cywilnej odpowiedzialności odszkodowawczej” [“Functions of Civil Liability to Pay Damages”] (2008) 9 *Przegląd Sądowy*.
- Leslie Ch. R., “Antitrust Amnesty, Game Theory and Cartel Stability” (2006) 31 *Journal of Corporation Law*.
- Molski R., „Programy łagodnego traktowania – panaceum na praktyki kartelowe?” [“Leniency Programmes – Panacea for cartels?”] (2004) 1 *Kwartalnik Prawa Publicznego*.
- Nordlander K., “Discovering Discovery – US Discovery of EC Leniency Statements” (2004) 25(10) *European Competition Law Review*.

- Piontek E. (ed.), *Nowe tendencje w prawie konkurencji UE [New Tendencies in EU Competition Law]*, Warszawa 2008.
- Reynolds M. J., “Immunity and Leniency in EU Cartel Cases: Current Issues” (2006) 27(2) *European Competition Law Review*.
- Sánchez Graells A., “Discovery, Confidentiality and Disclosure of Evidence Under the Private Enforcement of EU Antitrust Laws” (September 8, 2006) *Instituto de Empresa Business School Working Paper No. WPED06-05*.
- Sandhu J. S., “The European Commission’s Leniency Policy: a Success” (2007) 28(3) *European Competition Law Review*.
- Schwab A., Steinle Ch., “Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed” (2008) 29(9) *European Competition Law Review*.
- Siedlecki W., Świeboda Z., *Postępowanie cywilne. Zarys wykładu [Civil Procedure. An Outline]*, Warszawa 2004.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Szanciło T., “Prekluzja w postępowaniu gospodarczym” [Preclusion in Proceedings in Commercial Matters] (2007) 6 *Przegląd Prawa Handlowego*.
- Amerykański i europejski system ochrony konkurencji [American and European System of Competition Protection]*, UOKiK, Warszawa 2007.
- Biuletyn prawo konkurencji na co dzień [Competition Law For Every Day - Bulletin]* 6/2007, UOKiK, Warszawa 2007.
- Whish R., *Competition Law*, London 2003.
- Wils W., *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, Oxford and Portland, Oregon 2008.
- Wiśniewski T. (ed.), *Postępowanie sądowe w sprawach gospodarczych [Judicial Procedure in Commercial Matters]*, Warszawa 2007.

Payment Card Systems as an Example of Two-sided Markets – a Challenge for Antitrust Authorities

by

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Abstract

This article aims to present the concept of two-sided markets on the example of payment card systems, which have attracted the attention of regulatory and antitrust authorities in recent years. First, the paper offers a few insights into the basic economic theory behind two-sided markets. Second, it presents a brief description of payment card systems and their features. The following analysis focuses on arguments that speak in favour of a regulatory or antitrust intervention into payment card systems. Finally, some of the potential problems that antitrust authorities must face when assessing two-sided markets are presented on the basis of an assessment of the decisional practice of the UOKiK President and the European Commission.

Classifications and key words: two-sided markets, antitrust v. regulation, interchange fees, payment card systems.

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I. Introduction

Since 1986 and the US *NaBanco*¹ case, competition law and regulation continue to be interested in interchange fees associated with payment card systems. Nonetheless, the approach of the antitrust and regulatory authorities has gradually changed both in relation to the existence of interchange fees as well as their level. The US District Court ruled in the *NaBanco* case that interchange fees were a necessary element of the relevant market consisting of all payment systems (including cash and checks). Even though interchange fees had substantial anti-competitive effects, these were offset by their pro-competitive benefits. In the opinion of the court, no less restrictive alternative was available².

In 2002, the European Commission granted an Article 81(3) EC exemption to VISA for its Multilateral Interchange Fee (hereinafter, the VISA decision). The decision was subject to the condition that the level of the interchange fee is modified and based on prescribed cost categories³. The exception expired on 31 December 2007. In 2003, the Reserve Bank of Australia used a cost-based formula to arbitrarily lower the level of interchange fees⁴. In a decision of 29 December 2006, the President of the Polish Office of Competition and Consumer Protection (UOKiK) found the joint setting of interchange fees by major Polish banks to be restricting competition (hereinafter, the UOKiK President decision). The contested practice took place within the framework of the Visa and MasterCard platforms. The Polish competition authority ordered the practice to be ceased⁵. The UOKiK President decision was overruled in 2008 by the Polish Court for Competition and Consumer Protection (SOKiK)⁶. At the end of 2007, the European Commission issued an extensive decision concerning the MasterCard system (hereinafter, the MasterCard decision) making a total U-turn in comparison to the earlier Visa case. The Commission declared MasterCard's Multilateral Interchange Fee to be restrictive of

¹ *National Bancard Corp. v. VISA U.S.A., Inc. (NaBanco)* 596 F. Supp. 1231 (S.D. Fla. 1984), aff'd, 779 F.2d 592 (11th Cir.), cert. denied 478 U.S. 923 (1986).

² *NaBanco*, 596 F. Supp. at 1265.

³ Commission decision of 24 July 2002, Case No. COMP/29.373, *Visa International*, OJ [2002] L 318/17.

⁴ See: H. Chang, D. S. Evans, D. D. Garcia Swartz, "The Effect of Regulatory Intervention in Two-Sided Markets: An Assessment of Interchange-Fee Capping in Australia" (2005) 4(4) *Review of Network Economics* 328.

⁵ Decision of the President of the UOKiK of 29 December 2006, DAR-15/2006, UOKiK Official Journal 2006 No. 1, item 5.

⁶ Judgment of the Court of Competition and Consumer Protection of 12 November 2008, XVII Ama 109/07, unpublished.

competition and not fulfilling the conditions of an exemption contained in Article 81(3) TEC⁷.

This brief presentation is a good indicator of how complex the assessment of interchange fees really is. Despite all economic considerations regarding the particularities of interchange fees in the context of markets that serve as platforms, a situation where competitors (banks) meet and fix “prices” (the level of the interchange fee) gives rise to considerable anxiety for competition authorities. Still, however complex their analysis might be, public authorities must refrain from seemingly simplifying it by ignoring the fact that payment card systems are an example of a two-sided market, with all its specific characteristics and implications.

II. Two-sided markets

1. Characteristics

Although the concept of two-sided markets might be difficult to grasp, consumers face them quite frequently in their everyday life. This is the case when buying a video game console or a computer operating system, reading newspaper advertisements or making payments with a credit or debit card. All these products or services have two traits in common. First is the necessity to “get on board” two groups of customers (the developers of video games or applications and their users, advertisers and newspaper readers, card holders and merchants) “whose ultimate benefit stems from interacting through a common platform”⁸. Second are the network externalities which occur, in general, when “the utility that a user derives from consumption of the good increases with the number of other agents consuming the good”⁹, the clearest example of which are telecoms services such as phone communication. The particularity of markets such as video games or payment card systems lies in the fact that network externalities take place between two sides of the market¹⁰

⁷ Commission decision of 19.12.2007 COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580 Commercial Cards.

⁸ J. Rochet, J. Tirole, “Platform Competition in Two-Sided Markets” (2003) 1(4) *Journal of the European Economic Association* 990.

⁹ M.L. Katz, C. Shapiro, “Network Externalities, Competition, and Compatibility” (1985) 75(3) *The American Economic Review* 424.

¹⁰ J. Ferrando, J.J. Gabszewicz, D. Laussel, N. Sonnac, “Two-Sided Network Effects and Competition: An Application to Media Industries”, Centre de Recherche en Economie et Statistiques, Working Paper no 2004-09, available at <http://www.crest.fr/images/doctravail/2004-09.pdf>

as well as the fact that the impact of a purchase made on one side of the market is not internalised¹¹ by the user who made it¹².

Although distinct, the two groups of customers acting on the opposite sides of the market are interconnected with each other. They are also equally important for one another and for the platform owner. This gives rise to the so called *chicken and egg problem*, where “to attract buyers, an intermediary should have a large base of registered sellers, but these will be willing to register only if they expect many buyers to show up”¹³.

These two characteristics imply that the pricing policy of two-sided markets is also unusual – the imperative of marginal revenue equating marginal costs¹⁴ does not apply. In order to get both sides of the market “on board” and internalize indirect network externalities, pricing policies in two-sided markets must not only determine the level of the price (the total price for the service) but also its structure (how will the total price be distributed between the two sides of the market)¹⁵. This atypical pricing policy is combined with differences in price elasticities of demand of the two sides of the market because merchants are willing to pay more for the possibility of offering card payment than card holders for the possibility of using their cards. Therefore the side of the market with lower price elasticity of demand is treated by the platform as the profit centre¹⁶ of the market and is charged more than the side that has a higher elasticity of demand.

2. Payment card systems as an example of two-sided markets

Payment card systems constitute one of the flagship examples of two-sided markets – cardholders on the one side – merchants on the other side. Two types of card systems can be distinguished: four-party (open-loop) payment associations and three-type (closed-loop) proprietary systems. The former involves four types of entities: cardholders, issuers, acquirers and merchants

¹¹ The process of internalization leads to a situation in which social marginal benefits resulting from the fact that a new user has joined the network equal social marginal costs. If network effects are not internalized they become network externalities and in effect size of the network differs from the social optimum, see: R. Kowalski, “Efekty sieciowe a błędy rynku” [in:] T. Bernat (ed.), *Problemy globalizacji gospodarki*, Szczecin 2003, p. 116–117.

¹² J. Rochet, J. Tirole, “Platform Competition...”, p. 994.

¹³ B. Caillaud, B. Jullien, “Chicken & Egg: Competition among Intermediation Service Providers” (2003) 34(2) *The RAND Journal of Economics* 310.

¹⁴ See: J.M. Perloff, *Microeconomics*, Pearson 2007, p. 350–352.

¹⁵ D. Evans, “The Antitrust Economics of Multi-Sided Platform Markets” (2003) 20(2) *Yale Journal on Regulation* 342.

¹⁶ J. Rochet, J. Tirole, “Platform Competition...”, p. 991.

interacting through a platform (Visa or MasterCard). The platform owns and promotes the logo of the system, coordinates the interactions of the participants of the system and provides the necessary IT infrastructure to process its transactions. The “openness” of a four-party system results from the fact that any financial institution can join it in the capacity of an issuing or acquiring entity. In this system, fees are set by member banks (issuers and acquirers, even though most banks perform both functions) rather than by the owner of the platform. By contrast, in closed-loop systems, such as Diners Club or American Express, one entity issues cards to card holders and acquirers merchants, setting at the same time the fees for the services it renders.

It is necessary to describe how transactions are settled in the four-party system in order to facilitate the following analysis showing the role and function of the interchange fee. When a card holder purchases a good worth PLN 100 in a merchant’s shop and decides to pay for it by a card (credit or debit), the merchant sends the transaction data to his acquiring bank – the bank with which the merchant is linked by contractual relationship and which provided the merchant with the technical equipment and services necessary to accept card payments. The merchant receives the purchase price less a merchant discount – a fee the merchant pays for the possibility of accepting card payments, which is usually a percentage of the transaction value. Assuming that the merchant fee in this example equals 2,5%, the merchant ultimately receives PLN 97,50. The acquiring bank sends the transaction data to the issuing bank – the bank that issued the card and in which the merchant’s customer has its bank account. The acquiring bank receives the purchase price (PLN 100) less the interchange fee (say 0,5% of the transaction value, PLN 0,50) which the issuing bank pockets as its revenue. To close the circle, the issuing bank presents the card holder with a bank statement with a charge for PLN 100 out of which the merchant received PLN 97,50 and the remaining PLN 2,50 is split between the issuing and the acquiring banks.

The interchange fee is paid by the acquiring bank to the issuing bank. Its economic cost is born by the merchant and, most likely, ultimately by the customer to whom it is passed on by the merchant. However, it is not entirely clear how should the interchange fee be treated or what it actually is. Is it a fee for services or a price based on specific costs? Is it a transfer of benefits between the participants of a four-party payment system¹⁷ or a balancing mechanism inevitable in two-sided market to balance the demand of card holders and merchants? It seems that the nature of interchange fees remains unclear.

¹⁷ Interchange fee is obviously not necessary in three-party systems where the issuing and acquiring functions are cumulated in one entity.

Indeed, even VISA and MasterCard presented diverging views in their respective proceedings before the Commission and the UOKiK President. In the Visa case, the interchange fee was said to be “a transfer between undertakings that are cooperating in order to provide a joint service”¹⁸. Before the UOKiK President, MasterCard initially argued that the interchange fee was a fee for services rendered to the acquiring bank. Later on, MasterCard decided to share the opinion of Visa stating that interchange fees were a mechanism of balancing the costs and benefits of a four-party payment card system¹⁹. In its ruling, SOKiK seemed to combine these two views. In the opinion of SOKiK, the interchange fee constituted a part of the issuer’s remuneration for offering the possibility to settle payments by card, or a price paid to the whole platform for the joint service it delivers to card holders and merchants²⁰.

In view of the special characteristics of two-sided markets, it seems most appropriate to view interchange fees as a balancing mechanism. This is so, in particular, in light of the need to establish an optimal price structure that reflects the differences in the demand elasticities of card holders and merchants²¹. Thanks to interchange fees, card holders are priced less for the use of cards than merchants, whose demand is less elastic. This cross-subsidization leads to an increase in the total volume of transactions and, through network externalities, increases the overall value of the payment system for both sides of the market²². Thus, the lower the cost of the cards, the more customers want to use them, the more merchants are willing to accept them and the more important it is for them to be able to accept card payments, especially if competing merchants do so as well. Still, merchants would not be willing to accept card payments only because many customers have cards. Among other reasons for merchants to accept cards are cost savings in terms of security expenses and fraud protection²³.

It follows from the above that interchange fees are necessary for a payment card system to function properly. What might raise doubts is the method of setting these fees. In a three-party system, all fees are set by one entity – the

¹⁸ Commission decision of 24.07.2002, par. 14.

¹⁹ Decision of the President of UOKiK of 29 December 2006, DAR-15/2006, p. 61.

²⁰ Judgment of the Court of Competition and Consumer Protection of 12 November 2008, XVII AmA 109/07.

²¹ See: B. Klein, A. V. Lerner, K. M. Murphy, L. L. Plache, “Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees” (2006) 73(3) *Antitrust Law Journal* 591.

²² *Ibidem*, p. 585.

²³ For further analysis of merchants’ benefits from interchange fee see: M.E. Guerin-Calvert, J. A. Ordovery, “Merchant Benefits and Public Policy towards Interchange: an Economic Assessment”, available at: http://www.newyorkfed.org/research/conference/2005/antitrust/Guerin_Calvert_Ordovery.pdf.

owner of the platform – who is simultaneously the issuer and the acquirer. In four-party systems, such as MasterCard or Visa, its members – financial institutions – jointly set the level of the interchange fee. In principle however, each member retains the freedom to sign bilateral agreements setting interchange fees with other participants of the system. Without bilateral agreements, a default fee is applied, “fixed” in a multilateral agreements concluded either at a domestic or cross-border level²⁴. The existence of a default interchange fee means that *some* fee will always be applied. This consideration is particularly important in the context of the Honour-All-Cards Rule, which protects customers from discrimination due to the type of card they use. Thus, knowing that the Honour-All-Cards Rule obliges merchants to accept all cards, some card issuers could demand excessive interchange fees from acquirers in bilateral negotiations if not for the existence of a default fee²⁵.

III. Reasons for intervention in payment card systems; regulation or competition

Despite the fact that payment card systems were considered “one of the great innovations of the twentieth century” by a representative of antitrust authorities²⁶, they have also become an object of interest for both competition law enforcers and regulators. Those who insist on a need for a regulatory or antitrust intervention in the functioning of payment card systems formulate a number of arguments in favour of their claim.

First, regardless of whether payments are settled in cash or by card, consumers pay the same price for the product. This leads to a situation where those paying in cash cross-subsidise card holders²⁷ since card payments are considered to be more expensive to use than cash²⁸. In more economic terms, payment card systems encourage an excessive use of cards by not charging consumers the

²⁴ See: Commission decision of 19.12.2007, par. 3.1.1.

²⁵ B. Klein, A. V. Lerner, K. M. Murphy, L.L. Plache..., “Competition in Two-Sided Markets...”, p. 574. For a different view on the implications of interchange fees in the context of the Honour-All-Cards Rule see: Commission decision of 19.12.2007, par. 507–509.

²⁶ T.J. Muris, “Payment Card Regulation and the (Mis) Application of the Economics of Two-Sided Markets” (2005) 3 *Columbia Business Law Review* 515.

²⁷ This argument was also used by UOKiK, see: Decision of the President of UOKiK of 29 December 2006, DAR-15/2006, p. 52.

²⁸ J. Vickers, “Public Policy and the Invisible Price: Competition Law, Regulation, and the Interchange Fee”, Federal Reserve Bank of Kansas City Payments Systems Research Conference Proceedings, available at: http://www.oft.gov.uk/shared_oft/speeches/spe0305.pdf

full marginal cost of using a card²⁹. However, the assumptions underlying this thesis are contestable. Some cost-benefit analyses³⁰ indicate that cash does not necessarily have the lowest social marginal cost when compared to other forms of payment. In addition, accepting cash payments carries with it its own costs for the merchant such as the need to pay for secure transport. The problem of cross-subsidization of card holders by cash payers is an effect of the competitive process. It is most likely also occurring between all other forms of payments because their marginal costs are unlikely to be equal.

Second, interchange fees lead to higher prices for customers since merchants pass on the fees which they themselves have to pay. Although this argument may seem convincing, at the same time customers receive the possibility to avoid paying in cash at a price that is below the marginal cost of this service for the issuing bank. Still, the extent to which card holders' fees are lower than marginal costs will depend, *inter alia*, on the market power of the issuing bank and the price elasticity of card holders' demand.

Third, an intervention in payment card systems is also supported by the fact that issuing banks compete so fiercely to attract potential card holders that they waste scarce resources on advertising (imposing an undesirable social cost)³¹. However, this claim ignores the existence of social efficiencies resulting from advertising such as educating the market or rising product awareness. Furthermore, this argument seems overly intrusive in relation to the freedom of companies to choose which business model they wish to adopt in order to compete in the market.

Finally, even if the interchange fee is a balancing mechanism only, used to eliminate externalities associated with two-sided markets, the member banks do not have the incentive to set the fee at a socially optimal level. Instead, it is more likely that they fix it at a level that maximizes their profits³². This argument could suggest the need for a more nuanced approach to be applied to payment card systems – one that acknowledges the necessity of a balancing mechanism (thus not attacking the fact of the existence of interchange fees) but intervenes where the actual level of the fee is concerned. In particular, linking the interchange fee to specific costs might constitute a remedy that would mitigate the participating banks in their pursuit of maximum profits³³.

²⁹ D. D. Garcia Swartz, R. W. Hahn, A. L.-Farrar, "The Move toward a Cashless Society: a Closer Look at Payment Instrument Economics" (2006) 5(2) *Review of Network Economics* 175–198.

³⁰ *Ibidem*.

³¹ A. S. Frankel, A. L. Shampine, "The Economic Effects of Interchange Fees" (2006) 73(3) *Antitrust Law Journal* 635.

³² *Ibidem*, p. 649

³³ The Commission seems to have adopted this approach in its Visa decision, see: Commission decision of 24.07.2002, par. 80.

However, certain points must be stressed before this approach can be accepted. Economic analysis carried out by leading experts in the field of two-sided markets shows that the privately optimal and socially optimal level of interchange fees is not equal. Still, the same authors maintain that it is currently hard to determine whether the level of the fee chosen by the member banks will remain too high or too low compared to the social optimum³⁴.

The method of setting interchange fees in four-party payment systems bears resemblance to a naked horizontal price-fixing cartel. In most cases, it was likely for this very reason that payment card systems have attracted the attention of antitrust authorities. However, some of the tools that competition authorities used in this context look a lot more like actions that could and should be taken by regulators than those normally associated with antitrust³⁵. That is the case, in particular, when the level of interchange fees was linked to certain “objective” costs³⁶.

The UOKiK President commissioned an experts’ opinion on the costs associated with payment card systems in Poland and the way in which they are reflected in the level of interchange fees³⁷. The authority’s conclusions seem to have stepped into the shoes of a price regulator where it claimed that the fees were not set in an “objective” way since they were not based on costs³⁸.

Antitrust enforcers are not meant to decide which types of costs are relevant and should be reflected in the level of interchange fees, especially since even economic scholarship cannot agree on which costs should be admissible in this context. In fact, some economists go as far as strongly criticizing cost-based interchange fees³⁹.

Another atypical application of competition law to payment card systems could occur if antitrust authorities tried to reduce the seemingly excessive use of cards by customers. This would amount to reducing output, which is not a normal goal of competition law.

It has also been suggested that the Commission’s change of attitude towards interchange fees⁴⁰ was triggered by increasing concerns for the effective launch

³⁴ J. Rochet, J. Tirole, “Competition policy in two sided markets with a special emphasis on payment cards” [in:] P. Buccirossi (ed.), *Handbook of Antitrust Economics*, MIT Press, Cambridge, p. 575.

³⁵ See note 33.

³⁶ For a critical analysis of using price regulation to overcome anti-competitive practices in payment card systems see: W. Szpringer, “Opłata za autoryzację transakcji kartami płatniczymi – punkt widzenia banków” (2002) 4 *Prawo Bankowe*, p. 74.

³⁷ Decision of the President of UOKiK of 29 December 2006, DAR-15/2006, p. 16.

³⁸ *Ibidem*, p. 33.

³⁹ J. Rochet, J. Tirole..., “Platform Competition...”, p. 577.

⁴⁰ In the Visa decision, the Commission stated that interchange fees did not restrict competition by object and that they qualified for an Art. 81(3) TEC exemption. In the later

of the Single European Payment Area⁴¹. In the MasterCard decision, the Commission stated that a scenario where domestic card systems migrate to Visa or MasterCard (attracted by the profits associated with their interchange fees) is not desirable. Although this would indeed make them SEPA compliant⁴², it would also reinforce the market position of VISA and MasterCard⁴³. This intervention seems to have been yet again motivated by more regulatory than competition law goals.

Competition law and regulation constitute two separate forms of market control – they have distinct tools serving different aims⁴⁴. As such, they should not be confused and used interchangeably. Antitrust authorities do not have the necessary skill and expertise to use regulatory instruments and the same is true with respect to regulators trying to act like a competition law enforcer. It could well be that payment card systems require a specific regulatory framework⁴⁵. Nonetheless, it should not be introduced under the cover of antitrust proceedings.

IV. Antitrust problems in two-sided markets

1. Relevant market

Two-sided markets are a real challenge for competition law authorities. Due to their specific characteristics, an antitrust analysis faces several problems that cannot be solved in a way analogue to single-sided markets. These problems will be identified here on the basis of a critical analysis

MasterCard decision, it ruled that interchange fees restrict competition and could not be exempted, see: Introduction.

⁴¹ For more details about SEPA and payment card systems see: A. Heimler, Sean F. Ennis, “Competition and Efficiency in Payment Cards: Which Options for SEPA?” (2008) 31(1) *World Competition* 19-35.

⁴² In order to become SEPA compliant the domestic card systems may either replace their national scheme with an international one, co-brand with an international scheme or make alliances with other card schemes so as to expand to the entire euro area, see: European Central Bank, *The Eurosystem’s View of a “SEPA for Cards”*, available at: www.ecb.int/pub/pdf/other/eurosystemviewsepacardsen.pdf

⁴³ See: Commission decision of 19.12.2007, par. 471-486.

⁴⁴ For an analysis of the differences between antitrust and regulation see: I. Maher, “Regulating Competition” [in:] C. Parker, C. Scott, N. Lacey, J. Braithwaite (eds.), *Regulating law*, Oxford University Press 2004, p. 186-206.

⁴⁵ For an analysis why civil law provisions are not adequate to deal with the problem of interchange fees see: W. Szpringer, “Opłata za autoryzację transakcji kartami płatniczymi – nowy aspekt ochrony konsumenta?” (2001) 12 *Prawo Bankowe* 87-88.

of the three aforementioned decisions: Visa, MasterCard and the UOKiK President.

Even the opening step of an antitrust analysis – the relevant market definition – faces major difficulties. Competition law authorities are often tempted to view two-sided markets from a vertical point of view as if the interactions within the platform were similar to different levels of a production chain. Such a methodology places acquiring and issuing services downstream and platform services upstream⁴⁶. This approach is often accompanied by the fact that complaints, usually made by merchants' associations, state that interchange fees set the floor for merchant fees⁴⁷. As a result, antitrust authorities tend to concentrate their analysis on the acquiring part of the market, ignoring its issuing side.

Both the UOKiK President and the Commission in its MasterCard decision defined the relevant product market as the market for acquiring payment cards⁴⁸. This approach overlooks the fact that the “product” in payment card systems is not only used by merchants but also by card holders and that the interchange fee affects not only the former but also the latter category of customers. Focusing on one side of the market only makes it impossible to fully appreciate the balancing role of interchange fees and the interdependence of the two sides of the market. In comparison, the relevant market in the Visa decision was said to consist of different payment card schemes (not including other means of payment such as distance payments, cash or cheque)⁴⁹. On this basis, the Commission was able to consider the demand of merchants and the demand of card holders as well as their interdependence.

Generally, the hypothetical monopolist test, also referred to as the SSNIP test, is used to delineate the relevant market. However, a question arises which prices should this test relate to in two-sided markets: card holders' fees, merchants' fees or the sum of both? In the MasterCard decision, in line with the opinions expressed in legal and economic literature⁵⁰, MasterCard advocated the application of the SSNIP test to the sum of card holders' and merchants'

⁴⁶ See: Commission decision of 19.12.2007, par. 263.

⁴⁷ See: Decision of the President of UOKiK of 29 December 2006, DAR-15/2006, p. 51.

⁴⁸ Ibidem, p. 37, Commission decision of 19.12.2007, par. 329.

⁴⁹ Commission decision of 24.07.2002, par. 43–52.

⁵⁰ See: R. B. Hesse, J. H. Soven, “Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases” (2006) 73(3) *Antitrust Law Journal* 730 and E. Emch T. S. Thompson, “Market Definition and Market Power in Payment Card Networks” (2006) 5(1) *Review of Network Economics* 45–60. For an alternative application of the SSNIP test in two-sided markets, yet still taking into account the independencies of both sides, see: L. Filistrucchi, “A SSNIP Test for Two-Sided Markets: The Case of Media”, *NET Institute Working Paper* No. 08-34, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287442.

prices⁵¹. Still, the Commission, allegedly fearing the cellophane fallacy, while defining the relevant market decided to emphasise product characteristics and past switching patterns rather than rely on the SSNIP test⁵².

In contrast, the UOKiK President decided to carry out a SSNIP test covering the acquiring side of the market only – considered were therefore merely merchants' fees⁵³. However, a single-sided approach to the definition of the relevant market flaws the whole of the following analysis of the balancing mechanism. When only the acquiring side is taken into account, all that can be said with respect to interchange fees is that they set the floor for merchants' fees⁵⁴. This finding says nothing about the function and effects of interchange fees from the perspective of card holders.

The view of the UOKiK President on the relevant market was not shared by SOKiK. The court did not uphold the antitrust decision precisely because of an erroneous definition of the relevant market. It has rightly noticed that the interchange fee cannot be assessed with respect to the acquiring side of the market only. It also indicated that it shared the views expressed by the Commission in its Visa decision where the relevant market was said to consist of the Visa and the MasterCard systems. Some elements of an economic analysis of two-sided markets were used to justify SOKiK's conclusions. This is noticeable, in particular, where the court stated that the interchange fee is a mechanism dividing the costs of payment card systems between its participants – card holders on one side and merchants on the other⁵⁵.

A proper determination of the relevant market is fundamental to an antitrust analysis – errors made at this stage of the assessment cannot be remedied later on, they lead to enforcement results that are at odds with an economic analysis. Considering only one side of the platform makes it impossible to assess the entirety of the system and, in the words of SOKiK, when that is the case, the antitrust analysis dangles in a vacuum⁵⁶.

2. Intra-system v. inter-system competition

The Commission has clearly changed its views concerning the definition of the relevant market in the time between the Visa and MasterCard cases. Among the reasons for the shift is its new focus on intra-system (between

⁵¹ Commission decision of 19.12.2007, par. 252.

⁵² *Ibidem*, par. 287.

⁵³ Decision of the President of UOKiK of 29 December 2006, DAR-15/2006, p. 37.

⁵⁴ *Ibidem*, p. 51.

⁵⁵ Judgement of the Court of Competition and Consumer Protection of 12 November 2008.

⁵⁶ *Ibidem*.

the members of the Visa or MasterCard associations), rather than inter-system, competition (between Visa and MasterCard). In the Visa decision, the Commission rightly noticed that interchange fees affect both of these relationships. Despite that fact, in the MasterCard decision, the Commission expressed the view that inter-system competition causes upward pressure on the level of the interchange fee. That would be so, because both Visa and MasterCard aim to attract a large number of banks by offering profits from high interchange fees⁵⁷. For this reason, the Commission decided to concentrate its analysis on intra-system competition. It is likely, that a broad definition of the relevant market (comprising various payment card systems) would have made this analysis more difficult.

Thus another peculiarity associated with the assessment of two-sided markets in antitrust proceedings becomes evident – more competition (between platforms) may lead to higher interchange fees. Clearly, this is a very counterintuitive conclusion. Importantly, the UOKiK President took note of this fact in its decision⁵⁸.

Payment card systems differ also from industries where it cannot be determined⁵⁹ whether breakthrough competition *for* the market (inter-system) is more beneficial than incremental competition *in* the market (intra-system). This is a consequence of multi-homing, in other words, the fact that merchants accept both Visa and MasterCard cards (as opposed to single-homing when only one brand is accepted). Multi-homing eliminates the possibility of a “winner-takes-it-all” outcome. Thus, no true competition *for* the payment cards market exists.

3. Effects of competition on prices

Among the distinguishing features of two-sided markets lies the fact that the effects of competition on prices are far more complex than in single-sided industries. This characteristic can be traced back to differences in the price elasticities of demand between the two sides of the market and indirect network externalities. Merchants may, for instance, be willing to pay higher merchant fees if this will result in lower card holders’ fees, which will increase in turn the number of customers interested in the possibility of paying by card.

Although increased inter-system competition (between issuing or acquiring banks) will exert downward pressure on prices on one side of the market,

⁵⁷ Commission decision of 19.12.2007, par. 467–470.

⁵⁸ Decision of the President of UOKiK of 29 December 2006, DAR-15/2006, p. 52.

⁵⁹ R. Pardolesi, A. Renda, “The European Commission’s Case Against Microsoft: Kill Bill?” (2004) 27(4) *World Competition* 525.

it can also have an unexpected effect on the other side. Should merchant fees substantially decrease, card holders' fees would have to increase to compensate. This would then discourage customers from the use of cards, making it less sensible for merchants to offer to accept them. However, this would also reduce the profits of the merchants since customers without the necessary financial resources would not have access to credit with a free-interest period.

Antitrust authorities should consider not only the price level but also the price structure found on two-sided markets. They should aim to encourage competition that leads to a balanced reduction in the price structure, rather than only in the price level. The Polish antitrust authority overlooked this fact when it argued that higher merchants' fees are detrimental to customers (since merchants pass them on to their customers)⁶⁰. At the same time, the UOKiK President ignored the fact that higher merchants' fees *might* mean lower card holders' fees. This is a vivid example of why two-sided markets should be subject to a more sophisticated analysis. In particular, competition authorities should avoid confining themselves to basic assumptions applicable to single-sided markets.

Not pertinent to two-sided markets is also the reasoning that benefits for one group of customers (in terms of lower prices) cannot offset the harm (in terms of higher prices) caused to another group. In two-sided markets these two groups are closely interrelated and remain within the same market⁶¹.

4. Conclusions

Payment card systems cannot be subject to a standard antitrust analysis. This is not to say that Visa and MasterCard can do no wrong from the point of view of competition law in light of the specificities of two-sided markets. Interchange fees can be used in an anti-competitive manner. They merit an informed and comprehensive assessment that takes into account indirect network externalities as well as the interdependence between the two types of customers found on payment card markets.

This article did not intend to provide definite and unequivocal solutions to the challenges faced by antitrust analysis in relation to two-sided markets. Neither lawyers nor economists seem to be able to agree on what approach should be applied in this context. By analysing the flaws in the decisional practice of both the UOKiK President and the Commission, this paper tried

⁶⁰ Decision of the President of the UOKiK of 29 December 2006, DAR-15/2006, p. 52.

⁶¹ E. G. Wey, *The Price Theory of Two-Sided Markets*, December 2006, p. 45, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324317.

to present the range of problems faced by antitrust authorities in this context. Particularly emphasised was the need for a more sophisticated assessment⁶² to be applied to payment card systems.

Meanwhile, MasterCard has filed an appeal against the decision issued by the European Commission⁶³. It can be hoped that the Court of First Instance delivers a detailed assessment of the case based on a comprehensive analysis of the economics of two-sided markets.

Literature

- Bernat T., *Problemy globalizacji gospodarki [Problems of globalisation of economy]*, Szczecin 2003.
- Buccirossi P. (ed.), *Handbook of Antitrust Economics*, MIT Press, Cambridge.
- Caillaud B., Jullien B., "Chicken & Egg: Competition among Intermediation Service Providers" (2003) 34(2) *The RAND Journal of Economics*.
- Chang H., Evans D.S., Garcia Swartz D.D., "The Effect of Regulatory Intervention in Two-Sided Markets: An Assessment of Interchange-Fee Capping in Australia" (2005) 4(4) *Review of Network Economics*.
- Emch E., Thompson T.S., "Market Definition and Market Power in Payment Card Networks" (2006) 5(1) *Review of Network Economics*.
- European Central Bank, *The Eurosystem's View of a "SEPA for Cards"* [available at: www.ecb.int/pub/pdf/other/eurosystemviewsepacardsen.pdf]
- Evans D., "The Antitrust Economics of Multi-Sided Platform Markets" (2003) 20(2) *Yale Journal on Regulation*.
- Ferrando J., Gabszewicz J.J., Laussel D., Sonnac N., "Two-Sided Network Effects and Competition : An Application to Media Industries", Centre de Recherche en Economie et Statistiques, Working Paper no 2004-09.
- Filistrucchi L., "A SSNIP Test for Two-Sided Markets: The Case of Media" NET Institute Working Paper No. 08-34.
- Frankel A.S., Shampine A.L., "The Economic Effects of Interchange Fees" (2006) 73(3) *Antitrust Law Journal*.
- Garcia Swartz D.D., Hahn R.W., Farrar A. L., "The Move toward a Cashless Society: a Closer Look at Payment Instrument Economics" (2006) 5(2) *Review of Network Economics*.
- Guerin-Calvert M.E., Ordovery J.A., "Merchant Benefits and Public Policy towards Interchange: an Economic Assessment" (2005).
- Heimler A., Ennis S.F., "Competition and Efficiency in Payment Cards: Which Options for SEPA?" (2008) 31(1) *World Competition*.

⁶² For a description of a whole range of economic factors that should be considered in a sophisticated analysis of two-sided markets see: S. Semeraro, "Credit Card Interchange Fees: Debunking Six Myths" (2008) 27(2) *Banking & Financial Services Policy Report* 6.

⁶³ Case T-111/08 *MasterCard and Others v Commission*, application, OJ [2008] C 116/26.

- Hesse R.B., Soven J.H., "Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases" (2006) 73(3) *Antitrust Law Journal*.
- Katz M.L., Shapiro C., "Network Externalities, Competition, and Compatibility" (1985) 75(3) *The American Economic Review*.
- Klein B., Lerner A.V., Murphy K. M., Plache L. L., "Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees" (2006) 73(3) *Antitrust Law Journal*.
- Muris T.J., "Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets" (2005) 3 *Columbia Business Law Review*, pp. 515-550.
- Pardolesi R., Renda A., "The European Commission's Case Against Microsoft: Kill Bill?", (2004) 27(4) *World Competition*.
- Parker C., Scott C., Lacey N., Braithwaite J. (eds.), *Regulating law*, Oxford University Press 2004.
- Perloff J.M., *Microeconomics*, Pearson 2007.
- Rochet J., Tirole J., "Platform Competition in Two-Sided Markets" (2003) 1(4) *Journal of the European Economic Association*.
- Semeraro S., "Credit Card Interchange Fees: Debunking Six Myths" (2008) 27(2) *Banking & Financial Services Policy Report*.
- Szpringer W., "Opłata za autoryzację transakcji kartami płatniczymi – nowy aspekt ochrony konsumenta?" ["Payment for authorization of transactions with payment cards – New aspect of consumer protection?"] (2001) 12 *Prawo Bankowe*.
- W. Szpringer, "Opłata za autoryzację transakcji kartami płatniczymi – punkt widzenia banków" ["Payment for authorization of transactions with payment cards – a point of view of banks"] (2002) 4 *Prawo Bankowe*.
- Vickers J., "Public Policy and the Invisible Price: Competition Law, Regulation, and the Interchange Fee", Federal Reserve Bank of Kansas City Payments Systems Research Conference Proceedings [available at: http://www.oft.gov.uk/shared_of/speeches/spe0305.pdf].
- Wey E.G., *The Price Theory of Two-Sided Markets*, December 2006 [available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324317].

Challenges of liberalization. The case of Polish electricity and gas sectors

by

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CONTENTS

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- II. Polish energy market in a nutshell
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Abstract

This paper applies the general insights of liberalization of the electricity and gas market to the market conditions of a particularly important new Member State in the EU, Poland. To this end the aim of this paper is to explain the Polish experience of liberalizing its energy market by reviewing those developments that produced its current shape. In fact there are two possible scenarios Polish policy makers can follow in liberalizing its energy sector. One would involve the UK approach that encompasses: ownership unbundling, less market concentration, less public ownership and more private capital in the industry. The second scenario follows the continental model: more concentration and vertical integration and more State or public ownership in the energy field (for instance, the French model). These two widely diverging approaches reflect different energy consumption patterns, energy mixes, sources of supply and natural resources of various countries. Having these differences in mind this research reviews developments that have produced the current state of liberalization of the electricity and gas sectors in Poland and discusses the prospects for further progress towards an integrated, competitive and liberalized

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European electricity and gas market in the light of the challenges that remain. These challenges include uneven unbundling, discriminatory third party access, insufficient independency of national regulator, consolidation and anti-competitive behaviour of incumbents or abuse of one's dominant position on the market.

Classifications and key words: electricity; gas; liberalization; competition, unbundling; third party access; regulation.

I. Introduction

An electricity and gas market fully open to competition is a unique mission, it is very hard to achieve, but certainly not impossible. Continued supply is crucial with respect to electricity, and for many customers, also gas. Undeniably, a guarantee of secure and reliable supplies of gas and electricity at reasonable prices constitutes an essential public service. However, the supply of energy is dependent on transmission and distribution infrastructure which is very costly to construct. Moreover, the fact that the return on investment (ROI) in networks, storage capacities or Liquefied Natural Gas (LNG) terminals is calculated on a long-terms basis often discourages potential private investors. The construction and operation of networks is thus left to natural monopolies which then have the incentive to use their dominant position, for instance, to deny access to infrastructure in order to slow down market opening. Independent regulation, which aims to secure non-discriminatory third party access to infrastructure, is therefore essential as a surrogate for competition in network activities. Finally, electricity and gas used to be supplied by only one, or very few, vertically integrated undertakings (VIU) controlling the entire electricity/gas distribution chain (from generation to supply) in almost all EU Member States. This model can be generally associated with high production costs and artificially low prices supplemented by cross-subsidization and State-subsidies. As a result, competition was absent and national markets segmented. Legislation, regulation and market-design are commonly associated with national governments, EU institutions, independent regulators, independent system operators and private interest groups. They should play a significant, if not the main, role in the development of liberalized and competitive national electricity and gas markets.

The liberalization of the electricity and gas sectors across the EU constitutes a major part of its Internal Energy Market strategy whereby the rules of a single market are extended to network industries. Alongside transport, telecoms and postal services, the energy sector is part of the general EU liberalization policy, which started in the mid 1980s and lead to the issuance of a substantial

amount of secondary legislation. Especially relevant in this context are the 2003 Directive concerning common rules for the internal market in electricity (Electricity Directive) and the 2003 Directive concerning common rules on the internal market in natural gas (Gas Directive)¹. The purpose of these two acts was to restructure the European electricity and gas sectors by: unbundling vertically integrated activities of electricity and gas conglomerates; reducing their horizontal concentration; introducing competition in wholesale energy generation markets and retail supply; monitoring transmission and distribution networks and; establishing independent regulators.

The main rules on internal energy markets contained in the directives were transposed into the Polish Energy Act on 3 May 2005². Unfortunately, some concerns remain about the compatibility of some of the domestic provisions with the directives. For example, the existing gas **transmission system operator** (TSO) does not seem to be properly unbundled yet. So far, it focuses on adapting its operations to Poland's relatively inefficient production and transmission structure, rather than on modifying its structure, which would in turn facilitate an open and competitive market. **Distribution system operators** (DSOs) in both electricity and gas have also not been functionally and legally unbundled to the required degree. This gives them the means to discriminate against other market players, especially new entrants, in favor of their own supply companies. Another source of constraint lies in Polish regulation itself. Until the mid 1990s, regulation was a foreign concept for Polish organizational and legal theory and practice. Polish policy-makers saw regulation as an unwanted development, considering independent regulators to be a threat to their authority.

Moreover, the circumstances surrounding the establishment of a Polish energy regulator substantially differed from the creation of its telecoms counterpart. In the mid 1990s, little reason existed to set up a telecoms authority since the sector was monopolised by the State owned landline operator. With the growth of mobile phones and the privatization of the incumbent, the need to establish a sector-specific regulator became clear. According to Majone and Surdej, Poland needed a telecoms regulator in order to control the incumbent and to ensure non-discriminatory conditions of third

¹ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity (OJ [2003] L 176/37); Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas (OJ [2003] L 176/57).

² Journal of Laws 2005, No. 62, item 552). The Energy Act regulates rules determining national energy policy, rules and conditions of supply and consumption of energy, fuels and heat, as well as rules and conditions of operation of energy companies and indicates the authorities responsible for matters relating to energy and fuels.

party access to its facilities³. By contrast, the need to regulate the energy sector did not arise due to technical improvements. Instead, it resulted from planned organizational and ownership changes (privatization) of the industry as well as new economic and organizational theories, which helped demonstrate that the energy market could be divided into a competitive and a monopolistic segment.

II. Polish energy market in a nutshell

Although the Polish energy sector is not fully liberalized yet, every household is theoretically free to choose from which producer or supplier it wishes to purchase its energy. At the time of Poland's EU accession, 51% of its energy market was liberalized⁴. In reality however, the Polish energy sector is still dominated by its former monopolists. The electricity market is dominated by four conglomerates controlling the entire electricity distribution chain from generation to supply. The situation of the gas sector is similar. Polskie Górnictwo Naftowe i Gazownictwo S.A. (PGNiG SA), established in 1976 as a fully vertically integrated State owned monopoly responsible for the entire gas distribution chain, continues to be the largest, as well as the only Polish, company operating in oil and gas exploration⁵, production, processing, storage, and trade⁶.

Due to the requirements set out in the Electricity and Gas Directives in relation to the unbundling of VIUs⁷ (as transposed into Article 9d of the Polish Energy Act), transmission has been separated, legally and functionally⁸, from the competitive activities of energy generation and supply. Nevertheless, PGNiG

³ See G. Majone, A. Surdej, "Regulatory Agencies in Economic Governance. The Polish case in a comparative perspective" (2006) 5 *KICES working papers*. Koszalin Institute of Comparative Administrative Studies 27.

⁴ M. Olejnik, "National Approaches to implementation – Poland" [in:] P. Cameron (ed.), *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe*, Oxford 2005, p. 405.

⁵ Exploration and production operations of the PGNiG SA are being conducted on the Mining and Geological Laws, and as such are not covered by the Energy Act.

⁶ See PGNiG SA web page at: www.pgnig.pl

⁷ See Article 9d of the Energy Act (Journal of Laws 2006 No. 89, item 625), as amended by the Act 2006 which transpose Directives. According to this Article there has to be a separation between the management of the TSO or DSO on the one hand and the management structure of the integrated energy undertakings on the other.

⁸ The core of functional or managerial unbundling is that system operators have effective and independent decision-making rights as well as independent management structures, especially regarding access to the networks. Legal unbundling, in contrast, requires that a separate legal undertaking be created, a legal entity or personality in which all activities different from

SA is still involved in transmission through its subsidiary, the TSO Gaz System. PGNiG SA is also involved in the distribution and supply of gas, a fact that effectively blocks competition in this market in violation of the Gas Directive.

Moreover, Polish authorities have delayed the restructuring of the gas market choosing instead to focus on electricity. The Ministry of Economy clearly stated that the liberalization of the gas market will be postponed until 2010⁹, a delay not permitted by the Gas Directive. So far, Poland has not informed the Commission about its plans concerning its gas market for the potentially transitory period leading up to 2010. The Ministry has merely asserted that Poland wants to diversify its gas supplies before addressing the issue of making its gas market more competitive. This claim is mistaken however, since competition facilitates the diversification of supplies and thus, enhances the security of supply.

With regard to unbundling, Article 3.24–3.25 of the Energy Act distinguishes between TSOs and DSOs. Article 3.26–3.28 concerns gas storage operators, LNG operators and combined operators. The role of system operators is central to electricity and gas markets. They are the only entities permitted to carry out transmission, distribution or storage activities – they must obtain a license from the Energy Regulatory Office (Urząd Regulacji Energetyki - URE), to carry out their business¹⁰. TSOs are mainly responsible for the transmission¹¹ of energy in Poland, while DSOs are responsible for the transmission and distribution¹² in stipulated regions of Poland, as indicated in their licenses.

System operators are obliged to grant access to their networks to all suppliers and traders, based on third party access rules set out in the Electricity and Gas Directives. Article 9 of the Polish Energy Act delegates the power to issue access tariff decrees to the Ministry responsible for the economy. Consequently, system operators must grant access in accordance with the

generation and supply (namely, transmission or distribution) are conducted. For more on this see B. Nowak, *Wewnętrzny Rynek Energii w Unii Europejskiej*, Warszawa 2009.

⁹ See Commissions Staff Working Document. Implementation Report – SEC(2006) 1709, page 136. Accompanying document to the Communication from the Commission to the Council and the European Parliament – Prospects for the internal gas and electricity market – COM(2006) 841 final. Available at: http://ec.europa.eu/energy/energy_policy/doc/10_internal_market_country_reviews_en.pdf

¹⁰ See Articles 32–43 of the Energy Act.

¹¹ Total number of electricity transmission networks (750 kV-only for connecting Polish electricity system with Ukraine, currently not used, 400 kV and 220 kV) in Poland is counted to be 13 thousands km. Additionally due to insufficiency in capacity and technological developments the distribution networks are used for the transmission purposes that is 110 kV lines, estimated at 32,5 thousands km. Transmission gas networks amount to 18,6 thousands km. See Program Operacyjny Infrastruktura i Środowisko, Warszawa 29 listopada 2006; p.4.

¹² Distribution electricity networks lower than 110 kV amount to 705 thousands km. Distribution gas networks amount to 123 thousands km.

general terms and tariffs approved by URE concerning the sale, transmission or distribution agreements between transmission/distribution operators and suppliers or traders. In the transmission segment, system operators themselves set tariffs; in the distribution segment, which is not really unbundled, vertically integrated distribution companies set their own tariffs. System operators can refuse access but only under certain, justified conditions such as serious financial or technical inadequacies or issues relating to the security of supply. Every refusal must be reasoned. The regulator reviews refusals acting in the capacity as a dispute-settlement body¹³. System operators are responsible for the security and condition of the electricity and gas networks¹⁴.

III. Unbundling of transmission system operators

Poland has established two TSOs – one for the electricity market (PSE–Operator) and one for gas (Gaz-System). The directives did not envisage derogation periods or exemptions from the unbundling requirements for TSOs. PSE-Operator was unbundled legally and functionally on 1 July 2004 by its parent company PSE SA (currently part of Polska Grupa Energetyczna – PGE). Gaz-System, the only gas TSO in Poland, was established on 16 April 2004 by its parent company PGNiG SA. Originally, 100% of its shares were held by its parent company. However, on 28 April 2005, PGNiG SA donated them to the Polish Ministry of Treasury.¹⁵ As a result, the Treasury maintains direct control over the natural gas transmission system in Poland, even though around 40% of the transmission networks and other connected facilities is still owned by PGNiG SA¹⁶. However, PGNiG SA is effectively also controlled by the Treasury, which holds 85% of its shares. Gaz-System has been legally unbundled since 1 July 2005.

To ensure competition, market opening and the proper functioning of the European internal energy market, system operators must have effective and independent decision-making rights as well as independent management structures, especially with respect to network access. In other words, system

¹³ Article 8 of the Energy Act.

¹⁴ Secure and proper maintenance involves: the ongoing long-term operational security of the system, the use, maintenance and repair and necessary expansion of the distribution or transmission networks, including connections to other gas or electricity systems. See for instance Article 3.24 and 3.25 of the Polish Energy Act.

¹⁵ For more on this see Gaz-System web page at: <http://www.gaz-system.pl/page?mid=10>

¹⁶ The 60 % has been recently donated through the Ministry of Treasury to the Gaz-System. See for more on this on portal CIRE.PL - *Gaz System odkupi gazociagi?* Available at: <http://www.cire.pl/item,29628,1.html>

operators should be independent from other activities not directly related to transmission or distribution. This is of particular significance to Poland where Gaz-System leases, rather than owns, the entire network infrastructure. This arrangement effectively makes the TSO an affiliate of PGNiG SA even though they were theoretically unbundled both in the legal and functional sense. The following case study will demonstrate that having VIUs present in the supply and/or generation chain as well as directly or indirectly involved in transmission, raises serious doubts about their non-discriminatory behavior.

At the end of 2006, Gaz-System denied pipeline access to the trading company Emfesz Polska (Hungarian origin). Access was needed in this case to fulfil Emfesz's contractual obligations to transport 150 million cubic meters of gas from the Polish border to the largest Polish fertilizer producer (ZA Pulawy). The grounds for the denial were vague. Gaz-System claimed, in favour of PGNiG SA, that Emfesz did not have adequate storage capacity in Poland¹⁷ in order to secure trade (all storage belongs to PGNiG SA). Moreover, according to PGNiG SA, it needed the entire Polish storage capacity for its own operation¹⁸. As a result, Emfesz lodged a complaint to the Polish Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumenta, UOKiK). However, the UOKiK President upheld the decision of Gaz-System. Emfesz took the case to the EU and is now awaiting decision. The Emfesz case highlights several important legal issues concerning the Polish energy sector.

First, access to storage is regulated according to Article 19 of the Gas Directive, stating that access procedures shall operate in accordance with objective, transparent and non-discriminatory criteria (Article 19(2)). Since there is no need to un-bundle storage (only separation of accounts), PGNiG is left in charge of the entire Polish storage capacity rather than transferring it to TSOs (be it Gaz-System or other independent storage operators). In light of PGNiG's dominant position, Emfesz has not been able to gain access. This fact might constitute a breach of Article 19 of the Gas Directive. PGNiG disagreed, claiming that it needed the entire available capacity for its own use. In fact, it saw the existing capacity as indispensable for its own operations and, since it was very limited, it claimed that the existing Polish storage capacity was not sufficient for sharing.

¹⁷ Recently Emfesz has found another solution to the obstacles set forth by the PGNiG. Namely the company had bought underground gas resources (Antonin in Poland) of approximately 120 million cubic meters of which 80 million cubic meters has been already exploited. Emfesz after exploiting the remaining 40 million cubic meters, plans to use the underground resources as the gas storage facilities. For more on this see "Emfesz zarzucił w Polsce mocną kotwicę" – available at portal CIRE: <http://www.cire.pl/item,29706,1.html>

¹⁸ See "New Gas Reserve Act gives PGNIG even stronger control over the Polish market" Gas Matters, May 2007, p. 18, Platts.

In addition, PGNiG argues that it cannot make its storage capacity available to third parties due to the Act on fuel reserves¹⁹, which forces the company to store larger quantities of gas in order to secure an adequate reserve in case of national emergencies. The Act requires every trading company that annually supplies above 50 million cubic meters of imported gas, to have a storage capacity in Poland and to maintain a 30-day reserve of gas. Companies that import less than 50 million cubic meters per year and have less than 100,000 customers are exempt from this requirement. Each year, PGNiG produces around 3.9 billion cubic meters of gas and imports around 7.9 billion cubic meters from Russia. At present, its storage capacity is only about 2 billion cubic meters. If PGNiG's argument was accepted, one would have to ask: Why have the Polish authorities adopted the Act on fuel reserves in the first place (with the aim to store gas on Polish territory) if it was clear that it would become a dead law due to the lack of storage capacity. In fact, even though PGNiG already controlled around 95% of the Polish gas market, the Act on fuel reserves made it possible for PGNiG to also control its competitors, for instance, by denying access to storage.

Second, the Emfesz case highlights also the fact that a denial of access to the transmission system may constitute a breach of Article 1(1) of the gas-regulation²⁰ (which states: "This Regulation aims at setting non-discriminatory rules for access conditions to natural gas transmission systems (...)"). Thus, Gaz-System's denial of system access constitutes discriminatory behaviour on the part of a TSO, acting in favour of its parent company (PGNiG SA) which is, in turn, the main gas trader in Poland.

Third, it might be inferred that the behaviour of Gaz-System indicates that it was informally granted preferential capacity for cross-border transmission and storage of gas (as the only gas TSO). If that was true, Poland would be in violation of the ECJ Judgment of 7 June 2005(C-17/03)²¹ which deems preferential access to historical long-term supply contracts and capacity reservations contracts to be discriminatory and thus, in violation of Directive 2003/54/EC and Regulation 1228/2003. Although this judgement concerns electricity, it could be easily applied to contracts granting preferential transmission, distribution and storage in other segments of the energy sector – in the case at hand, natural gas. If so, Poland would be in violation of Directive 2003/55/EC and Regulation 1775/2005. Still, as a dominant market

¹⁹ Act from 16 February 2007 on Reserves of Oil, Oil Products, Natural Gas and on Procedures in Case of Emergency in Security of Fuel Supply and Disturbance on Oil Market (Journal of Laws No. 52, item 343).

²⁰ Regulation (EC) No. 1775/2005 of the European Parliament and Council of 28 September 2005 on conditions for access to the natural gas transmission networks, OJ [2005] L 289/1.

²¹ OJ [2005] C 182/2.

player, Gaz-System may argue that it has denied access to Emfesz because it must fulfil its public service obligations by protecting the security of supply or because it was concerned about the economic and financial difficulties associated with take-or-pay contracts. However, such refusal would be subject to derogation by the competent national regulatory authority as well as confirmation of the Commission, neither of which took place in this case. Moreover, it is hard to believe that supplying 150 million cubic meters of gas to a single company would threaten the security of the nation's supply.

Finally, PGNiG, or more precisely, the Ministry of Treasure as its owner, might be thought to have breached Article 31 EC. Under this Article, Member States are obliged to intervene to ensure that State monopolies of a commercial nature do not discriminate against companies from other EU Member States regarding the conditions under which goods are bought and sold. In a case comparable to the above, the Commission issued a formal request under Article 226 EC asking Malta to intervene in the actions of its monopoly over the import, storage and wholesale of petroleum products. Malta, according to Commissioner Kroes, had been maintaining discriminatory measures favouring its own commercial state monopoly, which blocked potential new entrants from entering Malta's wholesale petroleum market²².

The fact that suppliers must negotiate with their competitors in order to contract their storage needs must be seen as a serious barrier for new entrants, undermining confidence in the market. As a result, even though it is not necessary to un-bundle storage, an obligation to separate storage operators would certainly enable competitors and regulators to verify whether all available storage capacity is offered on the market on transparent terms.

In addition to its legal consequences, the Emfesz case has political implications. Polish authorities oppose liberalizing the gas sector because doing so will boost the prices of subsidised gas and leave the Polish gas market open to influences by companies such as Emfesz, which has close ties to the Russian companies Gazprom and RosUkroEnergo. This concern might be partly eliminated by the third country clause – an amendment to the Electricity and Gas Directives contained in the third legislative package on EU internal electricity & gas markets. The package contains safeguards to ensure that in the event that companies from third countries wish to acquire a significant interest, or even control, over an EU network, they will have to clearly and unequivocally comply with the same unbundling requirements as EU companies. The Commission can intervene where a purchaser cannot

²² For more on this see IP/07/958 from June 2007 on Commission requests Malta to adjust import monopoly for petroleum products. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/958&format=HTML&aged=1&language=EN&guiLanguage=en>

demonstrate both its direct and indirect independence from supply and generation activities.

Even when unbundling is conducted with regard to independent decision-making, or separate accounting and bookkeeping procedures, the threat remains that a TSO will remain informally dependent on its parent company. Experience shows that three types of problems arise where a TSO/DSO forms part of a VIU. First, system operators often treat their affiliated companies better than competing third parties, for instance, by using network assets to make entry more difficult for competitors. Second, non-discriminatory access to information cannot be guaranteed since there is no effective tool to prevent a TSO/DSO from releasing sensitive market information to the generation or supply branch of a VIU. Third, investment incentives within VIU are distorted since vertically integrated system operators have no reason to develop their network in the interests of all market players. Such situation has a negative influence on the competitiveness of the Polish energy sector as well as its security of supply, especially in terms of infrastructure. Therefore, ownership unbundling seems to be the best solution to end discriminatory practices. Ownership unbundling should give rise to a situation where the same person (e.g. a pension fund) can only hold non-controlling minority interests (for instance up to 10% of shares) in a TSO/DSO and a supply undertaking. Moreover, minority shareholders should not be able to hold blocking rights in both undertakings nor appoint members of their managerial boards nor have a representative in the boards of both entities. This way, the inherent conflict of interests would diminish.

However, as a key amendment proposed in the Commission's third energy package, ownership unbundling remains a controversial issue. According to the Commission and Member States such as the UK and the Netherlands, the most radical form of ownership unbundling would increase competition and clear the path for a greater level of sustainability and supply security²³. On the other hand, ownership unbundling is strongly opposed by the affected companies, such as E.ON and RWE or EDF and GDF, as well as by Germany and France²⁴. These two countries, in light of the specific structure and strong

²³ For more on this see third legislative package

²⁴ In fact the Commission's proposal of ownership unbundling has been criticized by 8 countries: France, Germany, Austria, Bulgaria, Latvia, Luxembourg, Slovakia and Greece. The 8 countries in a letter to the European Commission and the chairwomen of the European Parliament's ITRE committee published in January 2008 (for more on this see Goldberg S., "Recent developments in the European Union energy sector" (2008) *European Energy Review* published by Herbert Smith LLP in association with Gleiss Lutz and Stibbe) gave several main reasons for their opposition to ownership unbundling. They argue that ownership unbundling: i) may not be compatible with the relevant constitutional laws and the free movement of capital across the EU, ii) does not respect the principle of proportionality as they argue other solutions

national orientation of their energy sectors, have chosen to advocate a third way on ownership unbundling – an independent system operator – sometimes referred to as the Scottish model. In Scotland, the two dominant energy companies continue to own electricity infrastructure but the transmission lines are leased and run by National Grid, an independent group that runs the infrastructure of UK's gas and electricity networks. This model could offer a compromise between those calling for big energy groups to be carved up and those advocating less radical action such as France or Germany.

IV. Unbundling of distribution system operators

The situation in the distribution segment of the Polish energy sector is more complicated than in transmission. Distribution companies are dominant in their respective geographic regions. New traders occasionally enter the market but they are generally linked to one of the main generators. According to Polish officials, DSOs have been functionally and legally unbundled. In reality, most DSOs are part of distribution supply companies (which have no production/generation capacity, though most of them are linked to major electricity generating companies). Only recently has a moderate change in that structure appeared – there are now fourteen electricity and six gas distribution companies, though most of them still function as DSOs and supply entities.

In the gas market, all six distribution companies are subsidiaries of PGNiG SA. The latter also largely controls the supply (sales) of gas to end-users, making it able to take actions against a competitive market. In addition, Polish authorities are delaying the liberalization of the gas sector until after the restructuring of the electricity sector. However, since the Commission did not foresee such a transitional period for the gas sector, it might yet start infringement proceedings against Poland under Article 226 TEU for the violation of the provisions of the Gas Directive.

From the six gas distribution companies (dolnośląska, górnośląska, karpacka, mazowiecka, pomorska i wielkopolska), only one sales entity (Oddział Handlowy PGNiG) has been actually unbundled as of 1 July 2007. Still, even this company remains under the supervision of its mother company

are available; iii) is not sufficient and appropriate tool to deliver the opening of the European markets and to reach objective of guaranteeing an adequate level of investment in the networks and fostering the integration of the internal market, iv) generates negative social consequences, although not specified what kind of; and v) will not have clear and positive consequences for grid investments and energy prices, as these are determined by other factors according to the eight, although again not specified what kind of factors.

PGNiG SA. In theory, the six existing distribution companies became DSOs strongly connected to PGNiG SA. However, why was only one sales entity unbundled so far and why has it been placed under PGNiG supervision? Moreover, the six new DSOs are controlled by PGNiG SA, an arrangement that is anti-competitive and incompatible with the unbundling requirements of the Gas Directive. It is hard to believe that the Commission will overlook the fact that the distribution and sales segments of the Polish gas market, even though theoretically unbundled, are in practice still under the supervision and command of a single VIC.

In comparison to the gas market, the distribution segment of the electricity market is more competitive. However, the level of dominance of PGE is still significant. Of the fourteen electricity distribution companies, only two (RWE STOEN and GZE SA²⁵) are owned by foreign capital. The remaining twelve are to some degree dependent on the Polish Treasury and the former monopolist. In light of the derogation periods provided in the Electricity Directive (with respect to legal unbundling and the under-100,000 customer clause), it is possible to have distribution companies operate as both supply companies and DSOs. This solution has however negative consequences for market participants because it creates the impression that the interest of the supply company is convergent with the interests of DSOs. Such convergence increases the possibility of discrimination against access-seeking third parties, which, in turn, reduces competition.

Furthermore, the Polish electricity market is currently in a state of transition with the management of the distribution companies often also responsible for the management of supply and distribution (network) activities. No separate premises or business structures – one for the DSO and another for the supply company – exist. Moreover, all distribution companies in Poland supply more than 100,000 customers in both the electricity as well as gas market. Thus, none meets the exception clause set in the Electricity Directive (less than 100,000 customers) making it possible to postpone functional unbundling. All this might suggest that Poland has not actually managed to functionally un-bundle its electricity market. If so, that would suggest a violation of EU laws.

Not surprisingly, the European Commission opened infringement proceedings against Poland in April 2006²⁶. In its Letter of Formal Notice, the Commission stated that Poland had either not begun legally unbundling or had not

²⁵ GZE SA (76,4% owned by Vattenfall) currently has been unbundled and the following entities have been created: Vattenfall Distribution Poland (GZE SA), Vattenfall Sales Poland (GZE Kontakt) and Vattenfall Heat Poland (EW SA).

²⁶ See Memo/06/152 Infringement procedures opened in the gas and electricity market sector, by Member States. Brussels, 4 April 2006, and “Polska nie przestrzega prawa unijnego” *Gazeta Prawna*, 19.12.2006.

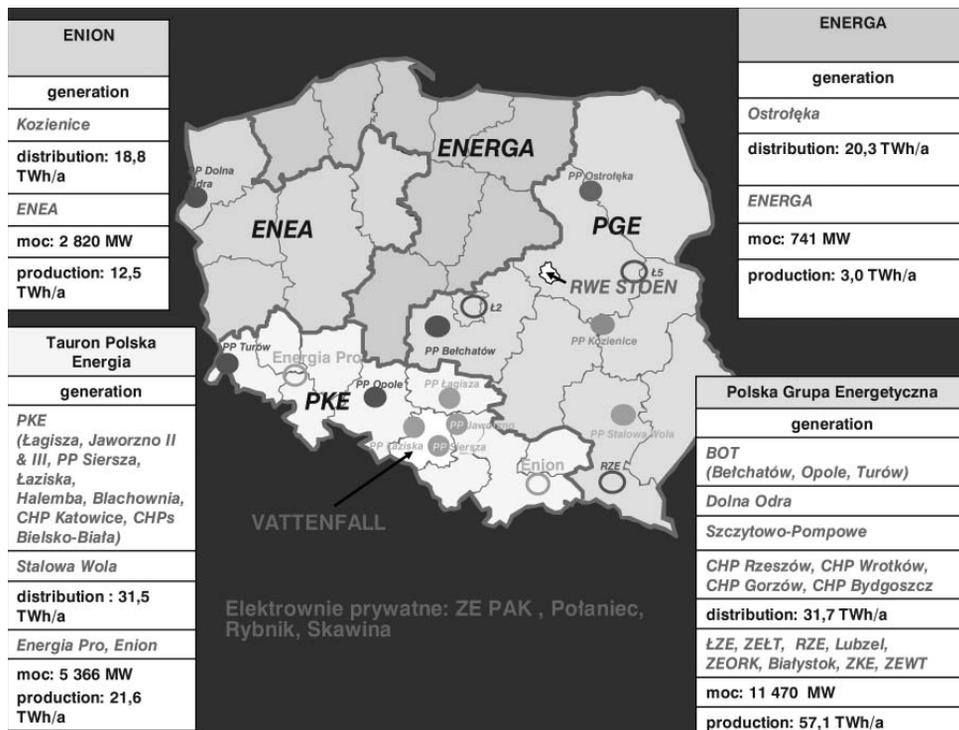
sufficiently unbundled its DSOs in the gas and electricity market. Additionally, the Commission claimed that Poland did not notify its public service obligations in the electricity and gas markets and also maintained preferential access for some historical contracts in relation to electricity. The Commission decided on 18 September 2008 to send a reasoned opinion to Poland concerning the failure to fully implement the Gas Directive²⁷ Since some of its provisions were indeed not transposed into the Polish legal system. The Commission decided however to limit the scope of its reasoned opinion to Poland's failure to designate a storage system operator. A reasoned opinion is the last step of the infringement procedure before referral to the Court of Justice.

Several additional problems arise from the "Program for the Polish electro-energy sector" policy adopted in 2006 by the Council of Ministers. On its basis, electricity distribution companies with network assets were grouped together with generators. As a result, four new energy giants were established. (i) The first vertically integrated conglomerate was set up under the name Polish Energy Group (Polska Grupa Energetyczna, PGE). It was created primarily on the basis of PSE SA, with an additional 85% stake of the largest Polish electricity generator (BOT Górnictwo i Energetyka SA), which was in turn made up of three electricity plants (Bełchatów, Opole, Turów) and two coalmines. Added was also: PGE-Energia SA, made up of a generation company (Zespół Elektrowni Dolna Odra) and four combined heat and power plants (CHP Rzeszów, CHP Wrotków, CHP Gorzów, and CHP Bydgoszcz) as well as eight distribution companies operating in the east and south of Poland (Łódzki Zakład Energetyczny SA, Zakład Energetyczny Łódź-Teren SA, Zakład Energetyczny Warszawa-Teren SA, Lubelskie Zakłady Energetyczne LUBZEL SA, Zakład Energetyczny Białystok SA, Rzeszowski Zakład Energetyczny SA, Zakłady Energetyczne Okręgu Radomsko-Kieleckiego SA, and i Zamojska Korporacja Energetyczna SA). (ii) The second conglomerate was named Tauron Polska Energia. It was established by merging Południowy Koncern Energetyczny (made up of five power plants, two CHP plants and two coal mines) with an electricity generator (Stalowa Wola) and two distribution companies (ENION and ENERGIA-PRO). (iii) The third energy giant, ENERGA, contains three power plants (Zespół Elektrowni, PAK, and Ostrołęka) and the distribution company Energia (formerly the group G-8 operating in northern Poland). (iv) Finally, the fourth conglomerate, ENEA, combined an electricity generator (Kozienice) and a distribution company (Enea).

Chart 1 identifies the shares of the four VIC and the regions in which they operate in Poland.

²⁷ IP/08/1374 Internal market in natural gas: the Commission sends reasoned opinion to Poland, Brussels, 18 September 2008.

Chart 1. Consolidation of the electricity sector in Poland.



Source: Polish Energy Regulatory Office (Urząd Regulacji Energetyki, URE)

The creation of the energy giants might have been a good idea in theory, assuming that they would compete with each other on the domestic market and, potentially, also externally. In practice however, the compatibility of this change is put in doubt in light of the provisions of the Electricity Directive, as transposed into the Polish legal system, unless a number of legal issues are considered.

The main problem associated with this reshuffle surrounds the issue of unbundling and, in particular, the need to ensure that generation and supply are separated from distribution and transmission. In other words, the conglomerate PGE would have to separate its network activities from its supply activities, while its eight distribution companies would have to become supply companies only rather than DOSs. Alternatively, they would have to divest their supply activities and become system operators only. For example, Zakład Energetyczny Warszawa-Teren SA does not currently fulfil the unbundling requirements. The company engages in generation, distribution and supply of electricity and heating. Moreover, it has around 815,000 customers and as such, it does not qualify for the “less-than-100,000-customer” derogation from the

unbundling requirement set out in the Electricity Directive. Other distribution companies from other conglomerates, such as ENION and ENERGIA-PRO, are in a similar position. Moreover, even though the unbundling requirement had not been fulfilled at that time, in late 2007, URE granted a distribution activities concession to all eight of PEG's distribution companies²⁸. Was URE's decision based on political considerations or was it a naïve wish of the regulator hoping that the companies would have unbundled by 1 July 2007?

It is doubtful whether the consolidation of the energy sector under State auspices is the correct choice. In Poland, consolidation through administrative methods is a political, rather than a market-oriented, solution. It goes against the Commission's ambitions to liberalize the continent's energy markets, to offer consumers more choice and to lower gas and electricity bills. Whenever politicians intervene in the mechanism of the free market, they jeopardize its overall long-term economic outcome. That has certainly been the case in Poland. The Polish Government might not have enough human and financial resources to equally equip all four of its new energy giants in order to create potentially competitive players on the EU market. A general scarcity of capital and resources in different branches of the national economy might also negatively affect the energy sectors. In addition, domestic consolidation by administrative means might bring about either of two possible outcomes. It may have a positive impact on the conglomerates, or at least on some of their parts, by strengthening poorly performing companies within the group. In other words, their well performing elements might act as leverage for their weak elements. However, the opposite might be true whereby the poorly performing companies might slow down the development of the strong ones, thus lowering the value and competitiveness of the group overall. This would, in turn, lower the overall competitiveness of the group in the context of the internal market.

Consolidation might indeed lead to greater cost savings or lower energy prices for consumers but only under the assumption that the group would become more efficient thanks to internal restructuring and better transparency. In this regard, privatization is the best route: consolidation makes sense only when accompanied by a sell of parts of the energy companies. At least partial privatisation would generate the capital and achieve the internal corporate resilience necessary to compete on EU markets. In defence of the energy companies, one might argue that the global financial crisis in general, and skyrocketing prices of wholesale gas and coal in particular has put them under great strain. In fact, it might have left them with no choice at all but to pass on their increasing costs to customers as well we to consolidate to increase

²⁸ See "Cztery firmy bez wydzielonej dystrybucji prądu", *Gazeta Prawna*, 1 June 2007. Available also at: <http://www.cire.pl/item,27919,1.html>

capitalization. Consolidation might indeed enable them to weather the present crisis. In the long run however, it may prove to have a harmful influence on the competitiveness of the Polish energy sector.

V. Energy market regulation and third party access

Regulation is commonly traced back to US industrial development and, in particular, to the railroad industry. Between 1840 and 1940, many independent agencies emerged whose members were appointed by the US President. The US President would not normally revoke these appointees before the end of their term in light of the concerns that presidential powers would grow excessively to the point of threatening the constitutional balance of power²⁹. However, the idea of sector-specific regulation was not exclusive to the US. Its roots can also be traced back 19th Century England where the Parliament created an independent railway commission with limited legislative, rather than exclusively administrative, powers.

In contrast, the European continental model of regulation has not been burdened by the problem of a “checks and balances” system so important in the UK and the US³⁰. Regulatory authorities were historically established so as to be functionally independent from political influences of presidents, prime ministers or ministers. They were intended to be impartial decision-making bodies without raising major constitutional concerns. However, in most EU countries, explicit constitutional provisions seem to exclude the possibility of establishing administrative bodies such as regulators not directly linked to the government or to a specific minister. For example, Article 146(3) of the Constitution of the Republic of Poland states that the Council of Ministers directs the activities of public administration. Similarly, the 1958 French Constitution is based on the idea that public administration is hierarchically subordinated to a Minister or to the Prime Minister. Article 20(2) of the French Constitution states that the government shall have at its disposal the apparatus of public administration. Article 20(3) notes that the government will answer to the French Parliament for its own actions as well as for the acts of its public administrators. Article 21 further prescribes that the Prime Minister must direct the activities of the government. It might be concluded, that the French Constitution prohibits the creation of independent regulatory

²⁹ On development of regulation see more G. Majone, *Regulating Europe*, Routledge, London 1996, p. 10.

³⁰ For more on the history of regulation in Europe see W. Hoff, *Polish energy regulation in its European setting*, LKAEM Publishing House, Warszawa 2007, p. 86–88.

agencies. However, the French Conseil Constitutionnel ruled in 1986 that Article 21 of the Constitution does not stand in the way of the Parliament assigning responsibility for establishing rules in a specified policy area to another public authority. That conclusion was based on the assumption that this was done within the framework of an act of parliament and for the purpose of implementing that act. The Conseil Constitutionnel also held that Article 20(2) would be violated only if the delegation of powers infringed essential aspects of governmental policy³¹.

Different aims were pursued by regulation in differed countries. The purpose of regulation in the UK and the US was not to promote competition *per se*, as it was in continental Europe, but rather to supervise network companies and their potentially monopolistic activities³². Such dissimilarity was linked to different ownership structures. In the UK and the US, network companies were from the outset largely privately owned. In continental Europe, the operation of the networks was entrusted to State owned energy undertakings, which in turn created legal and natural monopolies. In this regard, Poland's approach to energy regulation and liberalization follows the continental model whereby the regulator is granted independence mainly to enhance its impartiality in decision-making. Nonetheless, in line with the German model, regulatory functions are integrated into the Polish Ministry of Economy³³. Statutory regulation is still a fairly new concept in Poland. As a result, no general legal framework or doctrinal consensus exists in relation to the question of how should regulatory agencies function in practice. The ongoing debate concerns the limits to the political independence of regulators as well as the scope of their powers. The trend is clear however: in spite of residual constitutional doubts and democratic concerns, independent regulators have become a necessary component of effective governance in all industrialized countries.

New market-oriented regulation for network industries requires an active national regulatory authority, independent from the influence of market players as well as from day-to-day governmental interference. The Polish energy regulator monitors network performance and regulates energy enterprises in order to secure the interests of final consumers and, at the same time, to ensure market stability³⁴. However, the competences of URE changed considerably with Poland's accession to the EU. Presently, it holds the position of a central authority of public administration. According to Article 21(2a) of the Polish Energy Act, the President of

³¹ For more on this see G. Majone, A. Surdej, "Regulatory Agencies...", p. 7–8.

³² For more on the aim of regulation in different countries see W. Hoff, *Prawny model regulacji sektorowej*, Warszawa 2008, p. 26–38.

³³ More on the regulatory functions of the URE and Ministry of Economy and its correlation see F. Elżanowski, *Polityka energetyczna. Prawne instrument realizacji*, Warszawa 2008, p. 84–94.

³⁴ www.ure.gov.pl

URE is nominated by the Minister responsible for the economy (presently, the Minister of Economy) and appointed by the Prime Minister. Until 2006, the term in office of the President of URE was set for five years³⁵.

Unfortunately, the Act on State Human Resources and Senior Higher State Offices of 24 August 2006³⁶ removed the tenure of the URE President. By doing so, it eliminated one of the fundamental pillars ensuring its autonomy, violating in turn the independence requirement set out in the Electricity and Gas Directives. The Prime Minister can dismiss the URE President in one of the listed cases³⁷: continued inability to perform his/her duties due to severe illness; grave violation of duty or criminal conviction. At first sight, it might seem that the law provides the regulator with sufficient independence from the government. However, the dismissal grounds are rather vague. With this change, the government acquired almost unlimited power to shape the structure of the regulatory system³⁸. In practice, the autonomy of the regulator is therefore rather limited while political influence is significant. This should be perceived as a major step back for Poland on its road to creating an independent regulator.

Several issues compromise the independence of the Polish energy regulator at this moment. The first major problem lies in the supervision over administrative bodies such as URE. The Ministry of Economy supervises its activities based on the Act on the Council of Ministers³⁹. According to its Article 34a(1), the Minister may issue binding decisions directed to his/her subordinate (dependent) agencies. In addition, Article 12 names the Minister of Economy as the chief administrative authority in charge of the energy policy. In practice therefore, all actions of URE must be compatible with governmental policy - URE must seek guidelines from the Ministry. As a result, the regulator is often under political pressure to act in favour of the incumbents (owned by the Treasury) or in favour of political considerations, rather than in favour of the market, for example, by approving inappropriate supply tariffs for gas or electricity (prices charged to end users).

On the one hand, regulated prices may sometimes protect customers, for instance, in the period of transition to an open and competitive market⁴⁰ or

³⁵ See Article 21(2a) of the Energy Act.

³⁶ Journal of Laws 2006 No. 170, item 1271.

³⁷ Art. 12(5) of Act of 24 August 2006 on State Human Resources and Senior Higher State Offices of 24 August 2006

³⁸ For more on this see Hoff W. (2007) *Polish Energy Regulation in its European setting*. LKAEM Publishing House, Warsaw p. 78–82.

³⁹ Ustawa z dnia 8 sierpnia 1996 o Radzie Ministrów (Journal of Laws 2003, No 24, item 199 with subsequent amendments).

⁴⁰ In transition periods towards well functioning competition the coexistence of regulated and market prices may be necessary to protect customers from potential abuse of dominant

when they are most vulnerable⁴¹. On the other hand, regulated prices are also a political instrument – when elections are in sight, politicians like to keep electricity and gas prices low. Unfortunately, market structure may suffer from price controls that should be declared a public service obligation. The free market cannot function if electricity prices are kept constant, despite rising costs of primary energy sources such as coal, oil or gas. On the gas market, low prices are hard to reconcile with such market factors as the need to move to more expensive supply sources such as LNG. As a result, regulated prices are a strong disincentive for investment in new generation capacity and alternative energy infrastructure, placing those who invest in renewable energy at a competitive disadvantage because it is more expensive than conventional energy production. Moreover, if regulated prices are not in line with the market, those suppliers that have no capacity to generate significant cost savings, or equivalent long-term contracts, will not be able to make competitive offers, which would cover their supply costs.

Therefore, in a country like Poland, where long-term contracts are being slowly abolished, maintaining regulated prices is a dangerous step for the market. It would be justified to separate the regulator from the Ministry and entrust the Parliament with the power to supervise it. This idea is supported by the fact that the division of tasks between URE and the Ministry of Economy is currently quite vague. Seeing as it is unclear who is in charge of guarantying the functional unbundling of network system operators, neither entity seems to be responsible. However, considering that unbundling is a political issue, it requires a political solution.

The second major problem concerning URE's independence derives from the fact that the regulator is financed from the State budget. Its autonomy is endangered by the potential risk of abuse of power by the government in shaping the budget allocated to the authority. This problem might soon be resolved thanks to the third legislative package on EU Electricity & Gas markets, which proposes to give budgetary autonomy to national regulators. Furthermore, since the regulator had no say as to the government's consolidation plans, as well as no authority to regulate cross-border issues, URE does not have the power necessary to intervene in the functioning of the market and to move it towards liberalization.

positions. Unfortunately in practice the co-existence of regulated and market prices is clearly not a transitory measure e.g., France or Poland. Such scheme has been valid for many years and there are no clear indications that Member States with regulated prices intend to remove them and proceed towards market prices.

⁴¹ However protecting vulnerable customers which fulfils requirements of public service obligations should not be confused with maintaining regulated energy prices for all categories of customers.

The third issue impacting the independence of the energy regulator concerns the absence of transparency in URE's relationship with the UOKiK. The two institutions must be separate and autonomous in their operations, especially in circumstances where both can claim jurisdiction such as abuse of market power or violations of suppliers' rights in third party access. Electricity and gas markets, where many mergers and acquisitions fall under antitrust law, are in urgent need of a clear identification of the hierarchy of authority and responsibility between URE and UOKiK.

Third party access has been implemented in Poland through the regulation of access tariffs to the transmission and distribution networks. The question of whether customers really do have third party access is measured by the possibility of switching suppliers. In general, a high switching rate indicates that there is a high level of choice of suppliers or traders. If suppliers and traders have easy access to networks, it can be assumed that access is transparent and based on well-defined tariffs. If the percentage of customers switching suppliers is low, in other words, if customers remain with incumbent suppliers, it must be assumed that their regulated prices impede the entrance of new suppliers. According to the Commission's Benchmarking Report of 2004, only 7% of large customers switched suppliers in the Polish electricity sector⁴². In 2005, only around 20% of large industrial customers and less than 1% of smaller businesses changed electricity suppliers⁴³. The switching rates remained low with only a few very large users changing electricity suppliers in 2006. Unsurprisingly, no gas customer has switched its supplier to date⁴⁴ and it is doubtful that such switch will take place next year.

As of 1 July 2007, there were 15.7 million electricity and 6.7 million gas customers eligible to change suppliers⁴⁵. According to URE's provisional statistics, only 63 industrial customers and 541 households changed their suppliers of electricity in 2007. Among the reasons contributing to low switching levels lies the fact that the switching procedure is costly and complicated involving: the need to balance rules set up by different DSOs; high costs of metering systems introduced by a number of distribution companies and; high equipment modernization costs. Switching is additionally obstructed by heavy administrative burdens such as the need for an expensive and complex expertise concerning access to the system for renewable energy in the case of

⁴² http://europa.eu.int/comm/energy/electricity/report_2005/doc/trade_unions/12b_epsu_psiu_report.pdf

⁴³ For more on this see European Commission, Report on Progress in Creating the Internal Gas and Electricity Market, SEC(2005) 1448.

⁴⁴ See "New Gas Reserves Act gives...", p. 18.

⁴⁵ For more on this see Z. Żukowski, "Umowę dostawy energii będzie można wypowiedzieć" *Gazeta Prawna* of 15 June 2007.

implicit (presumed) lack of capacity set by the operators. Customers are further deterred from switching by the lack of an automated customer information exchange system between suppliers and distributors.

In comparison, at the end of 2006, approximately 50% of all customers (more than 50% of large industrial customers, more than 50% of small and medium businesses and 48% of all households) changed suppliers on the UK electricity market. On the gas market, entities other than the incumbent supply 64% of all customers: more than 85% of large industrial customers, more than 75% of small and medium businesses and 47% of homes⁴⁶. These numbers place the UK energy sector among those with the highest switching rates in the EU.

VI. The shortcomings of market reforms

The shortcomings of the reforms of the national energy sector can be traced back to the fact, that competition in Poland is generally limited to vertically integrated suppliers that are part of former monopolists. Non-vertically integrated (“independent”) energy producers and suppliers have been largely excluded from the market and thus, from the benefits of liberalization. In consequence, vertically integrated incumbents divided the market among themselves – facing only minimal competition – significantly limiting customer choice. Therefore, even though all customers have the right to choose their supplier since 1 July 2007, their choice is in practice very restricted since suppliers are strongly linked to incumbent system operators, which hold the right to grant access to their networks.

In the first part of 2007, only around 1.5% of electricity was purchased on a liberalized market and only 1.8 % of the volume of gas was purchased by entities other than the regional distribution companies owned by PGNiG⁴⁷. This constraint does not apply to energy trading companies, which in theory could operate on a regional or national scale. In practice however, they do not do so because over 55%⁴⁸ of all energy trading is blocked by existing long-term contracts (LTC). Long-term contracts are an exception in competitive markets with adequate liquidity (e.g. the Scandinavian or UK electricity markets). Conversely, in less liberalized markets, companies are bound by long-term supply contracts which oblige them to receive all of their electricity

⁴⁶ Data collected during the stage at the European Commission DG TREN, Unit D-1.

⁴⁷ See “New Gas Reserves Act...”, p. 18.

⁴⁸ See the assumptions of the Ministry of Economy on long-term contracts available at: <http://www.cire.pl/item,27821,1.html>

or gas from the incumbents. Long-term supply contracts can create barriers for smaller firms that want to expand their sales or for potential competitors who want to enter the market. A dominant firm is thus likely to abuse its market position, in light of Article 82 EC, if it ties a substantial proportion of demand to obligatory purchases on a long-term exclusive basis⁴⁹. Long-term contracts have generally the potential to prevent, restrict or distort competition. They are subject to scrutiny under EU competition rules.

Poland has repeatedly, but so far unsuccessfully, tried to eliminate LTCs between electricity generators and PSE (acting as a single buyer), most of which were concluded in the later half of the 1990s. A new law on the recovery of stranded costs due to the cancellation of LTCs⁵⁰ entered into force in August 2007. A maximum of € 3.3 billion⁵¹ in compensation is offered to State owned and private electricity generators as an incentive for a voluntary cancellation of LTCs. If power producers do not take advantage of this voluntary scheme, they leave themselves open to sanctions by the Commission, which believes that LTCs distort competition.⁵² Compensation payments started in the second quarter of 2008 – all 13 State owned generators as well as several privately owned generators, such as Elcho (owned by CEZ), Zielona Góra and Kraków (owned by EDF), Połaniec (owned by Electrabel) and Nowa Sarzyna (owned by Ashmore Energy, formerly Enron), are expected to cancel their LTCs.

A new law on LTCs envisages additional compensation of up to € 270 million⁵³ for gas-fired, combined heat and power plants signed before 1 May 2004. Gas-fired CHP plants have higher variable costs flowing from take-or-pay commitments for the supply of gas. Without extra compensation, gas-fired plants would be disadvantaged *vis-à-vis* coal-fired generators, which buy local coal under short-term contracts. Five CHP plants will be eligible for extra compensation (Zielona Góra, Nowa Sarzyna and three state owned companies: EC Gorzów, which is owned by PSE, EC Lublin and EC Rzeszów).

The cancellation of LTCs is legally and practically logical and justifiable. They have a negative influence on competition and market liquidity creating

⁴⁹ See Case T-65/89 *BPB v. Commission* [1993] ECR II-389, para. 68.

⁵⁰ Journal of Laws 2007 No. 130, item 905.

⁵¹ See Ministry of Economy Web page available at: <http://www.mg.gov.pl/Wiadomosci/Strona+glowna/kdt.htm> (visited 13 July 2007).

⁵² In this regard in November 2005 Commission used its competences under Article 226 EC and asked Poland to deliver Reasoned Opinion regarding long-term contracts. Additionally in its decision C-17/03 of June 2005 ECJ (concerning preferential access given by the Dutch regulator to transport capacities, for imports resulting from long-term electricity supply contracts) considered that the existence of long-term contracts, even concluded before the entry into force of the electricity directive, does not justify any preferential treatment and as such LTC are perceived discriminatory *vis-à-vis* other market players.

⁵³ “Poland’s power producers to terminate PPAs” (2007) 116 *Energy in East Europe*.

entry barriers and distorting the prices of final energy products. The mechanism is straightforward – compensation is being paid in quarterly, pre-payments spread over a period of several years. The payments are handled by a special body, the Manager of Accounts (Zarządca Rozliczeń), owned by the TSO PSE-Operator. The costs of the compensation will be borne by end users. A *transitional fee* will be added to their electricity bills replacing the current equalization fee. Compensation will be calculated based on the difference between revenues raised from the sale of the amount of electricity produced at market prices and estimated stranded costs.

Although the cancellation of LTCs does not raise major legal issues, it has some negative economic consequences. Long-term contracts provide a financial guarantee for electricity generators seeking to invest in infrastructure – they were used to secure bank credits of around € 5.3 billion⁵⁴ (about half of which has already been repaid) to finance the modernization of aging plants and the construction of new capacity. Additionally, LTCs serve as a guarantee for private investors seeking to invest in the energy sector. Assuming that there is a need for new nuclear generation capacity, or capacity based on renewable resources, the return on investment in the energy sector is very long. Finding potential investors is therefore difficult, especially since the necessary input would have to be substantial. Additionally, present global financial crisis is putting an extra strain on the whole of the world economy. The cost of a 2500 megawatt nuclear power plant would be around \$7 billion (3 million per megawatt as opposed to 1 million per megawatt in a coal-fired power plant). Receiving a guarantee in the form of a LTC for the supply of electricity would help secure investment and sustain its rating. Because around 60% of Polish infrastructure needs immediate upgrading, that extra security is important. Unfortunately, legal and business considerations are not always in sync – a lot depends here on the will of the banks to grant credits without the guarantee of a LTC.

Another significant factor delaying the opening of the market, and thus the advent of effective competition, is the slowness of the privatization process. Some believe that energy companies should not be privatized at all. Considering that they are the backbone of the national energy sector, they fear that privatization might undermine the nation's security in the energy field.⁵⁵ The managers of the incumbents as well as their trade unions maintain that privatization will result in major job losses and negative consequences for the environment. Not surprisingly, the energy sector is overstaffed, inflating energy prices. The public still has a negative attitude toward privatization and liberalization.

⁵⁴ “Poland’s power producers....”, op. cit.

⁵⁵ This is a very often mistake made by the politicians. In practice national security is achieved by the diversification of sources and supply routes and not by privatisation or consolidation.

Economic indicators show that Poland's energy demands greatly exceed the available supply. Its growing energy needs will require both domestic and foreign direct investment. Opening of the sector to private investment, considered to be a means of alleviating Poland's energy shortage, is a steadily growing necessity rather than just one of the available options. Poland suffers from a long-standing lack of investments in production capacity as well as lack of upgrades, or even proper maintenance, of the electricity and gas transmission and distribution grids.

The problem of ownership must also be emphasised. Privatisation plans for the electricity market started as early as 1997. However, they were abandoned for political reasons by the former government (in power from 2005–2007) which focused on consolidating existing State owned energy companies into large capital groups such as PGE or Enea. Only recently has the new government taken steps towards partial privatization of these energy giants. However, the preparations needed to float these companies on the stock exchange are not simple, especially when financial markets are in turmoil. To meet listing requirements, energy companies may need, among other things, to increase their capital. However, this is an issue they have to face anyway, considering the investment challenges they face. Although costly, the creation of new capacity is necessary to ensure Poland's energy security.

Partial privatization on the stock market may not necessarily translate into the necessary internal restructuring or improve business practices of energy companies. Despite public trading, they may still be subject to strong political influence that is not always in line with the market. In the future, a strategic investor might still take partial, or even complete, control over these entities. This outcome depends on the Ministry of Treasury which owns most of the energy sector. In order to attract potential strategic investors, the Polish government must reduce the risk associated with its current policies – it must significantly enhance transparency in government institutions and create a climate favourable to economic growth. The introduction of a policy that reflects the interests of investors and consumers is also a must. The sector also needs an independent regulator with the power to ensure affordable services for consumers.

The political controversy surrounding privatization has put pressure on the government to retain State ownership of energy networks or energy network companies (system operators). On the one hand, State control might be justified not only from the strategic point of view but also from the competitive point of view. It makes it possible to set the conditions of access to the electricity grid/gas network independently of commercial interests. However, assuming that the State continues to own a major share of infrastructure companies, it must not hold any stock in generation or supply companies. At the very least, it must

limit its participation in generation or supply companies to a level which does not allow it to exercise any influence over their operations. Such an approach would emphasize the necessary expansion of the energy infrastructure with respect to the security of supply. It would also achieve the objective of securing efficient operation and development of the infrastructure and the provision of equal access to the grids for all users.

On the other hand, while State ownership of system operators might find justification in competition and strategic interests of the country, State ownership of supply companies cannot. Only privately owned supply companies are directly linked to customers and exposed to the free market and thus able to adapt to the market mechanism of demand and supply when setting electricity/gas prices. In this regard, Poland does not have adequate financial and human resources to equally equip all of its State owned energy giants. Thus, for the benefit of the market and consumers, supply companies should leave State hands. Where networks or network operators are bundled together with supply companies under State auspices, the problem of unbundling would arise. Monopolistic public entities would be tempted to abuse their favorable market position to discriminate against competitors.

VII. Conclusions

There are at least two possible scenarios Polish policy makers can follow in liberalizing its energy sector. One would involve the UK approach that encompasses: ownership unbundling, less market concentration, less public ownership and more private capital in the industry. The second scenario follows the continental model: more concentration and vertical integration and more State or public ownership in the energy field (for instance, the French model). These two widely diverging approaches reflect different energy consumption patterns, energy mixes, sources of supply and natural resources of various European countries.

Three issues make it difficult to objectively measure which of the models is better. First, the process of market opening is far from complete. Second, the process started much earlier in the UK than in other EU countries – historical circumstances have thus given the UK an advantage over other regions. Third, the UK has adopted a model based on a political, legal and economic environment that has long since supported the accumulation of private capital and the pursuit of entrepreneurial initiative. In contrast, the French have successfully adopted an approach that has entailed a very strong role of the State. It is difficult to determine in the abstract whether one of

the models is better than the other. It is thus difficult to predict which model should be applied in Poland.

From the Polish point of view, changing the structure of its energy markets (from State to private ownership), especially under heavy opposition from trade unions, is very difficult in political terms. With its history of a centrally-planned economy and the nationalization of the energy sector, Poland is likely to find the French model easier to accept. This acceptance does not guarantee however that it would turn out to be the best economic choice for the national energy sector. In this regard, Poland's and France's experiences are very different. Whereas France has long since exposed its State owned entities to competition in the EU and the global market (with moderate State interventionism), Poland has persistently protected its socialist economy from market forces. For years, it was irrelevant whether State owned companies were profitable or not. The lack of a capable, market-tested private sector in general, has delayed the development of Poland's electricity and gas markets in particular. In the opinion of the author, the lack of a competent industry "owner" (far more knowledgeable about the particularities of the sector than the State) severely impacted its development.

If the French model is somewhat problematic for Poland so too is the UK model. The latter is likely to be the better option because both its electricity and gas markets have been fully open since 1998, as a result of the liberalization process that started in the late 1980s. What characterises the UK model is that: price controls are removed; customer-switching rates are among the highest in the EU; market concentration is relatively low; the ownership of gas and electricity transmission companies is unbundled and thus, there is no incentive to discriminate among market players and; finally, that competition is considered to be effective. Particularly the English and Welsh markets appear to have become much more competitive since the late 1990s. The sector in general has become more efficient and customer bills have fallen (some of the lowest energy prices in the EU). The research of Joskow⁵⁶ suggests that structural, regulatory and market reforms like those in the UK have significantly improved the condition of the energy companies – once State owned monopolies that have undergone an effective privatisation process. The latter, together with a mechanism to regulate distribution companies, has generated significant cost-savings overall, without compromising service quality. Wholesale markets have also stimulated improved performance among existing generators and facilitated major investments in new energy-generating capacity. Although the outcome of the liberalization of the UK energy sector has been satisfactory, the radical political and economic transformation, from which it originates and

⁵⁶ P. Joskow, *Lessons Learned From Electricity Market Liberalization* (2008) *The Energy Journal, Special Issue. The Future of Electricity: Papers in Honor of David Newbery*.

which began in the Margaret Thatcher era, would be very difficult to apply in Poland. Although Thatcher's policies might not have benefited everyone, she ensured that the UK economy has not become a socialist welfare-state such as Germany or France. This is especially noticeable in the energy sector, with its high rate of employment (not to say over-employment).

One has to wonder therefore whether it would be possible to somehow foster in Poland the results of UK liberalization process? Alternatively, would it be possible to apply a conjunction of the two models? The answer is, to some extent, yes. Consolidation through administrative means, as conducted in Poland, goes against the Commission's spirit of liberalization. However, it could succeed in the long run if followed by privatization (through the stock exchange or through private ownership by a strategic investor and, if necessary, partial government ownership) which would lead to internal restructuring of the energy conglomerates. Paradoxically, privatization needs strong support from the government. Unfortunately, the government's seemingly strong liberal approach towards the reform of the energy sector is threatened by the negative attitude towards privatization in general, and unbundling in particular, of the trade unions and the two energy giants PGNiG and PGE. The workforce and the companies themselves are indeed very influential stakeholders in this debate, allegedly able to successfully lobby the government and to affect the formation of economic policy.

Literature

“Cztery firmy bez wydzielonej dystrybucji prądu” [“Four firms without a separation of electricity distribution”] *Gazeta Prawna*, 1 June 2007.

Elżanowski F., *Polityka energetyczna. Prawne instrumenty realizacji [Energy Policy. Legal Instruments of Its Implementation]*, Warszawa 2008.

European Commission, Report on Progress in Creating the Internal Gas and Electricity Market, SEC(2005) 1448.

European Commission Staff Working Document. Implementation Report – SEC(2006) 1709, page 136. Accompanying document to the Communication from the Commission to the Council and the European Parliament – Prospects for the internal gas and electricity market – COM(2006) 841 final. Available at:

http://ec.europa.eu/energy/energy_policy/doc/10_internal_market_country_reviews_en.pdf

Goldberg S., “Recent developments in the European Union energy sector” (2008) *European Energy Review* published by Herbert Smith LLP in association with Gleiss Lutz and Stibbe.

Hoff W., *Prawny model regulacji sektorowej [The Legal Model of Sector-specific Regulation]*, Warszawa 2008.

- Hoff W., *Polish energy regulation in its European setting*, LKAEM Publishing House, Warszawa 2007.
- Joskow P., "Lessons Learned From Electricity Market Liberalization" (2008) *The Energy Journal, Special Issue. The Future of Electricity: Papers in Honour of David Newbery* IAEE.
- Majone G., Surdej A., "Regulatory Agencies in Economic Governance. The Polish case in a comparative perspective" (2006) 5 *KICES working papers*, Koszalin Institute of Comparative Administrative Studies.
- Majone G., *Regulating Europe*, London 1996.
- "New Gas Reserve Act gives PGNIG even stronger control over the Polish market" (2007) *Gas Matters*, Platts.
- Nowak B., "Rozdział przedsiębiorstw zintegrowanych pionowo w sektorze energii elektrycznej i gazu na podstawie Dyrektyw Elektroenergetycznej i Gazowej" ["Separation of Vertically Integrated Undertakings in Electricity and Gas Sector Based on Electricity and Gas Directives"] (2007) 8 *Przegląd Ustawodawstwa Gospodarczego*.
- Nowak B., *Wewnętrzny Rynek Energii w Unii Europejskiej [Internal Energy Market in the European Union]*, Warszawa 2009.
- Olejnik M., "National Approaches to implementation – Poland" [in:] Cameron P. (ed.), *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe*, Oxford University Press 2005.
- "Poland's power producers to terminate PPAs" (2007) 116 *Energy in East Europe*.
- Roggenkamp M., "Gas Liberalization in the Netherlands: Ownership Unbundling and the Reorganization of Gasunie" [in:] Hammer U., Roggenkamp M. (eds.), *European Energy Law Report III*, Intersentia, Antwerpen-Oxford 2006.
- Skoczny T., "Państwowe monopole handlowe w prawie wspólnotowym" ["State Monopolies of Commercial Character"] (1997) 3 *Studia Europejskie*.
- Skoczny T., "Energetyka" ["Energy Industry"] [in:] Barcz J. (ed.), *Prawo Unii Europejskiej. Prawo Materialne i Polityki [European Union Law. Substantive Law and Policies]*, Warszawa 2003.
- Szydło M., "Unbundling własnościowy (ownership unbundling) jako instrument regulacyjny w sektorze energetycznym (część I)" ["Ownership Unbundling as an Instrument of Regulation in Energy Sector (Part I)"] (2007) 2 *Przegląd Ustawodawstwa Gospodarczego*.
- Szydło M., "Unbundling własnościowy (ownership unbundling) jako instrument regulacyjny w sektorze energetycznym (część II)" ["Ownership Unbundling as an Instrument of Regulation in Energy Sector (Part II)"] (2007) 3 *Przegląd Ustawodawstwa Gospodarczego*.
- Taylor S., "Energy unbundling faces switch-off" *European Voice* 14–21 June 2007.
- Żukowski Z., "Umowę dostawy energii będzie można wypowiedzieć" ["Energy Supply Contract Can be Terminated"], *Gazeta Prawna* 15 June 2007.

Benefits and Costs of Vertical Separation in Network Industries. The Case of Railway Transport in the European Environment

by

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- I. Introduction
- II. Benefits for competition resulting from vertical separation in railway transport in the European environment
- III. Other merits of vertical separation in rail transport in the European environment
- IV. Coordination of the production process and propensity to invest in specialized assets
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- VI. Conclusions

Abstract

The article is devoted to a phenomenon called vertical separation in the area of network industries. Vertical separation is understood as de-merging of infrastructure and delegating control over it to independent manager banned from operating on downstream markets which are subject to liberalisation. Arguments for and against these tendencies have been examined using the example of the European railway transport. The complete analysis presents vertical separation as a promising solution for the railway industry. One of the conditions for the success of this reform is forming of a close cooperative relationship, based on loyalty and trust, between the infrastructure manager and its clients – rail operators. Building such a relationship should be supported by the implemented regulatory policy.

Classifications and key words: network industries, public utilities, railway transport, economic regulation, liberalisation, vertical separation.

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I. Introduction

Contemporary economics considers the problem of vertical integration of economic activity to be an issue of great interest. Somewhat less attention has been so far paid to the “mirror reflection” of this problem – vertical disintegration. The latter issue is usually analyzed in the context of vertical specialization of production. However, vertical disintegration is also a particularly interesting area of the experiments of public authorities which undertake liberalization reforms in public utilities. Those that reform public utilities, eager to open them up to competition, can decide to de-merge infrastructure from a previously monopolistic incumbent and entrust it to an infrastructure manager banned from operating on downstream markets which are subject to liberalisation¹. Literature rarely calls this approach “vertical disintegration” using instead terms such as “vertical separation” (as used in this article), “unbundling”, “vertical divestiture” or “break-up”.

The term “experiment” has been used here on purpose. The view is often stressed in literature that in recent decades economic regulation has become less discretionary and more based on an economic analysis (at least in OECD countries). However, the first wave of vertical separation in network industries, taking place in the last decade of the 20th century², was based on activities of a discretionary and controversial character that prioritized positive results of liberalization above all else. At the same time, they lacked any in-depth analysis of the potential negative long-term effects of the reforms that took place in industries, which had been historically formed and, until then operating in a vertically-integrated manner.

This refers to EU countries as well. The basis of the reform of network industries in the EU can be summarized with the motto: “competition where possible, regulation where not”. When the introduction of competition is at stake, infrastructure de-merging and entrusting its management to a specially established company (vertical structural separation) seems to be a much better solution than its “liberalization alternative”. The latter solution is usually

¹ I.e. final consumer service markets.

² In some countries, it began several years earlier, in others, it ended a little later (e.g. in Poland). In Poland, vertical separation in infrastructure sectors has been implemented in the power industry – where the PSE Operator, a Transmission System Operator (TSO), was established within the structure of the PSE energy company as a functionally unbundled company – and in railway transport – where the infrastructure manager PKP Polskie Linie Kolejowe SA (lit. Polish Rail Lines) was structurally separated. The telecoms regulator has for the time being withdrawn from the already advanced plans of a functional separation of Telekomunikacja Polska SA (TP SA).

referred to in literature as mandatory or open access³. It consists of the provision to new market entrants of non-discriminatory access to infrastructure controlled by an (vertically-integrated) incumbent.

An incumbent that controls infrastructure can be tempted to refuse or limit granting access to new entrants (its rivals in downstream markets). However, the means of blocking access to service markets and strategic entry deterrence available to an incumbent are very limited if infrastructure management is entrusted to a separate entity, which has no incentive to discriminate since it does not compete in downstream markets. Separating infrastructure from an incumbent is thus meant to eliminate the risk of vertical market foreclosure by a former monopolist⁴. Many examples of such activities are still taking place. Thus, while solutions based on mandatory access are aimed at counteracting foreclosure and consist of enforcing of the granting of non-discriminatory access by the regulator, the object of vertical separation is to eliminate it altogether. It is this very feature that determines the attractiveness of vertical separation. However, its critics argue that vertical separation in infrastructure industries entails a severe interference in the traditional vertical structure of these industries (mandatory access does not have a structural character) resulting, in particular, in an increase in the costs of vertical coordination of the production process. Some commentators go as far as to accuse public authorities of doctrinalism and ignoring the shortcomings of this solution.

Railway transport constitutes an area of particular interest from the point of view of vertical separation of infrastructure industries. The eminent American economic historian A. D. Chandler claimed that railway companies – besides telegraph ones – were “the first modern business enterprises to appear in the United States”⁵. The railway sector was the first industry to see the appearance of a hierarchical managerial organization (low, medium and top level management). Railway transport, the emergence and development

³ Presenting the „liberalization alternative” in this manner – vertical disintegration of an incumbent v. no disintegration coupled with mandatory network access – is a simplification common in industrial economics, especially this based on a formal analysis. In the practice of individual industries, several degrees of vertical disintegration can be distinguished. The growing literature on this subject usually speaks of its four areas – separation of accounts that must accompany mandatory access, functional (called also operational) separation as well as structural separation right up to the separation of ownership.

⁴ The expression “vertical market foreclosure” is used in industrial economics to refer to a situation where a company operating in a competitive downstream market simultaneously operates in a closely connected monopolistic upstream market and denies (or hinders) access to an asset (e.g. infrastructure) supplied by this market which is a key production input in the downstream market. In this way the company expands its market power from the upstream market to the competitive downstream market.

⁵ A. D. Chandler, *The Visible Hand: The Managerial Revolution in American Business*, Cambridge 1977, p. 79.

of which largely conditioned the industrial revolution of the 19th century, was not accidentally the first industry to be subjected to modern sector-specific regulation (in the US – in 1887). It constituted an innovation not only in technological but also in organizational terms. Its structure was well thought out and refined over the decades. The separation of infrastructure from operational business may thus seem to be particularly controversial and precipitate action in the case of this industry.

Indeed, vertical separation has been repeatedly criticized by railway circles⁶. Still, the opinions remain divided both among industry representatives and researchers. The dominant view among scholars is that railway transport is a particularly difficult and unpromising area for vertical disintegration as compared to other network industries. This view is supported by such eminent researchers as J. A. Gómez-Ibáñez⁷ and R. Pittman⁸. Ch. Nash and C. Rivera-Trujillo⁹ stress that the “[s]eparation of infrastructure from operations has been argued to be an essential prerequisite for non discriminatory access, yet it raises important issues of transaction costs”, which remains an important research question.

Similarly, according to the authors of econometric analysis, the conclusions that can be drawn for economic policy implications of vertical separation are ambiguous. At the end of their interesting econometric research, Ch. Growitsch and H. Wetzel¹⁰ remark that: „[i]ndeed, economies of scope exist for a majority of integrated European railway companies. Future sector restructuring should be aware of that issue and avoid increasing transaction costs unnecessarily. On the other hand, not disentangling the railway sector further retains discriminatory incentives and complicates regulation. Policy makers should carefully outweigh positive and negative aspects of vertical integration in railways”.

⁶ See e.g. C. Pfund, “The separation of railway infrastructure and operations constitutes a fundamental mistake” (2003) 3 *Public Transport International*.

⁷ J. A. Gómez-Ibáñez, *Regulating Infrastructure. Monopoly, Contracts and Discretion*, Cambridge 2003, p. 338.

⁸ R. Pittman, *Structural Separation and Access Pricing in the Railways Sector: Sauce for the Goose Only?* (October 15, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=605621

⁹ Nash Ch., Rivera-Trujillo C., *Rail regulatory reform in Europe – principles and practice*, Paper presented at the Conference on Competition in the Rail Industry, Madrid, September 2004.

¹⁰ Growitsch C., Wetzel H., *Economies of Scope in European Railways: An Efficiency Analysis “University of Lüneburg Working Paper Series in Economics”*, No. 29, July 2006. p. 17–18.

II. Benefits for competition resulting from vertical separation in railway transport in the European environment

Ch. Nash and C. Riveira-Trujillo refer to the American example where vertically integrated railway undertakings operate on each other's infrastructure. In their opinion, this can indicate that non-discriminatory access can be achieved without complete separation. Although this view is not stated directly, it can be assumed that what they mean is to achieve this goal without excessive regulation, at a satisfactory cost and in reasonable time¹¹. Similar views were formulated by other scholars on the basis of American experiences¹².

The example of the US is undoubtedly of particular interest. It should be pointed out however that American railway companies make their infrastructure available to each other on a reciprocal basis. It is this very reciprocity that differentiates the American from the European railway sector – while the former is characterised by symmetry, the latter is plagued by asymmetry when it comes to the problem of who controls infrastructure. In Europe, railway tracks are run either by vertically-integrated incumbents or, as a result of vertical separation, by independent infrastructure managers. Literature on industrial organization often stresses that asymmetry resulting from a competitive edge proves not only the necessary condition but also an impulse for a company to implement strategic behavior elements¹³. In the example presented here, the competitive advantage enjoyed by an incumbent stems from exclusive control over the key input (i.e. infrastructure) for the provision of downstream services.

Unlike in Europe, the situation of American operators is also symmetric in that they present similar efficiency levels. By contrast, at least in the period following liberalization (in practice for much longer), incumbents could be expected to be less efficient than new entrants. Lower efficiency of incumbents can derive from a number of factors such as: overstaffing; unfavourably structured personnel; frequently de-capitalized and obsolete production assets; ineffective management structures; inexperience of the management as far as free market conditions are concerned; poor circulation of information within an entity of an unusually large size; disproportionate strength of labour unions;

¹¹ Assuming that costs and time flow are irrelevant, the problem of information asymmetry between a regulator and an infrastructure-controlling incumbent seems insignificant.

¹² See e.g. J. A. Gómez-Ibáñez, *Regulating Infrastructure...*, p. 339; R. Pittman, *Structural Separation...*, op. cit.

¹³ See e.g. D. W. Carlton, J. M. Perloff, *Modern Industrial Organization*, Boston 2005, p. 352. Strategic behaviour (more strictly: non-cooperative strategic behaviour) encompasses the actions of a firm trying to maximize its profits by improving its position relative to its rivals.

a de-motivating remuneration scheme; and a negligent approach towards the firm's property which can lead to theft or destruction.

Moreover, at the moment of liberalization, vertically integrated incumbents were usually burdened with the public service task of providing passenger transport. In Europe, public services were traditionally financed by cross-subsidization. In the case of the railway sector, it took the form of subsidizing passenger transport by freight services. Market liberalization should entail the abandonment of these practices but this is not common. Instead, new entrants are most active in the most lucrative segments of the market and thus, by "skimming the cream", achieve higher operational efficiency than incumbents. It is clear, that the latter will note the asymmetry of efficiency and profitability to their disadvantage. It is thus likely that an incumbent will be eager to reduce that asymmetry by taking advantage of its control over railway tracks. It can also be assumed that the fiercer the competitive pressure exerted on a vertically-integrated incumbent, the more inclined it will be to strategic behaviours, which will in turn translate into denials of fair access to infrastructure.

As early as 1917, T. Veblen noted that: „[a]ll business sagacity reduces itself in the last analysis to a judicious use of sabotage”¹⁴. Sabotage, nowadays often referred to as strategic behaviour, can in this example take such forms as:

- 1) explicit refusal to grant infrastructure access;
- 2) demanding excessive price for access;
- 3) discrimination in network capacity allocation;
- 4) necessity to meet additional requirements;
- 5) denial of access to additional services or facilities;
- 6) delaying access to infrastructure and limiting access to information;
- 7) offering a lower standard of access than agreed and mounting "artificial obstacles".

The range of tools for discrimination at the disposal of a vertically-integrated incumbent is thus very wide. "Opportunity makes a thief" writes A. Sulejewicz referring to a situation where the drive to maximize profits makes a company take advantage of all available business opportunities¹⁵. Sticking with the criminal rhetoric, a vertically-integrated incumbent has not only the motives but also all the necessary means to commit a crime. Clearly, this metaphor should not be taken literally. An incumbent can indeed use illegal tools for discrimination (e. g. excessive access prices) but it can also take advantage of loopholes or inconsistencies in its institutional arrangements (e.g. those

¹⁴ T. Veblen, *An Inquiry Into the Nature of Peace and the Terms of Its Perpetuation*, The Macmillan Company, 1917 p. 152.

¹⁵ A. Sulejewicz, *Partnerstwo strategiczne: modelowanie współpracy przedsiębiorstw*, Warszawa 1997, p. 117.

relating to network capacity allocation) which, theoretically at least, do not constitute a breach of existing provisions.

The asymmetry between vertically-integrated incumbents and other market players in relation to infrastructure control pushes incumbents to use discriminative measures in fulfilling their access obligations. Another form of asymmetry between an incumbent, its rivals (i.e. its clients in the upstream market) and a sector-specific regulator relates to information, which constitutes an additional incentive to discriminate for an incumbent. Information asymmetry is related to various aspects of granting infrastructure access and in particular, to access pricing and capacity allocation. Economic theory shows that information asymmetry can entail the danger of moral hazard, which is the case in the analyzed scenario. Such asymmetry may nevertheless be attenuated by a regulator, provided that appropriate resources (e.g. highly qualified personnel) are used for that purpose. This might prove to be a great problem in practice since regulatory authority is executed by governmental bodies that often suffer from the scarcity of resources (personnel and financial). Since railway transport is not a socially sensitive industry, such as telecoms or the energy sector, it can be difficult to persuade decision-makers to assign the necessary means to a railway regulator.

Despite the major importance of information asymmetry for an incumbent's motivation, it no longer plays a significant role in the case of several of the aforementioned categories of discrimination. One of those categories is the explicit refusal to grant infrastructure access, based on an incumbent's belief that such an action will prove profitable, or from loopholes and inconsistencies in regulatory provisions. The latter can occur, for instance, when law-makers fail to introduce a legal obligation to grant access to a specific infrastructure element (e.g. sidings in Poland). Referring once again to the famous opinion of T. Veblen, it can be assumed that refusal to grant access can be embraced by an incumbent as a judicious action providing that the relevant sectorial regulator remains passive in this respect or is unable to implement the necessary regulatory decisions or impose sanctions.

The passiveness of a regulator may result from a scarcity of the tools and resources at his disposal or even from an unwillingness to act. This can in turn be associated with internal reasons – with a close relationship between a regulatory office and an incumbent in particular. Such links are inevitable in industries which used to be monopolised – otherwise regulatory offices could not employ any personnel with notable industry experience. Lack of commitment on the side of a regulator can also be caused by external reasons such as political support enjoyed by an incumbent. Major state-owned companies (e.g. integrated railroad enterprises) enjoy a very strong position because of their large workforce, usually organized in strong labor unions,

their “social mission” and often a management structure closely related to the political sphere. Moreover, state authorities are usually responsible for the direct supervision of incumbents seeing as their treasuries generally remain as their primary shareholder. Regulated industries can thus struggle with a conflict between their regulatory and proprietary functions. In such cases, a regulator might be under pressure to turn a blind eye to some of the activities of an incumbent.

Railroad transport is no exception. In fact, a wider problem is addressed here of the will to act not only on the side of a sector-specific regulator but also of any given government that can hamper any reforms started by its predecessors. Additionally, already privileged state-owned incumbents frequently enjoy an informal (no legal basis) status of a “national operator”. To illustrate, in Poland, official governmental documents use this term when referring to all train-operating companies of the incumbent “Polish State Railways” even though it was not introduced by existing legal provisions¹⁶. This is all the more important because EU reforms of railway transport involve the opening up of national markets to foreign competition. As can be expected in such a situation, arguments are voiced in some EU countries for the strengthening of the competitive potential of “national operators”, granting them protection periods before the introduction of foreign competitors or even in favor of the creation of “European champions”. In this climate, it seems easier to gain political consent for the discrimination of some of the participants of national railway markets especially when their stockholders are foreign.

Thus the issue of a strategic use of political and legislative processes for one’s own purpose becomes evident. This issue has long since been raised in economic literature but not necessarily in relation to state-owned firms only. Among authors concerned with this problem are J. A. Ordover and G. Saloner, the latter calling such actions “perhaps one of the most efficient methods for disadvantaging existing and prospective competitors that is available to an incumbent firm”¹⁷. However, this problem seems to be particularly severe in the case of a state-owned incumbent operating in a regulated industry. It highlights the issue of a regulator’s autonomy from the sector it regulates, from other bodies of state authority and from other participants of the political process. Although autonomy does not guarantee a regulator’s commitment, it remains a necessary condition for a regulator to demonstrate his willingness to act.

¹⁶ See *Strategy for railroad transport till 2013* adopted by the Ministry of Transport in April 2007, p. 23, 31 and others.

¹⁷ J. A. Ordover, G. Saloner, “Predation, Monopolization and Antitrust” [in:] Schmalensee R., Willig R.D. (eds.), *Handbook of Industrial Organization*, vol. 1, Amsterdam 1989, p. 573.

A number of criteria must be met for a regulator to be able to challenge a vertically-integrated incumbent that remains determined to prevent new entrants from accessing its infrastructure. Regulators must be equipped with sufficient resources, regulatory tools and the will to act. According to the authors of a report on structural reforms in the rail industry in the OECD countries [2005]: „[a] well-resourced regulator, through persistence and vigilance, could hope to limit the anti-competitive activity of the incumbent, but the outcome is unlikely to be as much competition as would arise in the absence of the incentive to restrict competition. Potential entrants, fearing the effects of discrimination, despite the best efforts of the regulator, may hesitate to invest in new capacity”. This is often the case, since the risk of incurring the costs of obtaining infrastructure access can be excessive in the perception of potential market entrants. This problem concerns primarily transaction costs associated with the formulation and enforcement of contracts (e.g. negotiations with the incumbent, legal costs, costs associated with running and governing the contract or possible court costs). It also relates to the costs of blocking financial resources in the means of production as well as alternative costs of investment in other industries or investment in financial markets. Even the most committed regulator cannot eliminate the risk of bearing those costs by new entrants – all a regulator can hope to do is to limit them.

It should be stressed however, that it is not only vertical foreclosure that contributes to the weakening of competition in downstream markets but also the beliefs of individual investors as to the risk of it actually occurring. Investments in rolling stock are highly capital-intensive and attributed to highly specialized assets due to, among other things, limited interoperability of railway networks in Europe. A high level of asset specificity tends to entail higher risk aversion among investors. The success of the liberalization process of railway transport might very well depend on enticing investors, seeing as its essence is to enhance competition. Vertical separation can in this sense constitute a clear sign that the authorities are truly committed to liberalization. Entrusting infrastructure to an independent manager eliminates the risk of vertical foreclosure and creates the necessary conditions for optimal exploitation of traffic capacity. The “incumbent v. rival” relationship is thus replaced by the “infrastructure manager v. client” link. This facilitates co-operation which is particularly important in industries where coordination plays a major role. This issue will be addressed further on.

However, vertical separation is not a remedy for opportunistic behavior of an infrastructure manager especially in relation to access pricing. Information asymmetry in this field still remains (even if it is reduced by more transparent cost allocation) and there is still only one provider in the upstream market, a fact that can induce it to use its market power. The infrastructure manager

must therefore remain subject to regulatory supervision. However, freed from the duty to focus on incumbents, the regulator can redirect its efforts towards the supervision of infrastructure access pricing and on raising the cost efficiency of the infrastructure manager. The latter issue remains of utmost importance to the market considering the relatively high share of monopolistic infrastructure costs in the overall costs of railway transport.

III. Other merits of vertical separation in rail transport in the European environment

Benefits for competition that result from vertical separation in rail transport are paralleled by profits of another type. Separation is therefore expected to help achieve full economies of scale from infrastructure management. An independent manager that does not have anti-competitive motivations resulting from vertical integration can maximize its service provision potential. Literature frequently notes that an infrastructure manager and an incumbent operating on downstream markets can both benefit from separation-related specialization¹⁸. The fact that an infrastructure manager can focus on the task of granting access, in addition to its motivation to create a partnership in its relationship with its carrier-clients, makes it possible to better adapt the upstream offer to the needs of those acting downstream, a fact that can in turn lead to mutual benefits. In view of the European Rail Infrastructure Managers (EIM) concentration on infrastructure activities leads to economies¹⁹.

Nevertheless, extra specialization benefits can also consist of the fact that that the structural reform also allows for a horizontal division of the incumbent into separate companies operating in various segments of rail transport. This provides for a de-merger of not only the companies responsible for public service provision (passenger transportation) but also of a freight service operator. The latter would then be able to follow what it believes to be the optimal path of development (evolving towards e.g. Rail Logistics Operator) and, while adapting its offer to the expectations of its clients, enhance its competitiveness. A de-merger also makes it possible to evolve further through mergers and acquisitions within the transportation and logistics sector. The commonness of the division of incumbents into carriers in Europe makes it possible to suggest that specialization-related benefits dominate horizontal

¹⁸ See e.g. *Structural reform in the rail industry*, DAF/COMP(2005)46, (OECD 2005).

¹⁹ J. Evans, *The case for separation of infrastructure*, EIM 2002, p. 2; available at: http://www.eimrail.org/pdf/polipapers/The_case_for_Separation__EIM_point_of_view.pdf.

economies of scope associated with the simultaneous provision of passenger and freight services.

Alongside the above analyzed benefits to competition, making it possible to privatise the incumbent seems to be the key advantage of vertical separation. Such an option also exists, at least theoretically, in the case of a vertically-integrated railway company. In practice however, since the financing of the development of infrastructure is commonly perceived as a task associated with a modern state, privatization of infrastructure is regarded in Europe (and elsewhere) as a controversial solution (except for telecoms). This is particularly so in relation to railway infrastructure since its development and maintenance is especially capital-intensive. Both investors and public authorities are additionally discouraged by the unsuccessful experiences of the UK. As a result, no European country is currently planning to privatize their railway infrastructure and it is unlikely that this approach will change in the near future. Unlike vertical separation, the privatization of an already de-merged incumbent is not controversial, usually after its division into at least two companies operating respectively in the passenger and freight segments of the downstream market. First, privatization eradicates the danger of conflict between the proprietary and regulatory functions of public authority. Second, it creates a chance for an incumbent to obtain the financial resources needed for modernization. Finally, in the case of privatization by a strategic investor, an incumbent can benefit from a new organizational culture and managerial know-how.

Thus a unique opportunity related to the vertical disintegration of a large railway company of building a new organizational culture and management structure of independent companies formed as a result of this process. This chance is of utmost importance for this sector. It creates the possibility of dismantling the fossilized structures of rail bureaucracy following an administrative or technical, rather than commercial, business model and having difficulties adapting to changing market realities. Moreover, the last few decades of continuing and deepening crisis have greatly affected rail transport which has, as a result, largely abandoned its traditional mission-oriented organizational culture. Instead, focus was placed on the maximization of internal benefits such as the privileges associated with “uniformed services” including: early retirement, their own health service, job security and free travel for employees and their families. In a number of European countries, the chance of introducing a new organizational culture seems to prevail over other benefits associated with vertical separation of rail transport. However, this task faces many challenges including opposition of the managerial staff and labour unions as well as the need to introduce an effective motivation scheme for passive or even demoralized personnel. Still, the break-up makes

it impossible to postpone restructuralisation, enforcing a decision which could never be taken otherwise for political reasons or because of the passiveness of the managerial sphere.

The benefits of vertical separation are thus not exclusive to new market participants and regulators. An incumbent can directly benefit from privatization, specialization, precipitation of restructuralisation and a new organizational culture. Shedding responsibility for infrastructure constitutes another advantage of vertical separation beneficial especially from the point of view of an incumbent's managerial board. This issue can prove to be of particular importance when public authorities fail to carry out their responsibilities in relation to the financing of infrastructure and a regulator prevents the raising of access charges for its use. A given incumbent may prefer to be in a situation where it is no longer in charge of infrastructure, especially if its regulator is proactive in its actions. This factor is particularly relevant in the initial phase of liberalization when the commitment of a regulator does not necessarily parallel his experience and especially when a regulator is authorized to apply such controversial regulatory measures as e.g. assisted entry.

According to the report on the restructuralisation of railway transport in OECD countries, even if some argue that vertical separation enhances costs transparency and the appropriate allocation of government subsidies to the development of rail transport, these benefits can be attributed primarily to the separation of accounts rather than to structural shifts²⁰. However, in spite of the use of separate accounts, a vertically-integrated incumbent may still be inclined to inappropriately allocate costs between its infrastructure and transport business enabling it to allocate subsidies in a manner inconsistent with the intentions of public authorities. Structural separation can therefore be said to contribute to the creation of a transparent system of subsidization of rail infrastructure and public services.

Another key benefit of vertical separation can be associated with the fact that it creates a unique, not excessively burdensome, regulatory regime for all market participants²¹. On this basis, it is possible to adopt a precise and qualifications-compatible division of supervisory tasks between the antitrust authority and the sector-specific regulator whereby the former can assume responsibility for the monitoring of competition in downstream markets. An antitrust authority may prove more efficient in this area than a sectorial regulator seeing as it has at its disposal the necessary tools, experience and personnel qualified to deal with anti-competitive market behavior.

²⁰ *Structural reform in the rail industry*, DAF/COMP(2005)46, (OECD 2005), p. 61.

²¹ Such a regime would encompass, among other things, a duty to meet the requirements necessary to obtain a licence and technical certificates as well as an obligation of regulatory reporting.

A regulator, equipped with sectorial expertise, may thus attribute most of his resources to the supervision of infrastructure management and to the creation of procedures meant to improve the functioning of railway markets. A clear division of competence does by no means preclude the possibility of cooperation between the two authorities – quite the opposite in fact – it may contribute to its enhancement.

Moreover, the submission of all downstream market players to a unique regulatory regime and the elimination of infrastructure-control-related asymmetry can in the long term strengthen cooperation between operators. This factor might prove crucial, because due to the competitive pressure exercised by haulage companies, rail transport has not only the potential for competition but also for close cooperation. Thus, even though vertical separation remains a predominantly pro-competition measure, it can also create favourable conditions for cooperation in downstream markets.

IV. Coordination of the production process and propensity to invest in specialized assets

The “loss of coordinated action benefit” has long since been identified as a potential effect of introducing competition in network industries. To illustrate, D. W. Carlton and J. M. Klammer wrote in 1983 that in the case of the introduction of competition „the special need for coordinated action in network industries must be recognized”²². Does vertical separation aggravate the loss of benefit of coordinated action in comparison to mandatory access? Any attempt to answer it should, as it seems, take two factors into account, that is, the coordination of capacity utilization and investment decisions, which are in turn linked to the problem of the propensity to invest in specialized assets.

At first glance, the issue of allocation seems neutral from the point of view of the choice between mandatory access and vertical separation. Either way, EU legislation requires that allocation is made in a manner independent from operators – by an independent allocating body or by an independent infrastructure manager. Still, unlike an allocating body which has no influence over the incumbent’s investment process, an infrastructure manager can improve long-term capacity allocation by appropriately shaping its investments. The knowledge of recurring problem areas can allow an infrastructure manager to reduce or eliminate the risk of bottlenecks and direct its investments towards

²² D. W. Carlton, J. M. Klammer, “The Need for Coordination Among Firms, with Special Reference to Network Industries” (1983) 50 *University of Chicago Law Review*.

an increase of capacity on the busiest sections of the rail tracks. This factor must be stressed as extremely important.

Economic literature often presents the integration of subsequent stages of the production process within a single company as a tool of minimizing the risk of opportunistic behaviour of co-operators through the attempts to renegotiate contracts over their duration. The more specialized the assets used as inputs in the production process, the higher the risk associated with such behaviour. O. E. Williamson even considers the specificity of assets to be a crucial issue for vertical integration²³. Both infrastructure and rolling stock are highly specialized assets and what's more, the possibility of using the latter is strictly dependent on the existence, physical characteristics and access to the former. This is the basis of the frequently articulated fear that separating infrastructure from an incumbent could negatively influence its propensity to invest in rolling stock.

However, the likelihood of this effect occurring in EU rail transport is minimized by the parallel existence of three factors:

- the infrastructure market is subjected to economic regulation;
- compatibility of infrastructure and rolling stock is regulated by strict technical standards;
- responsibility for basic infrastructure lies with its owner – in this case, the state.

Regulating the infrastructure market contributes to the reduction of the risk that an operator (also incumbent) that has invested in highly-specialized production assets – rolling stock in particular but also infrastructure such as freight terminals – will be exposed to attempts to renegotiate the economic terms of their contract (price in particular) relating to a key input or even of being issued a notice of termination (access denial). The risk of an infrastructure owner discretionally modifying its key physical features, making it impossible for an operator to use specialized assets that it has acquired, is eliminated by the existence of specific technical standards. Finally, the fact that the state is responsible for the infrastructure minimizes the risk of its manager being engaged in activities that could result in an irrevocable depletion of its reserves. To illustrate, an infrastructure manager would not be allowed to eliminate a chosen element of its infrastructure, vital to operators, just because it is located on an expensive plot of land which the manager wishes to sell. Since proprietary supervision is exercised by the state, it is justifiable to expect that such operations will be blocked in the public interest. On the same basis, it is likely that public authorities will be quicker to intervene if the regulation or management of the infrastructure market is not performed appropriately.

²³ O. E. Williamson, *The Economic Institutions of Capitalism. Firms, markets, relational contracting*, Free Press 1985.

It could be reasonably argued therefore, that the risk of an incumbent reducing its investments in specialized assets as a result of vertical separation will be reduced by the simultaneous occurrence of the three aforementioned factors. At the same time, in the case of new entrants, vertical separation minimizes the risk of such investments by eliminating the possibility of strategic foreclosure of the downstream market by an incumbent. It can be thus assumed that vertical separation in rail transport in Europe helps maintain a low level of investment risk in specialized assets for downstream market competitors.

Vertical separation should not have a negative impact on investment decisions concerning the development, modernization and maintenance of railway infrastructure, which is public property and infrastructure investments are only partially financed from access fees. A decision taken by public authorities to de-merge an incumbent is taken on the basis of the belief that it is right to do so. It should therefore not lower the propensity to invest in infrastructure. Since structural separation favours the creation of a transparent infrastructure subsidizing system, it can positively influence the investment process in this field. In practice however, states often delegate decisions to infrastructure managers. Thus it is essential for them to know of their state's participation in the financing of infrastructure *ex ante* (i.e. before fixing access charges for a given schedule). State financing should not be exposed to excessive yearly fluctuations and public authorities must fulfil their obligations in this field. Otherwise, an infrastructure manager might find the risk of investment into network development and modernization too high to bear. These postulates are also valid for the financing of infrastructure owned by a vertically-integrated incumbent²⁴.

It seems therefore that it is not so much the issue of propensity to invest but rather that of vertical coordination of investments between a manager and carriers that constitutes an area of potential problem associated with infrastructure de-merging in rail transport in Europe. Still, the very introduction of competition, irrespective of the nature of the access-granting measures, results in a need to horizontally coordinate investment decisions because different infrastructure users may present different demands as to the directions of its evolution. From this point of view, vertical separation seems far more preferable to mandatory access. While an integrated rail company is obliged to grant access to infrastructure to its rivals, it does not have to take their postulates into account as far as the infrastructure's future shape is concerned. Indeed, an incumbent would not account for the preferences of its rivals as it has no reasons to help its competitors. On the other hand, an independent manager, one that is neutral towards carriers and whose mission

²⁴ While the reduction of investment propensity may, for a change, constitute a problem in the case of a separated private infrastructure, this issue goes beyond the scope of this article.

is to grant infrastructure access, is likely to try to adjust its offer to the needs of its customers. In order to do so, an infrastructure manager will consult its decisions on the expansion and modernization of the network with railway operators and will spare no effort to take account of their postulates²⁵.

The problem of vertical coordination has two substantial dimensions. The first one is related exclusively to the incumbent and involves the breakage of established coordination channels. The second one involves the risk of an infrastructure manager maximizing its own utility at the cost of operators and of being cut off from vital information from the downstream market. Both dimensions can affect all downstream markets participants.

Breaking existing coordination channels of a vertically-integrated incumbent does not concern new market entrants since it does not generate any costs for them. Instead, they can expect that coordination with the participation of a neutral infrastructure manager will be more beneficial to them. For new entrants the “incumbent-rival” relationship is replaced by the “infrastructure manager-client” relationship, which favors the development of cooperation links that are particularly important in the case of a coordination process, including the coordination of investments. New cooperation links in the “infrastructure manager-client” relationship refer also to the incumbent. However, their development takes time and from the point of view of an incumbent, which possessed such links in the past, the necessity to wait for new links to form can constitute a negative effect of vertical separation.

What seems crucial at this point is the assessment of the quality of an incumbent’s old coordination channels. The result of an effective coordination of investment decisions relating to infrastructure and transport operations is the possibility of adjusting the offer to the changes of the requirements of final customers. It should be noted however, that state-owned monopolies enjoyed considerable freedom as to their decisions on the number and type of railway services provided. Being indifferent to the preferences of end users, they were unable to react to changes in demand making it one of the causes of the railway crisis mounting since the 1960s. Paradoxically, the lack of reaction to shifts in demand led to a situation where coordination channels between the monopoly’s subsidiaries were not developing. Coordination was replaced by central planning of investment decisions in both subsidiaries (infrastructure and operations) made by the management of the company.

Market liberalization induces former monopolists (current incumbents) to adjust their offer to the needs of end users – the creation of effective investment coordination channels is necessary to this end. If vertical separation

²⁵ The question of whether these postulates can be contradictory constitutes a separate issue. However, if the incumbent is the infrastructure owner, it will probably tend to resolve conflicts from a position of strength.

is implemented during the initial phase of the liberalization process, the cost of dismantling old vertical coordination channels is relatively low since they are generally of poor quality. This cost may be higher when vertical separation is carried out during a later phase of the reform. Similarly to a vertically-integrated railway company before liberalization, an independent infrastructure manager is also a state monopoly. It can be nevertheless expected that it will be much more likely to take account of its clients' wishes seeing as they form a relatively small group of railroad operators rather than a large group of end-users.

The creation of new cooperation links between an infrastructure manager and its clients is an exceptionally interesting problem. Literature often emphasizes that vertical integration of previously independent entities decreases the "power" of incentives because managers feel less responsible for the results of their actions²⁶. From this point of view, vertical separation strengthens the management's responsibility for the effect of the production process. However, this positive at first glance phenomenon can give unexpected results in industries for which vertical coordination is essential. In network industries, it can prevent the monopolistic infrastructure manager from encompassing the entirety of the production process and make it focus on the maximization of its own utility. That problem manifested itself in the UK where the executives of Railtrack (the infrastructure manager) missed the fact that the company's long-term interest was closely linked with the development of downstream markets. Stagecoach (one of the downstream market players) made an interesting observation in this context suggesting that this phenomena resulted, among other things, from the lack of a cooperative culture accompanied by fragmentation of the industry into a matrix of contractual relationships²⁷.

According to C. Pfund, the manager's independence from operators leads to a conflict "in a natural way". He summarizes the effects of such actions in Europe as follows: "[t]he infrastructure units were declared as independent and this independence was clearly demonstrated. Cooperation was replaced by confrontation"²⁸. His opinion is worth noting even though he does not seem to consider the new entrants' point of view or the fact that, for an incumbent, the very refusal of treating the "national operator" in a privileged manner may constitute proof of a confrontational attitude of an infrastructure manager. Confrontation and conflict are clearly not "the reverse" of cooperation, which is the lack of the latter. However, in an industry where the coordination of

²⁶ See e. g. H. Cremer, J. Cremer, P. De Donder, "Costs and Benefits of Vertical Divestiture" (2008) 68 *Communications & Strategies*.

²⁷ *A Platform of change. The Potential of Vertical Integration on Britain's Railways. A discussion paper*, Stagecoach Group plc, November 2001, p. 8.

²⁸ C. Pfund, "The separation....", op. cit.

production efforts is a key issue, the lack of cooperation can particularly swiftly lead to a conflict as various market players blame each other for interrupting its harmony.

For this reason, the coordination of the investment process between a manager and operators proves of utmost importance. Infrastructure managers should know that operators possess the best knowledge of end-user preferences. The maximization of railway transport services utility for end-users conditions the long-term interest of all those involved in their provision. Thus, the investment decisions of a manager should take into account the needs, preferences and postulates of infrastructure users and fulfil its obligations as to the condition of the infrastructure. The risk of an independent manager being cut off from reliable information, relevant to the shape of the offer on downstream markets, is a potential problem related to the implementation of vertical separation in railway transport. The aforementioned possibility of an infrastructure manager maximizing its own utility at the cost of operators, constitutes an additional risk factor. Both risks may be substantially reduced by the creation of cooperation links based on trust and loyalty between a manager and its clients.

At this stage, a regulator is faced by an important task – he should aspire to the role of an entity that facilitates and, when needed, enforces cooperation between firms. If possible, he should restrain himself from any direct intervention into the complex process of service provision by railway transport. Instead, a regulator should serve as a readily available conflict solving platform for all market players and promote the development of cooperation links within the sector. This requires a regulator to strengthen his authority and make sure that his “legitimization for regulation” is not solely based on the provisions calling him to life. Finally, a regulator should be aware of the fact that yielding to the temptation of regulating coordination in a discretionary manner can disrupt the functioning of the railway market.

A separate issue refers to the decision-making process in the context of investments that require a modification of the technical standards regulating the compatibility of rolling stock and infrastructure. In theory, technological progress may necessitate the introduction of innovations affecting the “rolling stock v. infrastructure” interface. In practice however, the introduction of technological innovations in railway transport translates into enhancements of the quality of infrastructure and rolling stock without modifying the wheel-rail set parameters because its change would inevitably make the new infrastructure incompatible with the old one. As a result, the transportation process with the necessity of transfers, trans-shipments and the utilization of different rolling stock would be disrupted.

In contrast, it is relatively difficult to assess the influence of vertical separation on non-coordination-related transaction costs of an incumbent,

which result from disclosing its relationship with an infrastructure manager, that is, the costs of the access contract. These costs may be divided into running costs (e.g. costs of negotiating) and governance costs. However, according to the EU model, access contracts with individual operators should not be subject to negotiations²⁹ since non-discriminatory access entails the same conditions for all downstream market players. However, collective negotiations are not precluded – they can be conducted on behalf of the operators by their economic chamber. It is nonetheless still up to the regulator to ensure that those conditions are equally favourable, rather than equally unfavourable, for all. Supervision of access contracts lies within the competence of a regulator and it should be exercised in cooperation with the parties concerned. If a regulator proves incompetent, transaction costs can be expected to rise as a result of transactions being externalized. That refers also to the costs of the execution of contracts.

V. Wheel-rail junction problem

One of the issues frequently raised in literature is a problem that H. Cremer, J. Cremer and P. De Donder³⁰ present as follows: “The wheels of railroad wagons and locomotives work best when they are round. However, as a wagon is operating, the wear and tear on the wheels is not symmetric and they become more irregular. This has negative consequences for the infrastructure: the wear-and-tear on the tracks is increased as is the risk of accidents. Of course, this implies that the suppliers of services create externalities towards the manager of the infrastructure; we would expect that integration would make them take into account these externalities in their choice of maintenance strategy”. It is worth noting for the sake of the argument, that the aforementioned externalities refer not only to an infrastructure manager but to other operators as well through a higher accident risk and the effects of the degradation of railway tracks on the condition of their rolling stock.

This is a very important issue from an economic point of view since it centres on moral hazard resulting from information asymmetry. It is tempting for operators to abuse this asymmetry by failing to meet technical standards regulating the wheel-rail set parameters. However, this problem should be considered from a broader context. The use of rolling stock has a negative

²⁹ More precisely, they are not subject to negotiations in some of their key elements. For instance, in Poland an operator can negotiate with the PKP PLK SA infrastructure manager practically only the method of settling mutual delays (a non-obligatory element).

³⁰ H. Cremer, J. Cremer, P. De Donder, “Costs and Benefits...”, *op. cit.*

impact on the condition of railway infrastructure – rolling stock must thus be maintained and renovated. Precise regulations exist limiting the scale of this impact by setting maximum axle loads, maximum velocity on different categories of track sections, and technical standards regarding the condition of wheel sets.

An operator that does not own infrastructure which it uses is tempted to run trains at a higher-than-permitted speed, overload carriages and fail to observe the maximum permitted life-span of wheel sets, which results in their deformation contributing to the deterioration of railway tracks. Vertical separation may induce the incumbent to such practices while it will remain a neutral element for new entrants (in the case of mandatory access they also use someone else's railway tracks). This risk can be limited by, besides supporting a higher level of loyalty within the industry, sanctioning such practices and by reducing the asymmetry that handicaps an infrastructure manager. It needs to be stressed, that such practices are widespread in road transportation where carriers do not also own the infrastructure they use (overloading trailer units is the key problem). In Poland, the Road Transport Inspection was established and equipped with sanctioning tools to reduce information asymmetry.

In railway transport, sanctions can consist of fines and, in particular cases, of the refusal to admit the rolling stock onto the tracks. Nevertheless, central to this issue is the question of who identifies the offences. If it were to be up to an infrastructure manager to declare that an offence took place, an operator could defend its action by trying to shift the blame onto that very manager – an operator could claim that the manager tried to obtain extra profits by taking advantage of its privileged position of a judge of matters which directly concern its own operations³¹. For that reason, it might be advisable to advocate that decisions on potential offences brought forwards by an infrastructure manager should be taken by public bodies responsible for rail-traffic safety. Reducing information asymmetry necessitates appropriate financial outlays from the latter even though those would equally have to be made by any integrated infrastructure owner if new entrants were granted mandatory access to its network.

Moreover, after a more in-depth analysis of the industry's needs, it is possible to conclude that information asymmetry might not be the most important problem in this field. The need for regular check-ups of the condition of rolling stock as well as the necessity to monitor their weight has always existed in this industry. It even led to the creation of a specific profession of "car inspectors" that continue to be employed by railway companies. Their task is

³¹ The risk of an infrastructure owner acting accordingly may be even higher when the infrastructure is integrated, rather than disintegrated, because this is when the problem of the guilt comes into question.

to verify “on the spot” whether a car is fit for operation. In the case of vertical separation, it is essential for inspectors to act on behalf of infrastructure managers. Furthermore, the use of diagnostic track systems for rolling stock makes it possible to control the impact of the condition of the carriages on infrastructure and enhance traffic safety. Intensifying the use of diagnostic tracks is associated with technological progress; it is noticeable both in relation to integrated, as well as independent infrastructure managers. Vertical separation might be able to induce infrastructure managers to introduce such facilities more widely.

VI. Conclusions

Vertical separation is a radical regulatory solution used to ensure access to upstream markets in network industries. Its wide utilization in the framework of the EU liberalization process can be traced back to the emphasis attached by EU law-makers on stopping incumbents from discriminating against new downstream market entrants. It can be expected that the scale and nature of the potential costs and benefits of vertical separation will vary between particular network industries. As shown in this analysis, vertical separation can prove a promising solution for railway transport in Europe.

It is not by accident that the term “potential” has been used here. In the opinion of the author, it is still too early for an *ex post* analysis of the pros and cons of vertical separation in the railway sector. The liberalization of EU railway markets is still not very advanced. In fact, it is still only in its initial phase in the case of passenger transport. Seeing as vertical separation is a very pro-competitive regulatory solution, its *ex post* assessment must wait. Thus the current phase could be referred to as an “experience gathering stage”.

This article has emphasised the role of the creation of a close cooperative relationship, based on trust and loyalty, between an infrastructure manager and its clients. The list of incentives that induce loyalty includes³²:

- long-lasting character of the relationship,
- refraining from opportunism,
- reciprocity of rewards and penalties,
- existence of an institution that enforces cooperation e.g. state-imposed regulation, authority of one of the partners,
- clear and prompt communication between the partners regarding policy changes,

³² A. Sulejewicz, *Partnerstwo strategiczne...*, p. 116–117.

- reporting involvement: as to among others bearing sunk costs,
- complete cooperation contract.

The appearance of some of these factors can be expected to occur naturally, such as, for instance, the long-lasting nature of the relationship between an infrastructure manager and its clients. Others, such as refraining from opportunism or clear and prompt communication between parties, will be facilitated by an increase in the awareness of the long-term economic interest of managers at both levels (infrastructure and operations).

The development of some incentives can be supported by regulatory policy. A complete cooperation contract is (even under the constraint of opportunism) difficult to formulate *ex ante*, even more so if market relations are something new to one or both parties. A regulator should therefore supervise the evolution of contracts rather than impose his own solutions. The authority must consider itself to be as a “third party” in the already complex contractual relationship between a manager and a carrier. As such, a regulator is charged with the task of facilitating that relationship rather than hindering it. The authority’s unique role is to ensure that the frames of the contract are strictly in line with the institutional frames of the newly created infrastructure market. The reciprocity of rewards and penalties can be enhanced by contractual provisions such as “performance schemes”, which are already in use in the European railway sector. Promoting and designing these kinds of tools in close cooperation with market participants, remains an important task of a regulator.

A general postulate regarding the role of a regulator in the coordination of the provision of railway services is that the authority should not become excessively involved. The actions of a regulator should be limited to promoting the development of tools serving its enhancement (e.g. reservation charges or congestion pricing). He can also favour development of cooperation links within the industry, becoming a platform for mediation, and consultation between market participants. This, however, requires a regulator to consciously build up the level of his authority.

Literature

A Platform of change. The Potential of Vertical Integration on Britain’s Railways. A discussion paper, Stagecoach Group plc, November 2001.

Carlton D. W., Klammer J. M., “The Need for Coordination Among Firms, with Special Reference to Network Industries” (1983) 50 *University of Chicago Law Review*.

Carlton D. W., Perloff J. M., *Modern Industrial Organization*, Boston 2005.

Chandler A. D., *The Visible Hand: The Managerial Revolution in American Business*, Cambridge 1977.

- Cremer H., Cremer J., De Donder P., "Costs and Benefits of Vertical Divestiture" (2008) 68 *Communications & Strategies*.
- Evans J., *The case for separation of infrastructure*, EIM 2002 available at: http://www.eimrail.org/pdf/polipapers/The_case_for_Separation__EIM_point_of_view.pdf
- Gómez-Ibáñez J. A., *Regulating Infrastructure. Monopoly, Contracts and Discretion*, Cambridge 2003.
- Nash Ch., Rivera-Trujillo C., *Rail regulatory reform in Europe – principles and practice*. Paper presented at the Conference on Competition in the rail industry, Madrid, September 2004.
- Ordover J. A., Saloner G., "Predation, Monopolization and Antitrust" [in:] Schmalensee R., Willig R.D. (eds.), *Handbook of Industrial Organization*, vol. 1, Amsterdam 1989.
- Pfund C., "The separation of railway infrastructure and operations constitutes a fundamental mistake" (2003) 3 *Public Transport International*.
- Pittman R., *Structural Separation and Access Pricing in the Railways Sector: Sauce for the Goose Only?* (October 15, 2004), available at SSRN (Social Science Research Network)
- Structural reform in the rail industry*, DAF/COMP(2005)46, (OECD 2005).
- Sulejewicz A., *Partnerstwo strategiczne: modelowanie współpracy przedsiębiorstw [Strategic Partnership: Modelling of the Co-operation of Undertakings]*, Warszawa 1997.
- Veblen T., *An Inquiry Into the Nature of Peace and the Terms of Its Perpetuation*, The Macmillan Company, 1917.
- Growitsch C., Wetzel H., Economies of Scope in European Railways: An Efficiency Analysis, "University of Lüneburg Working Paper Series in Economics", No. 29, July 2006. http://opus.uni-lueneburg.de/opus/volltexte/2006/387/pdf/wp_29_Upload.pdf
- Williamson O. E., *The Economic Institutions of Capitalism. Firms, markets, relational contracting*, Free Press 1985.

LEGISLATION REVIEWS

2008 Antitrust Law Developments in Poland

by

Marek Stefaniuk

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I. Introductory Notes

Antitrust law, similarly to other disciplines of administrative law, concerns three interrelated aspects of legal regulation: substantive law, procedural law and legal provisions regulating the status of relevant bodies of public administration. In 2008, the Polish antitrust field was subject to legal amendments relating to the status of public administration bodies responsible for competition and consumer protection governed by the Act of 16 February 2007 on Competition and Consumer Protection¹ and other specific legal acts.

The status changes affecting the competition and consumer protection field should be considered in the broader context of the: *Resolution and Approach of the Cabinet No 13 of 22 January 2008 on the Completion of the Public*

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¹ Journal of Laws No. 50, item 331.

Administration Reform and related Workflow Procedures implemented in 2008. The improvement of co-ordination between political and central governmental bodies of public administration was identified by the Cabinet as one of the targets of this reform. In order to achieve it, some public administration bodies were consolidated. That was the case with the Trade Inspection („Inspection”), acting in its capacity as an competent control body for the protection of consumer rights and interests as well as the economic interests of the State, and the President of the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumenta*: UOKiK), acting in its capacity as a Polish competition and consumer protection body. As a result, the central body of governmental administration, the Chief Inspector of the Trade Inspection, and its central office, the Chief Inspectorate of the Trade Inspection Office were abolished. A short description on the key legal developments relating to this consolidation process is presented below.

2. Legal developments concerning the Status of the UOKiK President and the UOKiK

2.1. Introductory remarks

According to Article 29(1) of the Competition and Consumer Protection Act, the UOKiK President is the central body of governmental administration competent in the matters of competition and consumer protection. In conformity with Article 29(6) of this Act, the UOKiK supports the UOKiK President in his actions. According to the Competition and Consumer Protection Act of 2007, and not unlike the former Act of 15 December 2000², the Trade Inspection constituted a subordinate body to the UOKiK President. The Chief Inspector, also a central body of governmental administration, was the head of the Trade Inspection. However, this organizational structure proved to be inefficient – it negatively affected the effectiveness of the UOKiK President and of the Trade Inspection (subordinated to him). The shifts of 2008 were meant to flatten the organizational structures of governmental administration in this field through the removal of the redundant body of Chief Inspector. The reform was expected to improve the transparency of the actions undertaken for the purpose of protecting consumer rights and public interests. They were also meant to help the implementation of clearer rules concerning the relationship between undertakings and their supervisory bodies as well as facilitate the establishment of effective, efficient and uniform mechanisms for the removal of non-compliant products from the market. Consequently, the reform was to

² Uniform Text in the 2005 Journal of Law, No. 244, item 2080 with subsequent amendments, revoked.

curb bureaucracy, improve information exchange and reduce operational costs of central administration.³ A governmental document traces back the reasons and grounds for the abolition of the Chief Inspector with the „improvement of control procedures, which would make it possible to mitigate the threat and risk originating in dangerous products being traded in Poland”.⁴

Relevant changes in the status of the UOKiK President as well as the status of the UOKiK itself were introduced by the Act of 10 July 2008 on the abolition of the Chief Inspector of the Trade Inspection, on the Amendment to the Act on the Trade Inspection and some other acts. According to Article 1 of the Act of 10 July 2008, the Chief Inspector and the Chief Inspectorate were abolished on 31st December 2008. The powers and responsibilities of the Chief Inspector were taken over by the UOKiK President. The Act of 10 July 2008 amended several provisions of the Act on Competition and Consumer Protection and other specific acts. It also introduced inter-temporal provisions. The changes arising from the Act of 10 July 2008 took effect on 31 December 2008.

2.2. Amendments to the Competition and Consumer Protection Act

The Act of 10 July 2008 amended Article 35, 36 and 62 of the Competition and Consumer Protection Act. First, Article 35(1),(2) and (4) were revoked. Article 35(1) used to state that the Inspection was subordinate to the UOKiK President; Article 35(2) used to provide that the UOKiK President approved of the action plan and control plans submitted by the Chief Inspector; Article 35(4) used to provide that the UOKiK President performed periodical evaluations of the Inspection's performance on the basis of reports submitted by the Inspection itself and passed on his evaluation results to the Chief Inspector. Article 36 used to allow the UOKiK President to publicize the results of controls performed by the Inspection, except for business secrets and other confidential information subject to protection under separate laws and related regulations. Finally, the new reading of Article 62 para 4 provided

³ *Reasons and Grounds for the Draft of the Act on Abolition of Chief Inspector of Trade Inspection, on Amendments to the Act on Trade Inspection and other Related Acts of Law*, Print-out no 400, p. 1; Postulates on the improvement of the competition protection system are included in the document adopted by the Cabinet in July 2008 setting out priorities for Polish competition policy entitled: *Competition Strategy 2008–2010*. For comparison purposes of the competition policy as one of the disciplines of the administrative policy see M. Stefaniuk, *Polityka konkurencji w Polsce [Competition Policy in Poland]*, [w:] J. Łukasiewicz (ed.), *Polityka administracyjna [Administrative Policy]*, Rzeszów 2008, p. 615–630.

⁴ The Office of the Competition and Consumer Protection, *2008 Annual Report*, Warszawa 2009, p. 11.

for the authorization to control undertakings to be issued by the UOKiK President or the regional inspectors of the Trade Inspection respectively.

2.3. Amendments to other Acts of Law

The Act of 10 July 2008 amending the Act of 15 December 2000 on the Trade Inspection⁵ substituted the term „Chief Inspector of the Trade Inspection” with the term „President of the Office of Competition and Consumer Protection” (in Article 5, Article 6, Article 7, Article 8, Article 9, Article 10, Article 22a, Article 23) and the term „Chief Inspectorate of the Trade Inspection“ with the term „Office of Competition and Consumer Protection “ (in Article 7, Article 22a, Article 30). Article 5 of this Act was also amended: the tasks of the Trade Inspection are now to be performed by the UOKiK President and the heads of regional (voivodship) governmental bodies (voivods). As far as administrative proceedings concerning the responsibilities and powers of the Trade Inspection are concerned, the competences lie with the regional inspectors while the UOKiK President is a body of higher instance.

Pursuant to Article 7 of the Act on Trade Inspection, the UOKiK President manages the operations of the Inspection with the support of the UOKiK. In order to facilitate the management of the Inspection, new structural and functional responsibilities and powers were vested on the UOKiK President. From the structural side, the UOKiK President gained influence upon the selection of managers in the organizational structure of the Inspection at the county level. According to Article 8 of this Act, the UOKiK President gives his consent to the appointment and dismissal of regional inspectors by the heads of regional administration bodies. Functional powers and responsibilities result from Article 9, Article 10, Article 22 and Article 23 of the Act on Trade Inspection. Article 10 of this Act governs the general responsibilities and powers of the UOKiK President acting as a body of the Trade Inspection. Furthermore, the Act vests the control powers pertaining to the Trade Inspection in the UOKiK President.

The new Article 10(2) of the Act on Trade Inspection is a total *novuum*. According to this rule, the UOKiK President may publicize the results of control proceedings conducted by the Inspection, except for business secrets and other confidential issues subject to disclaimer provisions under separate laws and regulations. This rule is clearly synonymous with the aforementioned revoked Article 36 of the Competition and Consumer Protection Act. Article 10(2) of the Act on Trade Inspection had indeed a purpose when the Inspection was headed by the Chief Inspector with the UOKiK President as

⁵ Journal of Laws from 2001 No. 4 item 25 with subsequent amendments.

its supervisor. Presently however, in light of the abolishment of the position of Chief Inspector, the tasks pertaining to the Inspection are managed directly by the UOKiK President. Publicizing control results lies within the powers and responsibilities related to the management of the Inspection and as such, it is governed by the Act of 6 September 2001 on Access to Public Information⁶ (the results of control proceedings must be regarded as public information within the meaning of Article 6(1)(4a) of that Act). While revoking Article 36 of the Competition and Consumer Protection Act was a due and correct action to be taken from the point of view of existing legislation, the same should have applied to Article 10(2) of the Act on Trade Inspection since it also constitutes a superfluous legal rule. The inclusion of Article 36 of the Competition and Consumer Protection Act in Article 10(2) of the Act on Trade Inspection constitutes an example of faulty legislation – a mechanical transition of rules from one legal act to another, without any prior due consideration of the function of such rules.

The Act of 10 July 2008 amended a number of other legal acts governing specific powers and responsibilities of the Chief Inspector – they are now assigned to the UOKiK President.

First, under the amended Article 13 of the Act of 7 October 1999 on the Polish Language⁷, the UOKiK President has become one of the entities that are empowered to apply to the Polish Language Council for opinions, in the form of resolutions, on the use of the Polish language in public actions and trade in the territory of Poland in which consumers participate.

Second, under the amended Article 14(2) of the Act of 5 July 2001 on Prices⁸, the UOKiK President is now the appeal body against decisions issued by regional inspectors of the Trade Inspection concerning pecuniary penalties levied on undertakings for notorious failure to perform duties as referred to in Article 12 of that Act.

Third, according to new reading of the Act of 30 August 2002 on Conformity Evaluation System⁹, the UOKiK President holds the position of a competent body of the goods control system (Article 38(1)(1) as well as of a monitoring body for the operation of the goods control system (Article 39(1)). In that latter capacity, the UOKiK President is responsible for: the co-operation with other competent bodies referred to in Article 38 para 2 point 2-9, for the transmission of information on non-conforming goods to other competent bodies, and for keeping the records of non-conformity.

⁶ Journal of Laws No. 112, item 1198 with subsequent amendments.

⁷ Journal of Laws No. 90, item 999 with subsequent amendments.

⁸ Journal of Laws No. 97, item 1050 with subsequent amendments.

⁹ Uniform Text in Journal of Laws from 2004, No. 216, item 1585 with subsequent amendments.

Forth, under the amended Article 13 of the Act of 12 December 2003 on General Product Safety¹⁰, the UOKiK President holds the position of a supervisory body over general product safety to the extent governed by that Act. His functions are performed on the basis of specific functional interrelationships, referred to in Article 17(4) of that Act, created between the UOKiK president and regional inspectors of the Trade Inspection. In this context, a regional inspector is obliged to notify the UOKiK President of the performance of a control. Under Article 18(5), a regional inspector that found a threat of a trading good being unsafe, submits his control report and files to the UOKiK President. Under Article 19(3), he is obliged to provide the UOKiK President with copies of relevant administrative decisions without delay.

Fifth, pursuant to the amended Article 11(2)(4) of the Act of 20 April 2004 on goods used in veterinary medicine¹¹, the UOKiK President holds the position of a body co-operating with the President of the Register Office for Medical Products, Medicine and Bio-killers – a body competent for the supervision of products used in veterinary medicine, permitted to be traded and used in the territory of Poland. Within that framework, the UOKiK President is obliged to notify the President of the Register Office if he finds faults and irregularities in products used in veterinary medicine.

Sixth, the amended Article 64(4) of the Act of 16 February 2007 on Crude Oil Reserves, Refinery Products and Earth Gas and State Fuel Emergency and Refinery Market Turmoil Procedures¹² designates the UOKiK President as the appeal body against administrative decisions on penalties levied by regional inspectors within the meaning of Article 63(1)(9) of that Act. Finally, according to Article 24(5) of the Act of 25 August 2006 on the Fuel Quality Monitoring and Control System¹³, the due payment (equivalent to the costs of the examination performed in cases when fuel is non-conforming with quality requirements governed by that Act) is paid by the undertaking being controlled to the bank account of the UOKiK and not to the bank account of the relevant regional inspector of the Trade Inspection, which used to be the case.

2.4. Inter-temporal rules

The Act of 10 July 2008 contains also relevant inter-temporal rules. These rules may be categorized according to the substance they govern as: procedural rules, substantive rules and staff-related rules.

¹⁰ Journal of Laws No. 229, item 2275 with subsequent amendments.

¹¹ Journal of Laws No. 93, item 893

¹² Journal of Laws No. 52, item 343

¹³ Journal of Laws No. 169, item 1200

Inter-temporal rules of a procedural nature are governed by Article 15 of the Act of 10 July 2008. From the time the amendment come into force (31 December 2008), the UOKiK President will run the proceedings and cases that were instituted by the Chief Inspector or are still pending.

Article 16 concerns substantive rules stating that the UOKiK President will take over the duties and obligations arising from contracts and agreements entered into by the Chief Inspector. Pursuant to Article 17, the UOKiK will take over the accounts receivable and payable as well as the assets of the Chief Inspectorate.

Staff-related inter-temporal rules govern both the employees and managerial staff of the Chief Inspectorate. According to Article 18 of the Act of 10 July 2008, those employed by the Chief Inspectorate, will become employees of the UOKiK on 1 January 2009. However, employment will be terminated upon the lapse of three months after the date of the transfer to the UOKiK if new terms and conditions of employment are not proposed before the lapse of that deadline or if the transferred employees do not accept the new terms of employment and remuneration proposed before the lapse of that deadline. Still, termination of employment does not apply to civil servants governed by the rules of Article 4 of the Act of 24 August 2006 on the Civil Service.¹⁴ On the day the act of 10 July 2008 comes into force, individuals holding managerial positions in the Inspection (the Chief Inspector, its deputy, director of the office of the Inspection and deputy directors and managers of the control-and-analytic laboratories) became members of state human resources governed by the Act of 24 August 2006 on Government Human Resources and Top State Positions.¹⁵ Pursuant to Article 20 of that Act, the UOKiK President is obliged to apply to the Prime Minister for the appointment of the person holding the position of the Chief Inspector to the position of a UOKiK Vice President.

3. Conclusion

Legal developments concerning Polish antitrust law made in 2008 were not extensive. They related exclusively to the status and system of public administration bodies responsible for competition and consumer protection. As such, they did not have a direct impact upon the application of antitrust law and its rules. Instead, they merely consolidated the structures of public administration of competition and consumer protection. Still, they had a direct impact upon the status of the UOKiK President and the organization of the UOKiK itself – the tasks of the Chief Inspector were assigned to the UOKiK President, his old supervisory tasks were nullified. Thus, the scope of the

¹⁴ Journal of Laws No. 170, item 1218 with subsequent amendments, revoked.

¹⁵ Journal of Laws No. 170, item 1217 with subsequent amendments, revoked.

responsibilities and powers of the UOKiK President was extended – he was vested with the powers to act as the competent control body established to protect consumer rights and interests as well as the economic interests of the State (tasks that used to belong to the Chief Inspector). The UOKiK President became also the superior body for voivods performing the tasks arising from the Act on the Trade Inspection at the regional level, with the help of regional inspectorates, constituting the joint government administration in the voivodeship.

The 2008 status changes can be evaluated both positively and negatively. On the one hand, they had clear positive attributes contributing to the simplification of the organizational structure of public administration and to the simplification of the relationships between control bodies and undertakings. They have also paved the way to cost savings due to staff reductions in public administration. On the other hand, the UOKiK President was once again vested with powers to perform tasks not directly connected with his primary function (antitrust authority). From that point of view, the legal developments of 2008 do not fully correspond with the objective of improving the operations of UOKiK, that is, they do not enable its President to act on gross violations of the Competition and Consumer Protection Act only (grounds for the draft of the Act of 16 February 2007 on Competition and Consumer Protection Act).

However, not only did the year 2008 see the entry into force of the aforementioned legal developments but also the drafting, enforcement and promulgation of key amendments some of which were not designed to take effect until 2009. They include: changes arising from the Act of 21 November 2008 on Municipal Employees,¹⁶ the Act of 21 November 2008 on the Civil Service¹⁷ and the Act of 19 December 2008 on the Freedom of Economic Activity and Amendments to related Acts of Law¹⁸ that came into force in 2008 but was not promulgated until 2009. Moreover, in 2008, a draft executive regulation of the Cabinet was developed concerning the Polish leniency programme¹⁹ (on the basis of the authorization contained in Article 109(5) of the Act) as well as a draft executive order on a new UOKiK statute. In conformity with Article 34 of the Competition and Consumer Protection Act, the organization of UOKiK is governed by its statute enforced under an executive order of the Prime Minister.²⁰ Since in Poland executive orders are

¹⁶ Journal of Laws No 157, item 976

¹⁷ Journal of Laws No 223, item 1458

¹⁸ Journal of Laws from 2009 No 18 item 97.

¹⁹ Journal of Laws No 20, item 109

²⁰ For the Statute of the Office, see M. Stefaniuk [w:] T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009, p. 1114–1123.

not subject to amendments²¹, the need arose to substitute the old act (order no 65 of the Prime Minister of 20 June 2007 on a new statute of UOKiK²²) with a new one (executive order of the Prime Minister no 146 of 23 December 2008 on a New Statute of UOKiK²³).

The attached new statute established a new organizational structure of the UOKiK corresponding with the new tasks assigned to its President concerning the management of the Trade Inspection. New organizational units were created: the Trade Inspection Department and laboratories including: the Specialist Laboratory for the Examination of Fuel and Chemical Products and Industrial Chemical Products in Bydgoszcz, Specialist Laboratory for the Examination of Toys in Lublin, Specialist Laboratory for Textile Products and Instrumental Analysis in Łódź and control-and-analytic laboratories in Katowice, Kielce, Olsztyn, Poznań, Warszawa and Wrocław.

Literature

- Stefaniuk M. [w:] T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on Competition and Consumer Protection. Commentary*], Warszawa 2009.
- Stefaniuk M., *Polityka konkurencji w Polsce* [*Competition Policy in Poland*], [w:] J. Łukasiewicz (ed.), *Polityka administracyjna* [*Administrative Policy*], Rzeszów 2008.
- Wronkowska S., Zieliński M., *Komentarz do zasad techniki prawodawczej* [*Commentary on Rules of Legislative Techniques*], Warszawa 2004.

21 S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej* [*Commentary on Rules of Legislative Techniques*], Warszawa 2004, p. 262

22 Monitor Polski (Official Gazette), No. 39, item 451, revoked.

23 Monitor Polski (Official Gazette), No. 97, item 846

Legislative Developments in the Polish Telecoms Sector in 2008

by

Kamil Kosmala*

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I. Introduction

Two issues were the primary subject of amendments in 2008 in the Polish telecoms sector. The first concerned the introduction of “technical” provisions relating to the fulfilment of Poland’s obligation to realize calls to the 112 European Emergency Number, as well as to other emergency service numbers (police, state fire rescue, medical emergency service). The second issue concerned the legal provisions relating to the functioning of the Polish National Regulatory Authority (NRA) and specifically, to the manner of appointment of the deputy President of the Office of Electronic Communications (Prezes Urzędu Komunikacji Elektronicznej; UKE). Subject to amendments were the relevant provisions of Acts of the Polish Parliament (in Polish: *ustawa*), as well as those set out in executive regulations of the relevant public authorities (in Polish: *rozporządzenia*). An issue of relevance in this context is also the failure of the Polish legislator to appropriately address certain key developments on the EU level that concerned the telecoms sector. While certain legal rules

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were indeed amended in 2008, Poland was nonetheless unable to respond swiftly enough to all EU requirements.

II. Calls to emergency numbers

The Act of 11 January 2008 on the amendment of the Polish Telecommunications Law Act (in Polish: Prawo Telekomunikacyjne; PT) and of the National Medical Rescue Act entered into force on 1 August 2008¹. It introduced major changes regarding the performance of the obligation to correctly route calls to emergency numbers by providers of publicly available telecoms services.

First, the rules concerning the servicing of calls to emergency numbers (Article 77(2) PT) were amended by placing an obligation on telecoms operators to route calls to emergency numbers to so-called "rescue notification centres", created by the National Medical Rescue Act².

Second, more detailed rules regarding the transfer of information concerning the location of those making emergency calls were introduced. The old rules contained in Article 78(1) PT³, were amended by more comprehensive provisions of Articles 78(1)-(8). So far, information on the location of the network termination point from where a call was made to an emergency number was rendered available to competent services on a real-time basis, if technically feasible. The recent changes made the UKE President into the administrator of a system that processes such information and transfers it to the appropriate rescue notification center. Specific details concerning this system can be found in the executive regulation of the Council of Ministers of 10 December 2008 on the organisation and functioning of the system which gathers and makes information and data accessible on the location of the network termination point from where a call is made to the 112 emergency number or other emergency numbers⁴. Simultaneously, telecoms operators were obliged to adapt their IT systems to this system and to transfer the necessary information to this system within two months of its launch. According to Article 3(2) of the Act of 11 January 2008, until the launch of the system, telecoms operators shall perform the obligations related to the routing of emergency calls and to the location of those making such calls, in accordance

¹ Journal of Laws 2008, No. 17, item 101.

² The Act of 8 September 2006 on National Medical Rescue (Journal of Laws No. 191, item 1410 as amended).

³ The Act of 16 July 2004 – Telecommunications Law (Journal of Laws No. 171, item 1800 as amended).

⁴ Journal of Laws 2008 No. 236, item 1620.

with the provisions of the PT in existence at that time. It shall also be noted that, from the end of November 2009, the location system managed by the President of UKE has ceased to exist.

The incentive for the aforementioned legislative changes was to ensure that the provisions of the PT satisfy the requirements of Article 26(3) of the Universal Services Directive⁵. Its incorrect implementation was subject to an infringement procedure launched against Poland in December 2006 by the European Commission under Article 226 EC. The Commission specifically objected to the inaccessibility of information on the location of a 112 caller if the call was made from a mobile phone. However, following the aforementioned amendment, these proceedings were closed on 16 October 2008⁶.

However, the new rules do not make the fulfilment of the obligation to make the relevant information accessible dependent upon the technical capacity of the operator, making them somewhat arbitrary since the actual capacity of particular operators is disregarded. Instead, the new approach is based on the assumption that “[t]he possibilities provided by the technologies relied upon nowadays remove all technical obstacles in this scope”⁷. While such a solution is correct in principle, it goes further than the requirement of Article 26(3) of the Universal Service Directive which obliges Member States to ensure the availability of information on the location of an emergency number caller to an extent that is technically feasible.

III. The functioning of the National Regulatory Authority

The Act on civil service, passed on 21 November 2008⁸, changed the appointment procedure for the deputy to the UKE President, previously based on Article 190 PT. The Act on civil service established also a new set of criteria to be met by a candidate for this position. While the deputy President of UKE is still appointed by the President of the Council of Ministers (the Prime Minister), the candidate must now be chosen by way of an open and competitive recruitment procedure. According to the old rules, the deputy President of UKE was selected from a group of candidates from within the

⁵ 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 (Universal Service Directive), OJ [2002] L 108/51.

⁶ Communication from the European Commission of October 16, 2008, IP/08/1529.

⁷ Reasoning for a draft of the Act, Lower Chamber Parliament's document no. 56.

⁸ Journal of Laws 2008 No. 227, item 1505.

“national personnel reserve”⁹. According to the new Article 190(8a) PT, the criteria which must be satisfied in regulation for a candidate to be appointed for the position of deputy President of UKE include, amongst other things, a level of education which corresponds to the scope of the competence of the regulatory authority, a suitable period of professional practice (6 years) as well as a minimum period of managerial experience and capability. The amended Act describes also the manner of carrying out the recruitment procedure for selecting a candidate (the so-called “competition”). Still, the dismissal procedure of the deputy President of UKE remains unchanged – it is conducted at the request of the UKE President by the minister responsible for communications.

IV. Secondary legislation

In 2008, a total of 15 executive regulations were issued in relation to the PT. Among the most important of them is the regulation of the Minister of Infrastructure of 28 February 2008 introducing a new national numbering plan for public telephone networks¹⁰ which primarily changes the format of special subscriber services (so-called “AUS” numbers) used, for instance, by taxis. On its basis, the old four digits format (9XYZ) was replaced by a five digits (19XYZ) starting from 15 February 2009. A timetable for the alteration of the way of calling national numbers from a fixed network was also introduced according to which, from 30 September 2009, the aforementioned numbers will not need to be preceded by the ‘0’ digit. The ‘0’ prefix will be totally removed from any national traffic starting from 15 May 2010.

In another development, low-power base stations (so-called “femtocells”) were covered by the amended executive regulation concerning radio equipment that may be used without a radio permit¹¹. By communicating with the controller of a cellular network base station *via* an IP Network, reliance on this type of equipment could ensure coverage for wireless networks inside

⁹ The national personnel reserve is a group of candidates who may be selected for high state positions. It was in force from October 2006 until March 2009 on the basis of Act of August 24, 2006 on the National Personnel Reserve and High State Positions (Journal of Laws 2006 No. 170, item 1270 as amended). The said Act was revoked by the Act of November 21, 2008 on the civil service.

¹⁰ Regulation of the Minister of Infrastructure of 28 February 2008 on the National Numbering Plan for Public Telephone Networks (Journal of Laws No. 52, item 307).

¹¹ Regulation of the Minister of Infrastructure of 29 February 2008 amending the Regulation on the Transmitting or Transmitting-Receiving Radio Equipment which May Be Used Without a Radio Permit (Journal of Laws No. 47, item 277).

buildings as well as places not covered by “normal” base stations. Importantly, the aforementioned equipment can only be used by those telecoms operators which possess a nationwide frequency reservation, as indicated in § 2(1)(5a) of this regulation¹².

The executive regulation on fees relating to the use of frequencies was also amended¹³. A general rule was established for setting fees concerning public mobile networks of a cellular structure. The practical consequence of this amendment is the regulation of fees for mobile networks working in the CDMA 2000 and 802.16 (WiMAX) standards. This is relevant because prior to this there was no legal basis for setting fees for the right to use frequencies as regards CDMA and WiMAX mobile systems. Still, the level of fees relating to the use of NMT 450i, GSM 900, GSM 1800 and UMTS remained unchanged.

Telecoms access constitutes another key issue regulated by way of an executive regulation in 2008. On 21 July 2008, the Minister of Infrastructure issued two acts concerning telecoms access: the first related to the scope of the application of a framework offer for telecoms access¹⁴, the second set detailed requirements ensuring telecoms access¹⁵. The first regulation addressed the scope of the framework offer concerning access to the local loop for the purpose of broadband data transmission (so-called “Bitstream Access”), an issue that was not regulated by the previous regulation of 2005¹⁶. The second executive regulation covered (as a part of the detailed provisions concerning cooperation between independent operators) the requirements necessary to ensure all forms of telecoms access, rather than only the manner of telecoms access realised by the interconnection of networks¹⁷, as has previously been the case¹⁸.

¹² 880–915 MHz and 925–960 MHz; 1710–1730 MHz and 1805–1825 MHz; 1920–1980 MHz and 2110–2170 MHz.

¹³ Regulation of the Council of Ministers of 12 November 2008 amending the Regulation on Fees for the Right to Use Frequencies (Journal of Laws No. 215, item 1356).

¹⁴ Journal of Laws 2008 No. 138, item 866.

¹⁵ Journal of Laws 2008 No. 145, item 919.

¹⁶ Regulation of the Minister of Infrastructure of 11 August 2005 on the Scope of a Framework Offer for Telecoms Access (Journal of Laws No. 160, item 1350).

¹⁷ The interconnection of networks is one of the specific forms of telecoms access. According to Article 2.25 PT, the interconnection of networks constitutes a special form of telecoms access realised between operators.

¹⁸ *I.e.* on the basis of the regulation of the Minister of Infrastructure of 11 August 2005 on detailed requirements related to the interconnection of networks (Journal of Laws No. 160, item 1349).

V. The failure of the national legislature to address certain key issues in 2008

At least two significant events occurred in late 2007 and 2008 at the EU level that should have been taken into account by the Polish legislator in 2008: (i) an Article 226 EC infringement procedure initiated by the Commission against Poland concerning the perceived lack of independence of the Polish NRA, and (ii) the issue by the Commission of the new Recommendation on the relevant product and service markets within the electronic communication sector¹⁹. Both of these events were not addressed until the 2009 amendment of the Polish PT. Still, both of them shall be addressed in the context of the overview of the legislative developments which took place, or rather, should have taken place, in 2008. Poland's failure to address these EU developments must be evaluated negatively.

The infringement procedure against Poland relating to the perceived lack of independence of the President of URE (the Polish NRA) was launched by the Commission in December 2006²⁰. Interestingly, this procedure commenced at exactly the same time as the aforementioned proceeding concerning Poland's failure to implement the requirements relating to 112 emergency number calls.

Due to Poland's passive attitude, the Commission brought a case to the ECJ²¹ acting on the basis of Article 226 EC. In this case, the Commission objected to an insufficient separation of the Polish State's regulatory functions from the exercise of ownership or control rights by the Polish State in a number of telecoms enterprises. Such a conjuncture was interpreted by the Commission as an infringement of Article 3(2) and (3) of the Framework Directive²², which requires Member States to ensure that their NRA are independent and exercise their powers impartially and transparently. Since the

¹⁹ 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. This act reduced the list of markets which had formerly been subject to *ex ante* regulation from 18 to 8, and almost completely omits the need for the *ex-ante* regulation of retail markets in the electronic communications sector (except of the retail market for access to the public telephone network at a fixed location for residential and non-residential customers).

²⁰ Communication of the European Commission of December 13, 2006, IP/06/1798.

²¹ The case was commenced on 11 July 2008, Case C-309/08, OJ [2009] C 247/12.

²² Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ [2002] L 108/33.

evaluation of the independence of a NRA refers to the relationship between the regulator and market players (those providing electronic communications networks, equipment or services), the main argument in this context concerned the absence of provisions defining the duration of the NRA's term in office and the lack of an exhaustive list of conditions for the dismissal of the Polish NRA. In consequence, the European Commission decided that the Polish NRA is greatly dependent on the Prime Minister and fails to guarantee that State-owned or controlled enterprises will be treated in the same way as other market participants. As noted above, the amendment required in this respect was not introduced into the Polish PT until 2009²³.

Regarding the legal amendments necessitated by the new Recommendations on relevant markets in the electronic communication sector, considered must be certain rules concerning the definition of relevant markets subject to *ex ante* regulation by the UKE President on the basis of the PT. Between the entry into force of the PT in September 2004 and July 2009, the minister responsible for communications was responsible for the definition of relevant markets (carried out by way of an executive regulation) subject to *ex ante* regulation. The old regulation of the Minister of Infrastructure issued on 25 October 2004²⁴ defined 18 relevant markets corresponding to the list contained in the Commission's Recommendation of 2003²⁵.

It should be noted that the approach introduced in the Polish PT (the fact that the relevant markets subject to sector-specific regulation are defined by means of an executive regulation), is unusual when compared to the practice of implementing the electronic communications Directives that regulate the actual procedure for analysing the relevant markets. The approach commonly used in other Member States associates the relevant market definition with specific regulatory decisions. In particular, these decisions contain the definition of the analysed market and simultaneously decide upon the eventual imposition of regulatory obligations upon the entities acting on that specific market²⁶.

²³ Act of 24 April 2009 on the amendment of the Telecommunications Law Act and other Acts (Journal of Laws No. 85, item 716).

²⁴ Regulation of the Minister of Infrastructure of 25 October 2004 on Defining Relevant Markets Subject to Analysis by the President of the Office for Regulation of Telecommunications and Post (Journal of Laws No. 242, item 2420).

²⁵ 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 [2003] L 114/45.

²⁶ For more discussion on this issue, see: T. Skoczny, "Ocena konkurencyjności rynków" [in:] S. Piątek (ed.), *Regulacja rynków telekomunikacyjnych*, Warszawa 2007, pp. 213-220; S. Piątek, "Prawo telekomunikacyjne w świetle dyrektyw o łączności elektronicznej" (2005) 3

The Polish model makes it necessary to immediately amend the executive regulation of 2004 so as to ensure its continuing compatibility with the new list contained in the 2007 Recommendations. However, no such change occurred throughout the whole of 2008. This failure to act on the part of a national legislator is contrary to the requirement of Article 15(3) of the Framework Directive which requires NRAs to define relevant markets appropriate to national circumstances, taking the utmost account of the Commission's recommendations and guidelines.

Literature

- Piątek S., "Prawo telekomunikacyjne w świetle dyrektyw o łączności elektronicznej" ["Telecommunications Law in the light of Electronic Communications Directive"] (2005) 3 *Prawo i Ekonomia w Telekomunikacji*.
- Rogalski M., *Zmiany w prawie telekomunikacyjnym. Komentarz [Amendments to telecommunications law. Commentary]*, Warszawa 2006.
- Skoczny T., "Ocena konkurencyjności rynków" ["Evaluation of Market Competitiveness"] [in:] S. Piątek (ed.), *Regulacja rynków telekomunikacyjnych [Regulation of telecommunications markets]*, Warszawa 2007.

Prawo i Ekonomia w Telekomunikacji 5; M. Rogalski, *Zmiany w prawie telekomunikacyjnym. Komentarz*, Warszawa 2006, p. 54.

Legislative Developments in the Postal Sector in 2008

by

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In 2008, a fundamental change in the legal status of the State-owned Public Utility Enterprise “Polish Post” (PPUP Poczta Polska) occurred as a result of progressive liberalization process of the postal services market in Poland. Polish Post was given the status of a joint-stock company on the basis of the Act of 5 September 2008, which defined the conditions of the commercialization of state-owned public utility enterprises¹. Polish Post is the largest employer among state-owned companies (nearly 100.000 staff) in the country. For years, it constituted a fossilized structure shaped under the conditions of a state monopoly. It found its doctrinal justification in the claim that monopolisation enables the state to ensure the privacy of correspondence, which is guaranteed by the Polish Constitution. Monopolisation was also said to allow customers to take full advantage of the existing network of postal offices and agencies. These essentially archaic arguments were typical for a centrally planned, state controlled economy and cannot be applied to current market conditions.

Long-lasting monopolisation of postal services resulted in a mismatch between their prices and their actual costs. At the same time, the overwhelming position of Polish Post deterred potential quality improvements, price reductions or a differentiation of postal services.

The privileged position of Polish Post was in conflict with the principle of equal status of entrepreneurs (firms) formulated in the Act of 2 July 2004², implementing the principles of free market economy. Poland’s accession to the EU and the implementation of the rules of its postal directives, guaranteed

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¹ Act of 5 September 2008 on commercialization of the State-owned Public Utility Enterprise “Polish Post” (Journal of Laws 2008 No. 180, item 1109).

² Act of 2 July 2004 on Freedom of Economic Activity (consolidated text: Journal of Laws 2007 No. 155, item 1095, with subsequent amendments).

a gradual opening of the domestic postal sector to competitive operators (to be completed in 2012). The national operator, which until then functioned as a state-owned enterprise, found itself under threat of losing its financial fluidity. As a result, a classic cost-saving procedure was implemented: staff reductions, holding back of investments and price increases. The situation was further aggravated by pay rise demands formulated by as many as 40 trade unions. All this made it necessary to commercialize the state-owned enterprise to make it able to face the market – it was granted the status of a joint-stock company, with the Treasury as its sole shareholder.

The Act of the commercialization of the State-owned Enterprise Polish Post refers to the rules contained in the former commercialization and privatization Act of 30 August 1996³. The principle of universal succession became the basic rule of the newly created joint-stock company allowing it take over all of the legal relationships formerly held by the state-owned enterprise. Moreover, the new company gained the exclusive right to use the word “Post” in its name and registered trademark. It was given the exclusive right to use – providing public postal services – a trademark showing the Polish national emblem and official stamps containing the picture of a white eagle with crown when. By lifting the principle of special protection against bankruptcy, formulated in Article 6(4) of the Bankruptcy and Remedy Act of 28 February 2003⁴, the company was made equal in the eyes of the law with other enterprises in that respect.

The decision to commercialize Polish Post was made by the minister responsible for communications on behalf of the Treasury. The decision established the following:

- 1) company’s statute,
- 2) company’s initial capital,
- 3) names of the members of the company’s authorities for the first term in office,
- 4) persons authorized to submit the company’s registration in the register of companies, if other than the managerial board.

For as long as the Treasury remains its sole shareholder, the company’s board comprises the following members:

- 1) one representative of the minister responsible for communications,
- 2) one representative of the Treasury,
- 3) one representative of the minister of finance,
- 4) two representatives of the company’s employees.

Candidates from among employees for the first managerial board are selected on the basis of indirect, general and confidential elections. The

³ Act of 30 August 1996 on Commercialization and Privatization of State-Owned Enterprises (consolidated text: Journal of Laws 2002 No. 171, item 1397, with subsequent amendments).

⁴ Consolidated text: Journal of Laws 2009 No. 175, item 1361.

result is determined by the majority of valid votes. The result itself is valid provided that a minimum of 50% of the employees submit their votes. If the first board has not been elected in due course, staff representatives will be appointed by trade unions (in 30 days from the summons of the minister of communications).

The law guarantees the new joint-stock company the right to form, by the decision of its general assembly, other joint-stock companies or limited liability companies in order to achieve common economic goals. Consent of the general assembly is also required to implement take-over, purchase or sell-out of shares procedures.

The area of the company's economic activity is defined broadly and encompasses:

- 1) provision of postal services including those of a general character,
- 2) issue, introduction and withdrawal from circulation of postage stamps, postcards and envelopes with a postage charge print,
- 3) rendering of other services exploiting the company's technical resources and personnel including subscription and distribution of newspapers, magazines, other publications, and philately,
- 4) provision of financial services and managing activities connected with them,
- 5) mediation in the provision of financial services including banking services,
- 6) provision of logistic support to customers, in particular in the domains of transportation, packaging and storage of goods.

Activities described in points 1 and 2 are carried out in accordance with the conditions of the Act of 12 June 2003 Postal Law⁵ and rules specified on its basis. The list of the company's economic activities is open-ended since the law allows the company to conduct other types of business activities, provided they do not affect the scope and quality of its primary activities. The company's business profile has been greatly enhanced by extending its offer of financial services, as a result of which, it has gained the status of a para-banking institution through the options listed below:

- 1) services connected to money transfers within and across the country's borders,
- 2) issue of debit cards and servicing of operations involving their use,
- 3) servicing operations involving cheques and bills of exchange,
- 4) purchase and sale of liabilities as well as operating relevant transactions,

⁵ Consolidated text: Journal of Laws 2008 No. 189, item 1159.

- 5) offering money loans from the company's own assets including consumer credit,
- 6) provision of bonds and guarantees as well as making financial commitments excluded from the financial balance,
- 7) sale of treasury securities and local authority bonds, conducting commissioned operations involving bonds in line with the rules and conditions stated separately for these type of activities,
- 8) services involving the conversion, sorting and storing of currencies,
- 9) storage of valuables and securities and the provision of safety deposit boxes,
- 10) transportation of cash, including securities and banking documents,
- 11) provision of information technology and data processing services to the general public as well as to financial institutions and banks.

The conditions of the provision of financial services must be made explicit in the rules available to the general public. Moreover, having signed an appropriate agreement with a bank, the company can perform some of the activities identified in the Banking Law. If the company controls more than 50% votes in the general assembly of a given bank, it may, when authorized by that bank, conduct banking operations on its behalf. However, it can do so only under the condition that it obtains an appropriate permission from the Financial Supervisory Commission. Such permission is subject to the evaluation by the Commission of the effects which the aforementioned operations might have on managing the bank and its internal control mechanisms.

The changes of the legal status of the former state-owned monopoly led to corresponding amendments in the Polish Postal Law. As a result of these adjustments, the old monopoly was replaced by a new company – Polish Post Joint-Stock Company (Poczta Polska S.A), which has gained the rights of a statutory public operator, obliged to provide general postal services and entitled to receive a state subsidy if its operations incur financial losses.

According to the Commercialization and Privatization Act of 30 August 1996, the employees have gained the right to obtain 15% of the shares of the new company free of charge, while the rest remains in the possession of the Treasury.

Another adjustment, based on criminal law, working to the advantage of the employees is the right to personal protection given to civil servants who, in this case, are obliged by law to carry out general postal services.

Legislative Developments in the Energy Industry in 2008

by

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The year 2008 was quite turbulent for the Polish energy sector, particularly so for industrial consumers of electricity. The shifts of 2008 are likely to be reflected by legislative amendments in 2009, seeing as the legislative process needs time to catch up. In 2008, the Energy Law Act of 10 April 1997¹ (hereafter, Energy Act) was subject to amendments deriving primarily from changes to other Polish legal acts and from the introduction of new rules associated with the implementation of EU laws.

The first set of amendments to the Energy Act entered into force on 1 January 2008 on the basis of the Act of 12 January 2007 on the amendment of the Energy Law Act, the Environmental Protection Law Act and the Conformance Evaluation System Act². The amendment related to Art. 23(2)(18a) of the Energy Act concerning the authority of the President of the Polish Energy Regulation Office (URE): “The scope of the URE President’s activities includes: (...) the collection and processing of information on energy producers, including the calculation and announcement by 31 March of each year of: a) average prices of electrical power produced through highly efficient co-generation that are calculated separately for electrical power produced in co-generation units, as noted in Art. 9(1)(1) and (2)”. Until 1 January 2008, point 18a read: “[t]he average price of electrical power produced in association with the production of heat.” This amendment is associated with the introduction into the Polish legal order of a system of certificates of origin concerning electricity produced from highly efficient co-generation. Such certificates are issued separately for electricity produced in a „co-generation

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¹ Consolidated text: Journal of Laws 2006 No. 89, item 625, with subsequent amendments.

² Journal of Laws 2007 No. 21, item 124.

unit fired by biogas fuels or with a total force of installed electrical source below 1 MW” and electricity produced from other sources.

Another set of amendments to the Energy Act entered into force on 25 October 2008 on the basis of the Act of 5 September 2008 on the amendment of certain laws in connection with the entry into force of the Protocol to the Agreement between the European Community together with its Member States and the Swiss Confederation on the free movement of persons³. This amendment expands the ability to file a motion to grant a power concession to entities based in or residing in Switzerland. As of 25 October 2008, Art. 33(1)(1) of the Polish Energy Act states that: „The URE President grants a concession to an applicant, who: 1) is based or resides in the territory of a European Union member state, the Swiss Confederation or a member of the European Free Trade Area (EFTA) – parties to the European Economic Area agreement”.

Further legislative developments affecting the Polish energy sector took the form of executive regulations. On 14 August 2008, the Minister of Economy issued a new executive regulation concerning Art. 9a(9) of the Energy Act⁴. In comparison to its predecessor issued in 2005, art. 4.2 of the new executive regulation contains an expanded range of sources for the production of renewable energy with „[a] part of energy obtained from thermal transformation of municipal waste” in accordance with the Waste Act of 27 April 2001⁵. The amendment is intended to increase the ability to obtain renewable energy, facilitating the achievement of the required renewable energy share in Poland’s general balance of energy production, in accordance with EU instructions. The new executive regulation is also meant to increase the percentage of biogas and biomass utilised in the incineration process as well as to increase power produced from these sources. In this manner, it helps solve the problem of low power productivity of renewable energy sources based on biomass incineration. Finally, the executive regulation increases the weight share of biomass in the total mass utilised in the incineration process from 5% (in 2008 and 2009) to 15% annually (subsequent years), so as to reach 100% in 2015. The threshold of production power was also raised from 5 MW to 20 MW.

³ Journal of Laws 2008 No. 180, item 1112.

⁴ Executive Regulation of the Minister of Economy of 14 August 2008 on the detailed scope of duties for receipt and presentation for discontinuance of certificates of origin, payment of substitute fee, purchase of electrical power and heat generated from renewable energy sources as well as the obligation to confirm data concerning the amount of electrical power produced from renewable energy sources (Journal of Laws 2008 No. 156, item 969).

⁵ Journal of Laws 2007 No. 39, item 251, with subsequent amendments.

On 7 May 2008, the Minister of Economy issued an executive regulation concerning art. 16a(8) of the Energy Act on the basis of a statutory delegation introduced into the Energy Act as early as 2005. According to the Energy Act, the URE President organises and conducts a tender for the construction of new electrical power production capabilities or the undertaking of projects aimed at reducing electricity needs. The new executive regulation⁶ specifies the terms for the organisation and conduct of a tender in this respect, including detailed requirements concerning its documentation as well as the appointment procedure and activities of the tender commission. The earlier lack of an executive regulation in this regard undoubtedly constituted a legislative loophole in this field.

Following from the above it can be said that the number and scope of amendments of the Energy Act was not great in 2008. The Minister of Economy announced however more extensive amendments for 2009. They will be primarily meant to strengthen the security of electricity supplies and aim to improve the functioning of Polish energy markets. Further legislative work is to deal with a draft new Energy Act.

⁶ Journal of Laws 2008 No. 90, item 548.

Legislative Developments in Rail Transport in 2008

by

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The Act of 28 March 2003 on Rail Transport¹ was amended three times in 2008. The first set of amendments was enforced under the Act of 7 February 2008 amending the Act on Rail Transport² and related to certificates of compliance. It transposed the Commission's Directive 2007/32/EC of 1 June 2007 amending Annex VI to Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Annex VI to Directive 2001/16/EC of the European Parliament and Council on the interoperability of the trans-European conventional rail system³. Subsequently, the Amendment Act of 10 July 2008⁴ expanded the Act on Rail Transport by a new Chapter 4a on the working time of railway employees engaged in interoperable cross-border services. The latter implemented Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of working conditions of mobile workers engaged in interoperable cross-border services in the railway sector⁵.

From the point of view of regulatory developments, the most important of these three groups of amendments was the last set introduced by the Act of 24 October 2008 amending the Act on the Commercialization, Restructuring and Privatization of the State Company "Polish State Railways" and the Act

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¹ Consolidated text: Journal of Laws 2007 No. 16, item 94, with subsequent amendments.

² Journal of Laws 2008 No. 59, item 359.

³ OJ [2007] L 141/63.

⁴ Journal of Laws 2008 No. 144, item 902.

⁵ OJ [2005] L 195/15.

on Rail Transport⁶. This amendment act partly modified the provisions of the Act on Rail Transport linked to the scope of Directive 2001/14/EC of the European Parliament and Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification⁷ (even though Poland has already implemented Directive 2001/14/EC by the Act of 16 December 2005 amending the Act on Rail Transport⁸).

First, the Amendment Act of 24 October 2008 strengthened the regulatory function of the President of the Rail Transport Office (UTK). Article 13 of the Act on Rail Transport was supplemented by paragraph 6a granting the UTK President the right to declare his decisions concerning the regulation of rail transport immediately executable, in whole or in part, provided that this is necessary in light of public interest or an exceptionally important interest of a party. In such cases, an appeal against the decision of the UTK President will not result in the suspension of its enforcement. This amendment may be important with respect to the fulfillment of the obligation imposed by Article 30(5) of Directive 2001/14/EC, which requires regulators to decide on complaints, and take action to remedy the contested situation, within a maximum of two months from the receipt of all information. Meeting this time-limit could have been impossible if the execution of the regulator's decision was stayed by an appeal. According to Article 30(2) of this Directive, this might concern, for instance, appeals against decisions of the infrastructure manager on the allocation of infrastructure capacity, the charging scheme or the level of infrastructure fees.

Second, the Act of 24 October 2008 introduced several changes to Article 33 of the Act on Rail Transport with respect to scarcity charges. It modified the elements of the charges collected by the infrastructure manager (Polish Railway Lines JSC - PLK S.A.) and somewhat clarified the methods of their calculation. The charges continue to consist of the basic charge and additional charges and the wording of Article 33(3) was slightly modified. According to its new version, "[t]he charge for the use of railway infrastructure is a sum of the basic charge and additional charges". This amendment is editorial in nature bringing in line the earlier discrepancy between Article 33(3), which mentioned a single "additional charge", and Article 33(11), which referred to plural "additional charges". Conversely, as will be seen below, the scope of the basic and additional charges changed.

According to the current wording of Article 33(2) "[t]he basic charge for the use of railway infrastructure is determined while taking into account

⁶ Journal of Laws 2008 No. 206, item 1289.

⁷ OJ [2001] L 75/29.

⁸ Journal of Laws 2006 No. 12, item 63.

the costs directly incurred by the manager as a result of operating the train service by the rail carrier”. Prior to the amendment, Article 33(2) provided that “[t]he charge for the use of railway infrastructure is determined taking into account the costs incurred by the manager as a result of the allocation and of making it possible to use the allocated train routes and the railway infrastructure”. A new paragraph 3a was added to Article 33 that determines the elements of the basic charge. It specifies that the basic charge is collected by the manager separately for minimum access to the railway infrastructure, which includes the services referred to in Part I paragraph 1 of the Annex to the Act (Article 33(3a)(1)), and for access to facilities related to train operation, which includes the services referred to in Part I paragraph 2 of the Annex to the Act (Article 33(3a)(2)). These amendments are linked to Article 7(3) of Directive 2001/14/EC requiring that “[t]he charges for the minimum access package and track access to service facilities shall be set at the cost that is directly incurred as a result of operating the train service”. Accordingly, the new wording of Article 33(2) is identical to the wording of this Directive. Moreover, services included in the charge for minimum access to railway infrastructure (Article 33(3a)(1)) are identical to those specified in paragraph 1 of Annex II to Directive 2001/14/EC concerning the minimum access package. Similarly, services included in the charge for access to facilities related to train operation (Article 33(3a)(2)) correspond to those specified in paragraph 2 of Annex II relating to the charge for track access to service facilities mentioned in Article 7 of this Directive. Thus, this set of amendments should ensure full compliance with the relevant provisions of Directive 2001/14/EC.

According to the current Article 33(11) of the Act on Rail Transport, “[a]dditional charges are levied for services provided by the manager other than those listed in Part I of the Annex to the Act, which shall be provided by the manager, if they were listed in the network rules and carrying them out is required by the rail carrier in its application”. In the past, additional charges could also be collected for the services listed in Part I paragraph 2 of the Annex to the Act (e.g. the use of refueling facilities, passenger stations, freight terminals, marshalling yards, tracks and facilities for train formation, storage sidings, maintenance and other technical facilities). These services are currently the starting point for the calculation of the basic charge for access to facilities related to train operation (an element of the basic charge specified in Article 33(3a)(2)).

Paragraph 4 was also slightly modified. It states that “[t]he basic fee for minimum access to railway infrastructure [the charge specified in Article 33(3a)(1)] is calculated as a product of passage of trains and unit rates determined depending on the category of the railway line and the train type, separately for passenger and freight transport”. The new wording is more

precise than its predecessor, which stated that “[t]he basic fee is calculated taking into account the planned passages of trains and unit rates determined depending on the category of railway line and the train type, separately for passenger and freight transport”. At the same time, paragraph 4b was repealed which used to state that “[t]he amount of the minimum unit rate referred to in paragraph 4a may not be lower than variable costs incurred by the manager in relation to the run of a given train”.

The Amendment Act of 24 October 2008 specified also in Article 33(4a) that it is possible to use a minimum unit rate of the basic charge, applied on the basis of the same rules to all rail passenger carriers, for the use of railway infrastructure related to the activities performed according to a public service contract. This minimum rate may concern the basic charge for minimum access to railway infrastructure (i.e. the first element of the basic charge mentioned in paragraph 3a(1)). Previously, this minimum rate concerned the whole basic charge. Paragraph 5 used to state that the unit rate of the basic charge is determined for a run of one train on a distance of 1 kilometer. Currently, it relates only to the unit rate of the basic charge for minimum access to railway infrastructure. These changes are coherent with the fact that in the past the basic charge did not include the component referred to in paragraph 3a point 2 because, it used to constitute an element of additional charges.

The new Article 33(4c) stipulates, in relation to the second element of the basic charge referred to in paragraph 3a(2), that “[t]he basic charge for access to facilities related to train operation is calculated as a product of the ordered services and of the corresponding unit rates set separately for the types of services defined in Part I paragraph 2 of the Annex to the Act”. Paragraph 5c, added by the Act of 24 October 2008, should stabilize unit rates of the basic charge for public passenger rail transport services, performed under the public service contract, as it guarantees that rate increases within a timetable validity period shall not exceed the expected inflation rate (adopted in the draft budget for a given year). Still, according to Article 6 of the Act of 24 October 2008, all of these changes concerning the charges for infrastructure use are not applicable to the calculation of charges in the period when the rail timetable for 2008/2009 is valid, unless they result in a decrease of the unit rates of the basic charge.

Last but not least, the amendments made by the Act of 24 October to the Act on the Commercialization, Restructuring and Privatization of the State Company “Polish State Railways” were meant to facilitate the realization of the “Strategy for Rail Transport until the year 2013” adopted by the Polish Council of Ministers on 17 April 2007. They were intended to facilitate the restructuring of the property of PKP S.A. and strengthen its coordinative function. They will, among other things, help the transfer progress of railway

lines to self-government units. Indeed, a definition of railway station was introduced into Article 4 of the Act on Rail Transport (supplemented by point 8a) due to the possibility of railway stations being also transferred to self-government units.

Simultaneously, the Minister of Transport has issued many executive orders concerning railways. The Executive Order of 18 August 2008 amending the Order on the Conditions for Access to and Use of Railway Infrastructure⁹ concerned the so-called “reservation charges”, for capacity that is requested but not used (paragraph 16(1) of the Order), collected by the infrastructure manager. This act set two distinct thresholds of such charges. First, when a railway operator resigns from a run of train later than 30 days before the planned time of its realization the infrastructure collects 10% of the costs, on the basis of which the basic charge for the run of this train on an allocated route would be calculated. Second, 25% of this sum is due when the resignation took place later than 72 hours before the scheduled time of its realization or when the allocated route was not used. Still, the actual Order of the Minister of Transport on the Conditions for Access to and Use of Railway Infrastructure of 30 May 2006¹⁰ was repealed in whole by an equivalent Executive Order of 27 February 2009¹¹ which should not only settle the provisions in question but also ensure full compatibility with the requirements of Directive 2001/14/EC.

Several executive orders linked to the interoperability of trans-European railway systems were also amended in 2008. The Order of the Minister of Transport of 20 June 2004 on the Basic Specifications Related to Railway Interoperability and Conformity Assessment Procedures of the Trans-European High-Speed Rail System¹² and the Order of the Minister of Transport of 5 September 2006 on the Basic Specifications Related to Railway Interoperability and Conformity Assessment Procedures of the Trans-European Conventional Rail System¹³ were amended twice on 7 January¹⁴ and 29 September¹⁵. These changes made it possible to apply the Commission’s decisions that came into force in this field.

To sum up, most of 2008 amendments related to the adjustment of Polish rules to EC law. This phenomenon illustrates a growing involvement of EC institutions in ensuring transparency, interoperability, security in European railways and, as a result, enhancing the competitiveness of railways with

⁹ Journal of Laws 2008, No. 157, item 984.

¹⁰ Journal of Laws 2006 No. 107 item 737, as amended.

¹¹ Journal of Laws 2009 No. 35 item 274.

¹² Journal of Laws 2004 No. 162, item 1697.

¹³ Journal of Laws 2006 No. 171, item 1230.

¹⁴ Journal of Laws 2008 No. 11, item 64 and 65.

¹⁵ Journal of Laws 2008 No. 182, item 1126 and 1127.

respect to other modes of transport. This process forces structural changes in the management of railway markets such as, guaranteeing managerial independence. As show, the UTK President may be entrusted with additional regulatory tasks. 2009 sees similar trends as it is the time-limit for the transposition (entrance into force) of key EC legislation in the field of railway transport. These acts change the system of certification of train drivers¹⁶, the rules of compensation for public service operators and those on granting exclusive rights¹⁷. They also regulate the liability of railway undertakings and their insurance obligations for passengers, their luggage and train delays¹⁸. However, the key change expected to take place in 2009 resulting from Poland's obligations imposed by EC law¹⁹ is the introduction of the necessary provisions on the right of access to infrastructure by rail carriers from other Member States for the purpose of operating international passenger services.

¹⁶ Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, OJ [2007] L 315/51.

¹⁷ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ [2007] L 315/1.

¹⁸ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ [2007] L 315/14.

¹⁹ Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, OJ [2007] L 315/44.

Legislative Developments in the Aviation Sector in 2008

by

Filip Czernicki*

The Polish Aviation Law (in Polish: Prawo Lotniczne; PL) of 3 July 2002¹ was amended five times in 2008. In this period of time, the Minister of Infrastructure issued also seven relevant acts of secondary legislations (executive regulations). Moreover, the aviation sector was directly affected by a resolution of the Constitutional Tribunal which declared the incompatibility of one of the rules of the PL with the Polish Constitution.

The first set of amendments was introduced by the Act on the amendment of the Aviation Law of 25 April 2008². On its basis, Directive 2004/36/WE of the European Parliament and Council on safety of air craft in third states using airports in the European Union of 21 April 2004³ was transposed into the Polish legal system. Under the amendment act, Article 27 PL granted broader rights to the President of the Polish Civil Aviation Office (ULC), including the right to detain an aircraft or land maintenance machinery and the right to restrict the use of an airport if safety rules are violated. Moreover, Article 155 PL was amended and a new Articles 155a, 155b and 155c were introduced setting out: (i) the rules governing ULC inspections; (ii) restrictions that may be imposed on aircraft that violate safety rules, and (iii); data collection from those inspections. These amendments entered into force on 21 June 2008.

The second set of amendments was implemented by the Act of 10 June 2008⁴. On its basis, subsection 4 was added to Article 54 PL which distinguishes local airports and regional airports (including national). Moreover, Article 4 of

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¹ Journal of Laws 2006 No. 100, item 696, with subsequent amendments.

² Journal of Laws 2008 No. 97, item 625.

³ OJ [2004] L 143/76.

⁴ Journal of Laws 2008 No. 144, item 901.

the amendment act regulates the transfer of former military airport property to local governments, an issue of utmost importance for the aviation sector. According to the new rules, the Military Properties Agency (AMW) will transfer its property to a governor who will then donate it to local governments (local, district or county). An executive regulation of the Minister of Transportation will list which properties will be transferred to local governments for public use. These amendments entered into force on 22 August 2008.

The third set of amendments was introduced by the Act on the amendment of the law on registered pledges of 5 September 2008⁵. On its basis, Article 38 PL was changed which precisely describes registered pledges on aircraft. This act entered into force on 11 January 2009.

The next set of amendments was implemented by the Act on the amendment of the law on free trade activity of 19 December 2008⁶. On its basis, Article 27 and 29 PL were changed by the granting to ULC employees of the right to control trade activities. These amendments entered into force on 7 March 2009.

The Act on the amendment of the civil service law of 21 November 2008⁷ introduced the fifth set of amendments to the PL in 2008. On its basis, Article 20 PL was changed which sets out the rules on the selection and appointment procedure of the ULC President. The selection procedure is very complex and specifies how the three short listed candidates are chosen. The final decision whom to appoint is taken by the Minister of Transportation. This act entered into force on 24 March 2009.

Furthermore, seven acts of secondary legislation (executive regulations) concerning the aviation sector were issued by the Minister of Infrastructure in 2008.

First, the regulation of 25 January 2008 regulates the amount, rules and terms of budgetary payments to the ULC to cover its running costs⁸.

Second, the executive regulation of 6 February 2008 on aviation rules⁹ refers to Annex No. 2 to the international civil aviation convention signed on 7 December 1944 (the "Convention"). It specifies that the Polish Air Navigation Services Agency will perform the competences and duties of an air traffic service (ATS) authority, as stated in the convention.

Third, the regulation of 17 June 2008 on the rules of air navigation service activities¹⁰ refers to Annex No. 11 to the Convention. It provides detailed

⁵ Journal of Laws 2008 No. 180, item 1112.

⁶ Journal of Laws 2009 No. 18, item 97.

⁷ Journal of Laws 2008 No. 227, item 1505.

⁸ Journal of Laws 2008 No. 17, item 105.

⁹ Journal of Laws 2008 No. 37, item 203.

¹⁰ Journal of Laws 2008 No. 111, item 709.

rules on the duties and competences of the ATS authority, the meteorological authority and the procedure of changing ATS routes.

Fourth, the executive regulation of 17 June 2008 concerns the rules of cooperation between the civil air navigation authority and the Polish Air Force¹¹. Its objective is to secure a specific role for the air defence system to be performed during peacetime. The cooperation shall take the form of: an exchange of information and experiences, training, cooperation on rescue operations, giving priority to EMER (emergency flights), SAR (rescue aircraft), HEAD (top officials aircraft) and all possible measures to ensure the safety of Polish air traffic.

Fifth, the regulation of 11 July 2008 on air transportation requiring special treatment¹² describes the limits and specifies the rules governing air transportation of special and dangerous materials as well as other items deserving special treatment such as human bodies, animals, medicine and chemicals. The aforementioned rules are based on Annex No. 18 to the Convention. The responsibility for the implementation and execution of this act lies with the ULC President.

Sixth, the executive regulation of 12 September 2008 concerns the establishment and setting up of the rules on the activities of the Air Space Management Committee¹³. The Committee was established under the executive regulation of the Minister of Transportation of 9 July 2003. Its main obligations include issuing recommendations and opinions to several relevant ministries and the ULC concerning draft executive regulation, air traffic procedures and space management. The Committee is also obliged to conduct an annual evaluation of the air traffic management's work and the execution of its procedures. The Committee is working on the basis of rules adopted by the Minister of Transportation.

Seventh, the regulation of 25 November 2008 on the structure of Polish air space and on the detailed conditions and ways of its use¹⁴ determines the structure of Polish air space available for aircraft. It indicates which parts are under control of the Polish Air Navigation Services Agency and which are not controlled. It specifies also the rules and conditions of the use of the Polish air space by each of its users.

It should also be stressed that on 30 September 2008, the Constitutional Tribunal declared that Article 122a PL is not consistent with the Polish Constitution¹⁵. The abolished provision spoke of the right to destroy a civil aircraft if it is misused or, specifically, if it is used as a tool for terrorism.

¹¹ Journal of Laws 2008 No. 117, item 741.

¹² Journal of Laws 2008 No. 126, item 814.

¹³ Journal of Laws 2008 No. 173, item 1074.

¹⁴ Journal of Laws 2008 No. 210, item 1324.

¹⁵ Journal of Laws 2008 No. 177, item 1095.

C A S E C O M M E N T S

Stopping the creeping telecom regulation. Case comment to the judgment of the European Court of Justice of 13 November 2008 – *European Commission v Republic of Poland* (Case C-227/07)

Facts

On 13 November 2008, the European Court of Justice (ECJ) delivered a judgment concerning the scope of the obligation to negotiate access agreements by telecoms operators, which constituted one of the most controversial provisions of the Polish Telecommunications Law of 2004 (hereafter, TL)¹. According to Article 26(1) TL, all operators of public communications networks were obliged to conduct, upon the request of other telecoms operators, negotiations regarding the conclusion of telecoms access agreements. The provision of Article 26(1) was accompanied by specific rules on dispute resolution among telecoms undertakings. On its basis, every operator that received an access request had to enter into access negotiations. In case of a dispute, any of the parties could submit to the President of the Office of Electronic Communications (UKE) a request for the issuance of a decision on any contentious issues concerning access. Such a request could be filed if negotiations were not taken up, access was refused or the agreement was not concluded within 90 days. The access-seeking party could even ask the UKE President to set a shorter time limit for the closure of the negotiations. All decisions resolving such disputes were immediately enforceable. As a result, an access request concerning any network could lead to the issuance of an administrative decision imposing access obligations.

The European Commission noticed as early as in its 10th Implementation Report that the Polish TL² imposed a general obligation to negotiate access on all telecom undertakings. In the opinion of the Commission, its provisions failed to correctly transpose the rules contained in the Access Directive³ into the Polish legal system. While Article 4(1) of the Access Directive indeed provided that the obligation to

¹ Act of 16 July 2004 – Telecommunications Law (Journal of Laws No. 171, item 1800, with subsequent amendments).

² European Electronic Communications Regulation and Markets 2004 (10th Report), COM(2004)759 Final, p. 191.

³ 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.

negotiate applied to all operators of public telecoms networks, it nevertheless restricted this obligation solely to interconnection agreements. Interconnection constitutes a specific type of access whereby networks are being linked physically and logically in order to allow their users to communicate or to access services provided in another network. Whereas the obligation to negotiate access may be imposed as a result of a market analysis of operators with significant market power (SMP), an obligation to grant access means a much wider commitment whereby facilities and/or services are made available to another undertaking for the purpose of providing electronic communications services. Access may cover network elements (local loop), physical infrastructure (ducts and masts), software systems, number translation, access and wholesale services (call origination or termination, wholesale line rental).

The Commission claimed additionally that Poland failed to correctly transpose Article 5(1) of the Access Directive. This provision concerned the power of national regulatory authorities (NRAs) to encourage and, where appropriate, ensure adequate access, interconnection and interoperability of services in accordance with the directive's provisions. The TL did not contain provisions strictly related to the transposition of this requirement.

Key legal problems of this case

The first controversy related to the means of ensuring access to telecoms networks and services. The TL relied on statutory provisions imposing obligatory access negotiations on all operators. The statutory obligation to negotiate access contained in the TL was combined with a dispute settlement mechanism applicable in the absence of an agreement. In contrast, the Access Directive required, in principle, the conduct of a market analysis, the determination of SMP operators and the imposition of a negotiation obligation with access-seeking undertakings.

The Commission and the Polish authorities disagreed as to whether the Polish approach met the aim of ensuring adequate access in accordance with Article 4(1) and 5(1) of the Access Directive. Polish authorities believed that requiring an operator of a telecoms network to enter into negotiations with those seeking access to that network (Article 4(1)) constituted a form of encouraging access to telecoms networks – the goal of Article 5(1) of the Access Directive. The Polish government claimed also that the fact that Article 26(1) TL contains an obligation to negotiate access, rather than only interconnection, constitutes a form of ensuring adequate access to telecoms networks. In its opinion, this extended obligation substituted for the lack of separate provisions directly devoted to ensuring adequate access. According to the Polish government, the sum of exceeding the scope of Article 4(1) but failing to include provisions equivalent to the first subparagraph of Article 5(1) of the Access Directive, fulfilled the overall purpose and function of the Access Directive.

The reasoning of the judgment stated that the means of the implementation of the goal of ensuring access can not conflict with the procedural safeguards that prevent the market from overregulation. These safeguards are crucial for the long term development of competition. Thus, the ECJ rejected the purely functional approach

to the transposition of the Access Directive demonstrated by Polish authorities. The difference in the scope between access and interconnection agreements was said to result from their distinct definitions. The transposition of the obligations relating to interconnection (a specific type of access) should not embrace other forms of access to networks (included in the definitions of access). Both definitions were contained in the Access Directive and in the TL.

The functional and purposive approach favoured by Polish authorities risked an uncontrolled expansion of regulation over the activities of operators without SMP. As the ECJ indicated, the Access Directive limited the obligation to negotiate access to operators designated as having SMP on specific markets. This was done on the basis of a specific market determination and analysis carried out by a NRA. The imposition of an obligation to negotiate access was envisaged in the Access Directive as the final part of a broader procedure, where the primary goal of promoting competition was balanced with safeguards preventing excessive regulation. The functional approach of the TL collided with the basic concepts of the EU regulatory framework. The statutory obligation to negotiate access precluded the UKE President from considering the state of the market as a whole before examining a request to resolve an access dispute. In other words, access disputes were settled by the regulator without a prior evaluation of the degree of effective competition on the market concerned. This approach made it impossible to withdraw an access obligation where competition intensified.

The Commission also complained that the first subparagraph of Article 5(1) of the Access Directive has not been correctly transposed into the Polish TL. Article 5(1) requires NRAs to hold the power necessary to intervene in order to ensure adequate access and interconnection in compliance with the objectives of Article 8 of the Framework Directive⁴. The TL did not have specific provision on such an *ex officio* intervention. Instead, it contained detailed provisions concerning access dispute settlement between operators.

The case at hand potentially required the assessment of two major legal issues. First, whether the general provision of Article 5(1) of the Access Directive constituted a type of a programmatic norm giving Member States considerable freedom in choosing the form and methods of its implementation. Second, whether it is admissible to make the power of a NRA dependent on the initiative of access seeking parties or on the existence of a dispute between undertakings. ECJ admitted that the contentious norm of Article 5(1) is limited to the provision of a general power to NRAs for the purpose of achieving the objectives of Article 8 of the Framework Directive. Thus, the ECJ found that the Commission's complaint that this norm was not properly transposed was not sufficiently substantiated by the fact that the Polish TL lacked the exact sane wording of the directive empowering the regulator to intervene. In the opinion of the ECJ, it was the duty of the Commission to show that the relevant provisions of the TL

⁴ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ [2002] L 108/33.

did not achieve the objectives of the directives. Since this was not the case, the second complaint of the Commission was rejected by the ECJ without further investigation.

The significance of the judgment

The ECJ judgment is a milestone in a series of EU interventions against excessive regulation of Polish telecoms markets. One route of expanding regulation beyond the boundaries set out by the EU regulatory framework followed the application pattern of Article 26(1) TL. Telecoms undertakings demanded a type of access that was not covered by regulatory decisions. Upon the ineffective lapse of the 90 days time limit for negotiations, they asked the UKE President to issue a decision settling the dispute by imposing an obligation to grant the requested type of access. Some requests took place before an analysis of the market concerned was carried out. Some access demands occurred in markets not subject to *ex ante* regulation or even in markets already said to be competitive. When notifying to the Commission draft decisions imposing access obligations, the UKE President used Article 5(1) of the Access Directive as their formal legal basis. In practice however, they resulted from the excessive definition of the obligation to negotiate access contained in Article 26(1) TL.

One of the cases disputed by the Commission involved a mobile virtual network operator (MVNO) requesting national roaming services from an established mobile network operator. The request was made even though an analysis of the market for access and call origination on public mobile telephone networks (market 15/2003) was not yet carried out and, most importantly, it was later found to be competitive. The Commission questioned the legal grounds of the decision and forced the UKE President to withdraw the draft imposing a national roaming obligation⁵. Another case of premature and excessive regulation concerned the market of peering services. Telekomunikacja Polska S.A. (TP SA) used to refuse peering agreements in connection with its offer of paid transit services for other telecoms undertakings. The draft decision notified by the UKE President was once again based on Article 5(1) of the Access Directive. The draft obliged TP SA to provide other telecoms undertakings with peering services, some of them free of charge. TP SA was also meant to apply cost oriented prices for peering services and prepare a reference peering offer. The Commission considered this obligation to be unfounded, infringing the proportionality principle, as well as premature in light of all the other obligations imposed on TP SA in order to ensure communication between subscribers of telecoms networks⁶.

Polish attempts at extending regulation beyond the boundaries of the EU regulatory framework were also a primary concern of numerous interventions by the Commission within the consolidation procedure based on Article 7 of the Framework Directive. The Commission vetoed draft decisions concerning markets 1/2003 and 2/2003, effectively preventing the extension of regulation onto retail broadband access markets⁷. Draft

⁵ PL/2007/0631, SG-Greffe (2007) D/203442

⁶ PL/2006/0656, SG-Greffe (2007) D/204768

⁷ Commission Decision of 10 January 2007, PL/2006/0518, PL/2006/0524.

decisions regarding markets 9/2003 and 14/2003 were questioned because included in these markets were services that were not substitutes (eg. calls to premium numbers and free phone numbers in the market 9/2003). Draft decisions pertaining to markets 3-6/2003 were amended and the draft decision concerning market 14/2003 withdrawn following serious doubts letters sent by the Commission to the UKE President. In these cases, the Commission believed that the market share of the leading operator was overestimated due to an incorrect market definition. Draft decisions regarding markets 10/2003 and 15/2003 were withdrawn. They were said to be insufficiently substantiated in terms of their initial conclusion that they were susceptible to *ex ante* regulation and the fact that an operator with SMP could be identified. The claim that regulation was extended to the retail broadband services market constituted the grounds of an action brought by the Commission in December 2008 (case C-545/08) against the regulation of retail tariffs for broadband access services without carrying out a prior market analysis⁸.

The ECJ judgment emphasizes the necessity of drawing a clear division between regulatory powers concerning access and those concerning interconnection. In case of interconnection requests, a NRA has broader competences to intervene regardless of market power of the operators involved. Demands for access in markets where no SMP exists, or where no *ex ante* regulation applies, require thorough individual selection. The legal demarcation between access and interconnection gains in importance. The difference between these two forms of cooperation in the telecoms sector is determined by statutory definitions contained both in the TL and in the Access Directive. Nonetheless, it can cause disputes where a regulator finds interconnection problems in order to justify an intervention. Such classification issues arise in the case of national roaming services and wholesale line rental (WLR).

The judgment emphasizes the role of a precise transposition of obligations based on pre-defined terms. It sheds some light on the disputed admissibility of the imposition of a “functional separation” obligation on the grounds of the wording of Article 8(3) of the Access Directive (imposing “other obligations for access or interconnection”) rather than obligations clearly listed in the Directive. The obligation of a “functional separation” including: separation of network assets, personnel separation, separate management of business units, different trade brands, separate budgets and accounting as well as separate systems of operational support, clearly and significantly exceeds the scope of “access” and “interconnection” as defined in the Directive. Imposing an obligation of a “functional separation” prior to the amendment of the Access Directive, which introduces explicit powers to apply new remedies, may exceed the powers of the regulator, which are restricted to clearly defined terms of access and interconnection.

The ECJ judgment closed the main route for the spread of regulation over telecoms markets, which was based on the unlimited obligation to negotiate access

⁸ See S. Piątek, W. Szpringer, “Efektywność regulacji rynków telekomunikacyjnych” [“Efficiency of Telecommunications Markets Regulation”] [in:] S. Piątek (ed.), *Regulacja rynków telekomunikacyjnych [Regulation of telecommunications markets]*, Warszawa 2007, p. 347–353.

combined with a dispute resolution mechanism. The judgment is also a warning against creeping regulation that exceeds the boundaries of the EU regulatory framework for communications networks and services.

Following the ECJ judgment, Article 26(1) TL was amended by the Polish Parliament on 24 April 2009. The new Article 26a TL imposes an obligation to negotiate interconnection on all operators but limits the obligation to negotiate access agreements to operators with SMP.

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**A local government's right to determine the conditions of operating
on the market for communal waste collection.**

**Can such conditions lead to an anticompetitive foreclosure
of that market?**

**Case comment to the judgement of the Supreme Court
of 14 November 2008 – *City Kalisz*
(Ref. No. III SK 9/08)**

Facts

In the decision (no. RPZ-40/2005) issued on 30 December 2005, the President of the Office of Competition and Consumer Protection (UOKiK) established an infringement of Article 8(2)(5) and (8) of the Act of 15 December 2000 on Competition and Consumer Protection¹ by the Kalisz city borough² (Miasto Kalisz, hereafter MK). The abuse took the form of preventing the creation of conditions necessary for the emergence or development of competition and market sharing. The same forms of abuse are currently listed in Article 9 of the new Act of 16 July 2007 on Competition and Consumer Protection³ (hereafter, Competition Act). Miasto Kalisz made the granting of a permit to collect communal waste from property owners subject to the possession of a technical base situated in the territory of MK or a neighbouring district. The UOKiK President ordered MK to cease the contested practice and imposed upon MK a fine.

Miasto Kalisz appealed the decision to the Polish Court of Competition and Consumer Protection (SOKiK) claiming that the UOKiK President infringed the listed above provisions of the Competition and Consumer Protection Act of 2000. The Court upheld the UOKiK decision. Miasto Kalisz appealed the ruling to the Court of Appeal in Warsaw. The appeal was dismissed. Miasto Kalisz filed a cassation request. The Supreme Court settled the dispute on 14 November 2008 in favour of the UOKiK stating that the cassation was not justified in this case.

¹ Journal of Laws 2005 No. 244, item 2080.

² Kalisz city borough acted as a plaintiff in this case.

³ Journal of Laws 2007 No. 50, item 337; see Article 9(2)(5) and (7) of the Competition Act.

The key legal problems of the case and key findings of the Supreme Court

Relevant markets

Two relevant **product markets**⁴ were determined:

- the market for the organisation of services of a public utility nature in the form of maintaining tidiness and order within a borough (**upstream market**). The city borough is liable for the organisation of such services⁵ (simultaneously the provisions of Polish antitrust law are applied to their activity⁶). Miasto Kalisz (plaintiff) held the position of a (**legal**) **monopolist**⁷ on that market;
- the market for communal waste collection from property owners (**downstream market**). The plaintiff not only conducted an economic activity on that market but also held a **dominant position** on it.

The **geographical scope** of these two **related** relevant markets comprised the territory of **the Kalisz city borough**. Miasto Kalisz was charged with the abuse of its dominant position on the downstream market. However, the abuse derived from the fact that MK exercised its substantial⁸ market power (“regulating power”) on the upstream market by leveraging it onto the downstream market.

Anticompetitive foreclosure of the communal waste collection market

The main claim of MK that was examined by the Supreme Court concerned the infringement of **Article 9(2)(5) of the Competition Act**⁹ – counteracting the creation of conditions necessary for the emergence or development of competition. The Supreme Court rightly did not find that the UOKiK President violated of this provision. For an infringement of Article 9 to occur, the dominant firm’s conduct must create significant barriers to entry or expansion¹⁰. The existence of such barriers practically excludes

⁴ Within the meaning of Article 4.9 of the Competition Act.

⁵ See Article 1 and 3 of the Act of 13 September 1996 on Maintaining Tidiness and Order within Communes [Ustawa o utrzymaniu czystości i porządku w gminach], Journal of Laws 2005 No. 236, item 2008.

⁶ Local authority units (i.e. city boroughs) possess the status of an “undertaking” within the meaning of Polish antitrust law (see Article 4.1a of the Competition Act); see also M. Bernatt, “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 judgement of Supreme Court of 5 January 2007 (Ref. No. III SK 16/06)” (2008) 1(1) *YARS* 220.

⁷ The execution of the tasks determined in the Act of 13 September 1996 on Maintaining Tidiness and Order within Communes has been exclusively entrusted to boroughs.

⁸ I.e. arising from the position of a legal monopolistic (on the upstream market).

⁹ And also the infringement of Article 9(2)(7) of the Competition Act (“[m]arket sharing according to territorial, product, or entity-related criteria”). The scope of that case comment is however limited to remarks concerning the form of abuse defined in Article 9(2)(5) of the Competition Act.

¹⁰ This approach is shared by recent judgments; see e.g. the judgment of the Supreme Court of 19 February 2009, III SK 31/08 (unpublished), where the court stated that the application

the possibility of the emergence or development of competition on a given market; thus their creation justifies the assumption of **market foreclosure**.

The contested practice of MK created a significant barrier to enter the market for communal waste collection from property owners or to expand their activities on that market.

That barrier took the form of a requirement to **possess**, by the undertaking applying for a permit to operate on that market, a **technical base situated within MK or the territory of a neighbouring district**. Such requirement, which simultaneously constituted one of the prerequisite of that permit, was introduced by an order of the President of MK (No. 529/2003). The plaintiff's argument should be rejected in which MK saw this condition as neither discriminatory nor anticompetitive (exclusionary), because it was applicable to all undertakings – both those already rendering services of communal waste collection and those applying for the required permit.

First, the application of Article 9(2)(5) of the Competition Act is not conditional on finding discriminatory behaviour¹¹. Second, the market entry (expansion) barrier raised by the MK President was of economic nature. The fulfilment of the contested condition required significant (additional) costs by the applicant. These costs were necessary for the creation, or move, of a technical base for waste collection/utilisation within MK or a territory of a neighbouring district¹². Such necessity constituted thus an essential factor discouraging potential competitors from entering the market for communal waste collection from property owners or from continuing their activities by actual competitors of MK. Consequently, this requirement led to the elimination (or at least to significant restriction) of the conditions necessary for the development of effective competition on that market. Such situation simultaneously gave an important advantage to those entities that already had (before the introduction of the disputed requirement) a technical base within MK or a neighbouring district since they did not need to incur any extra costs. This was clearly the case with the plaintiff which conducted an economic activity on that market¹³.

of Article 9(2)(5) of the Competition Act shall be limited to the creation of entry barriers that are of fundamental nature – barriers that concern the conditions necessary to effectively enter and operate on the given market.

¹¹ In this case, there were no grounds to find merely an instance of “pure” formal discrimination. The discrimination really did take place since it placed at a competitive disadvantage all those undertakings which did not fulfil it on the day it was established; the condition created unequal conditions of competition that favoured those undertakings that already had a technical base in the required territory such as MK. Consequently, the conduct of MK could also be qualified as a discriminating practice defined in Article 9(2)(3) of the Competition Act. However the infringement of that provision was not subject of the judgment of the Supreme Court.

¹² Rightly emphasized by the Supreme Court, which stressed that the undertaking which did not possess a technical base in the prescribed territory but had one elsewhere, would have to consider the profitability of opening a second base within MK or the transfer of the existing base to the prescribed territory. Such activities would have certainly created significant extra costs.

¹³ The plaintiff held a dominant position also on that market. By the introduction of the disputed condition, the plaintiff intended to monopolize also that market (or at least

Objective justification (state action doctrine)

The Supreme Court rightly stated that an allegedly anticompetitive conduct could – despite such qualification – be treated as legal, if it is permissible or even required by the law or is objectively justified by other reasons. The undertaking shall not be found liable for a violation of the prohibition of dominant position abuse, if domestic legal provisions or decisions of public authorities impose on that undertaking the obligation of conduct that is incompatible with this prohibition. In such cases, the contested conduct is not considered to be autonomous. Instead, it is the effect of the observance of an order of the national legislator or executive authority (the so called “state action doctrine”¹⁴).

However, the conditions for the application of the “state action doctrine” have not been met in this case. The contested requirement regarding the localization of waste collection facilities is not provided by the Act of 13 September 1996 on Maintaining Tidiness and Order within Communes or the provisions of the Order of the Minister of Environment Protection of 30 December 2005 on the Detailed Methods of Determining the Requirements to be Met by Those Applying for the Permit¹⁵. Although the provisions of these acts indeed empower local authorities to determine the requirements for a waste collection permit¹⁶, they do not give them full discretion in defining the conditions necessary to obtain that permit.

First, the required conditions should be formulated in a way that would allow for a proper fulfilment of the objectives of the Act of 13 September 1996 on Maintaining Tidiness and Order within Boroughs and Related Tasks (determined in that act)¹⁷. The introduction of the contested requirement should thus have contributed to an effective implementation of these objectives. However, the plaintiff failed to demonstrate that the questioned requirement was indispensable to the implementation of the specified tasks and, in particular, for ensuring safe and environmentally friendly communal waste collection from property owners¹⁸. Indeed, proving the indispensability of that

to strengthen its position on it) by was of an anti-competitive leveraging of its monopolistic position from the *upstream* market (the market for the organisation of services of a public utility nature; see: *Relevant markets*).

¹⁴ The state action doctrine has been developed in the jurisprudence of EU courts; see e.g. case T-513/93 *Consiglio nazionale degli spedizionieri doganali v Commission*, [2000] ECR II-1807; joint cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing*, [1995] ECR I-6265; case T-271/03 *Deutsche Telekom AG v Commission*, [2008] ECR II-477.

¹⁵ Journal of Laws 2006 No. 5, item 33.

¹⁶ For the conduct of activities in the field of communal waste collection from property owners.

¹⁷ See also Article 7(7) of that Act – its provisions (along with secondary legislation) shall safeguard the maximum safety for citizens and the environment of the borough.

¹⁸ The plaintiff claimed however, that if the technical base is removed from the territory from which the waste collection services are to be rendered, the conduct of the waste collection activities could be significantly hindered or even made impossible. The Supreme Court found this argumentation to be speculative stressing that MK failed to demonstrate any concrete examples for its claims.

requirement should be treated as an objective justification for the contested conduct, which would eliminate the possibility of qualifying it as dominant position abuse. The plaintiff did not submit such proof.

Second, the provisions of the aforementioned Regulation of the Minister of Environment Protection include an *expressis verbis* obligation to define the requirements necessary to obtain the permit **in a way which does not restrict competition**.

Final remarks

The disputed requirement established by the MK President was not neutral from the point of view of ensuring equal conditions for commencing and conducting economic activities on that market. It led to an anticompetitive foreclosure of that market. The Supreme Court rightly qualified the contested conduct as an abuse of a dominant position by MK in the form of the prevention of the creation of conditions necessary for the emergence or development of competition (Article 9(2)(5) of the Competition Act).

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**Gratuitous transfer of ownership of energy transmission infrastructure
as an abuse of a dominant position.
Case comment to the judgement of the Supreme Court
of 16 October 2008 – *Kolej Gondolowa*
(Ref. No. III SK 2/08)**

Facts

In the decision no. RKR - 8/99 of 24 March 1999, the President of the Office of Competition and Consumer Protection (UOKiK) did not agree with the complaint submitted by Kolej Gondolowa Jaworzyna Krynicka S.A. (KGJ). As a result, the UOKiK President refused to declare that the Energy Supplier used monopolistic practices and thus abused its dominant position in the local electricity supply market. KGJ complained that the Supplier had imposed a requirement upon KGJ to surrender the ownership of energy transmission facilities constructed mostly at the expense and by the effort of KGJ. The original antitrust proceedings in this case were conducted pursuant to the Act of 24 February 1990 on Counteracting Monopolistic Practices and the Protection of Consumer Interests¹ which is no longer in force.

KGJ and the Energy Supplier were parties to two contracts: a) an investment agreement entered into on 28 June 1996; and b) an agreement on the gratuitous transfer of energy transmission facilities to the Supplier entered into on 11 April 1997. The Supplier made the activation of the energy supplies conditional upon the conclusion of the latter agreement.

The dispute among KGJ, the UOKiK President and Energy Supplier in question is one of the longest in the history of Polish antitrust jurisprudence – Polish courts have made their position on this matter known as many as eight times, four of which were Supreme Court judgments².

¹ Consolidated text: Journal of Laws 1999 No. 52, item 547.

² Background: 22 November 2000 – the Antimonopoly Court dismisses KGJ's appeal; 24 April 2003 – the Supreme Court issued a judgement in favour of KGJ's final appeal; 19 May 2004 – the Competition and Consumer Protection Court dismissed KGJ's appeal; 7 December 2005 – the Supreme Court issued a ruling resolving a legal question; 6 April 2006 – the Warsaw Appeals Court dismissed KGJ's appeal; 5 January 2007 – the Supreme Court issued a judgement in favour of KGJ's final appeal; 5 July 2007 – the Warsaw Appeals Court issued a judgement changing the UOKiK President decision and confirming the abuse of the dominant position by the Energy Supplier; 16 October 2008 – the Supreme Court dismissed the final appeal of the Energy Sup-

Ultimately, it was decided³ that the Energy Supplier had abused its dominant position in the local market of electricity supplies by imposing onerous contract terms and conditions on KGJ. The contested practice took the form of an agreement on the gratuitous surrender of infrastructure built mostly at the expense and by the effort of KGJ without providing any financial compensation for the service. This legal assessment was upheld by the Supreme Court in the judgement under consideration here. However, before this ruling, various views were presented by Polish courts and the UOKiK.

Key legal problems of the case and key findings of the Court

In the opinion of the UOKiK President, the Energy Supplier did not force the terms and conditions of the agreements concluded in 1996 and 1997 upon the plaintiff (KGJ). The antitrust authority held the view that these terms were neither onerous nor did they generate any unjustified benefits to the Supplier. Investment costs were settled by way of a civil-law agreement respecting the equality of its parties. The contribution of KGJ to the joint investment amounted to 53%, while the Supplier covered 47% of the total. The latter was additionally burdened with future operating and maintenance costs.

The Supreme Court disagreed with that position in its judgement of 24 April 2003 because this approach could be considered to be correct only if the gratuitous surrender of the facilities had an impact on a corresponding reduction of the electricity prices charged to KGJ. A gratuitous surrender of expensive infrastructure in return for the possibility of receiving energy supplies, charged however at a full price, was a *prima facie* onerous contractual condition. The Supreme Court compared it to a car manufacturer who, in addition to charging the price of a car, would also request buyers to gratuitously participate in the cost of building and equipping the car assembly facility. According to the Supreme Court, access to the energy supply source needed by the buyer to conduct his business cannot be considered in a market economy as a fair equivalent of a gratuitous surrender of property assets. The Supreme Court also noted that the “imposition” in question may also be an expression of the lack of choice available to KGJ. To assess whether onerous contractual terms had been indeed imposed, the Competition and Consumer Protection Court should consider whether a reasonable electricity customer would enter into such an agreement (obliging it to gratuitously surrender facilities build by the customer) if the Supplier operated in

plier. Moreover, the Supreme Court judgement of 5 January 2007 was voted twice (in favour) – see K. Kohutek, “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 judgement of the Supreme Court of 5 January 2007 – Kolej Gondolowa (Ref. No. III SK 17/06)” (2008) 1(1) *YARS* and K. Kohutek, *Commentary to the Supreme Court Judgement of 5 January 2007 (III SK 17/06)*, Lex/el 2008.

³ By the Warsaw Appeals Court’s judgement of 5 July 2007, which was upheld in effect on the basis of a commented ruling.

a competitive environment and the customer had the possibility of choosing among several supply sources.

After a re-examination of the case, the Competition and Consumer Protection Court issued a judgement on 19 May 2004 rejecting KGJ's appeal against the UOKiK decision. The court decided that the assessment of whether a monopolistic practice had taken place should cover both mutually independent agreements signed by the Supplier with KGJ. The Court stated that such an assessment could not be performed with respect to the first agreement, because the administrative proceedings were initiated after the lapse of the period specified in the Polish antitrust statute of limitations (one year after the end of the year in which the contested practice ceased). With respect to the 1997 agreement, the Competition and Consumer Protection Court stated that the act of concluding it was a performance arising from the commitments specified in the contract of 28 June 1996. In other words, the Supplier did not impose the terms of the agreement dated 11 April 1007 on KGJ. One could speak of an "imposition", at most, with reference to the 1996 contract since the second agreement was nothing more than the execution of the first. Consequently, a hypothetical abuse could have occurred, at the latest, at the time of signing the first agreement (June 1996). According to the Court, there were therefore no grounds for the UOKiK to initiate proceedings due to the lapse of the period identified in the relevant statute of limitations.

The Supreme Court rejected the above argumentation in its judgement of 5 January 2007. When KGJ entered into the 1997 agreement, it had no freedom of choice, not as much because it had entered into the 1996 contract, but because of the monopolistic position of the Supplier on the energy supply market and due its conduct. For this reason, the Supreme Court considered that the limitations period should be counted from the moment of entering into the second agreement rather than from the first. Therefore, the UOKiK proceeding had been initiated within the deadline specified in the statute of limitations. The Supreme Court also asserted that if the market in which the parties operated had been competitive, the energy buyer would not have been obligated to build energy transmission facilities using his own resources and then surrender them gratuitously to the energy supplier since this would be economically unreasonable. Furthermore, the Supreme Court expressed the opinion that the conduct of the Energy Supplier could be treated as an abuse of its dominant position also by virtue of the use bundling.

In its judgement of 16 October 2008, which is the subject of this commentary, the Supreme Court essentially agreed with the argumentation presented earlier by the various courts. At the same time, it initiated a new thread in the matter – the issue of public interest which, in the opinion of the Supreme Court, had indeed been breached.

The Supreme Court stated that the Supplier which held a dominant position had to pay KGJ equivalently for taking over the ownership of the energy transmission facilities used to supply energy to KGJ and built with a 53% participation of the latter. By coercing KGJ into the agreement on a gratuitous transfer of ownership, the Supplier committed an act of an abuse of its dominant position evidenced by the imposition of onerous terms of that agreement.

The assessment of the judgement

In my opinion, the Supreme Court finding of an abuse of a dominant position by the Energy Supplier was incorrect. On the other hand, I agree with its interpretation of the notion of public interest and of the provision of the antitrust statute of limitations.

Doubts raised by the judgement

First, what should have been clarified before considering any other aspects of the case (not done by any of the courts involved in this case) is the civil-law nature of the infrastructure taken over by the Supplier. According to predominant (until 2006) interpretation of Article 49 in connection with Article 191 of the Civil Code, facilities used for the transmission of energy provided by the supplier become its property by virtue of the law on their hook-up⁴. This would mean in this case, that the Energy Supplier would become the owner of these facilities by virtue of the law. The conclusion of the 1997 agreement, which confirmed that fact, would only be of declaratory nature. Consequently, the Supplier should have been charged with an abuse of its dominant position because it refused to pay for these facilities (by virtue of the law and confirmed by the agreement) rather than because it coerced KGJ into their gratuitous surrender. The establishment of these civil-law circumstances would have eliminated the need for the Supreme Court's speculations⁵ if it was possible to treat the conduct of the Supplier as illegal bundling and to assume, that the gratuitous surrender of the necessary facilities by the energy buyer was not linked in any way to the object of the energy sales agreement.

Second, it seems that the Supreme Court upheld the view expressed in its earlier judgement of 24 April 2003 whereby the conduct of the Supplier could not be justified by the long-term nature of the return on investment because "[a] short or long-term nature of an investment can impact the magnitude of benefits associated with it but has little to do with the legitimacy of their acquisition".

In my opinion, this view is both incorrect and detached from economic realities. In addition, it breaks away from other jurisprudence. A completely different assertion was made by the Supreme Court in its judgement of 27 May 1998⁶. On that occasion, the Court assumed that the assessment of whether benefits obtained by a dominant undertaking are unjustified should take into account of the burdens arising from the long-term nature of the intended (accomplished) investment. This particular case involved an analogous situation to the dispute at hand – the participation in the cost

⁴ See, for example, the Antimonopoly Court judgement of 16 June 1999 (XVII Ama 22/09) and the Constitutional Tribunal judgement of 4 December 1991. It seems that this jurisprudence was permanently changed by the Supreme Court resolution of 8 March 2006, III CZP 105/2005, (2006) 10 *Orzecznictwo Sądu Najwyższego Izba Cywilna* 159, (2007) 7–8 *Orzecznictwo Sądów Polskich* 84.

⁵ See the Supreme Court judgement of 5 January 2007, III SK 17/06 (unpublished), in which the court pronounced itself on the matter at hand for the third time.

⁶ I CKN 702/97, (1999) 7–8 *Orzecznictwo Sądów Polskich*, item 139.

of building a power grid by the energy supplier and user. In the earlier case, the Supreme Court decided that an assessment of the equivalency of the energy supplier's performance needed to take into account the period needed to recoup the grid expansion investment outlays. In my view, this approach is correct. Any assessment of investment costs must take into account the time needed to recoup them. The longer that time, the higher the investor's estimate of the cost of his performance. In my opinion, not taking into account the time needed for the Supplier to cash in on the investment is an omission showing the absence of an economic approach to the examined case.

The third key element of this judgement is burdened with similar defects. In my opinion, the charge of having imposed adverse contractual terms has not been substantiated, but made plausible at most. The reasoning of the Court was based on the following premise: the Supplier gained an unjustified benefit because it received gratuitously at least part of the infrastructure needed to sell energy. At the same time, there was no equivalency between the performance of the Supplier (supply of energy and the construction of 47% of the infrastructure) and of KGJ (payment for energy, construction of 53% of the infrastructure and gratuitous surrender of its ownership to the Supplier). This approach, which is likely to reflect the true trade relationship between the parties, unfortunately suffers from the absence of economic considerations.

It seems that in constructing this reasoning, the Supreme Court based itself on the principles of logical thinking and life experience rather than on a specific economic analysis. For example, such an analysis should juxtapose the cost of building the facilities, against potential profits generated by the Supplier from energy sales. If the investment cost to be incurred by the Supplier was so high that the sale of energy would not generate a fair profit, then a gratuitous transfer of ownership of these facilities could be economically justified. After all, one cannot expect the Energy Supplier to finance a business venture which will not yield an income⁷. In my view, these circumstances should have been examined by the courts on the basis of evidence taken from an expert opinion⁸. Since this was not the case, the imposition by the Supplier of onerous contractual terms was made plausible only through the application of the principles of logical thinking and life experience, rather than proven by a sound economic analysis. The above example is characteristic of Polish jurisprudence. In my view, economic analysis, which should be conducted on the basis of appropriate

⁷ It should be noted that the Polish energy law was changed after 1997 by a provision obliging the energy supplier to enter into a supply agreement under which the energy buyer guaranteed to cover the supplier's expense involved in constructing or expanding the supply grid in an amount ensuring that the supplier's future revenues from that buyer would be higher than that expense (A. Walaszek-Pyziół, W. Pyziół, *Prawo energetyczne. Komentarz [Commentary on Energy Law]*, Warszawa 1998, p. 40–41). Before 1997, i.e., under the legal order binding for the case under examination, that provision did not exist.

⁸ There was no taking of such evidence despite the fact that both KGJ and the Energy Supplier had applied for it. The court could have also taken that [economic] evidence *ex officio* – in this respect, see the Supreme Court judgment of 4 September 2002, I CKN 461/01, (2003) 3 *Orzecznictwo Sądów Polskich*, item 17.

expert opinions, does not play a sufficient role in the decisional practice of the UOKiK President or in the jurisprudence of common courts.

On the other hand, I agree with the following conclusions of the Supreme Court: Interpretation of “public interest”

An issue that arose only at the final stage of the proceedings was whether, in view of the fact that the Supplier had used the contentious practice only towards a single undertaking, there was cause for invoking a breach of public interest and thus engaging the antitrust authority in the case rather than a common court. The answer to this question was in affirmative.

The Supreme Court decided that a breach of public interest occurs when a company’s conduct has, or can have, a harmful effect on the market by influencing the quantity, quality and price of goods or the extent of the choice available to consumers and other buyers. The number of companies affected by the practice is irrelevant in terms of the admissibility of applying antitrust legislation.

That viewpoint is correct. The fact that the Supplier’s conduct affected only one company is irrelevant because KGJ would compensate for its weakened financial position (caused, among others, by not having been paid for the surrendered infrastructure) by increasing the price that it would charge its own customers⁹. Relevant here is also the Supreme Court’s judgement of 24 July 2003¹⁰, which stated that an assessment of whether the terms of free competition are breached or threatened in a relevant market should not be restricted to examining the potential injustice caused to direct business partners of the undertaking that dominates that market. A broader outlook is required, one that takes into account the issue of how the actions of a dominant undertaking impact the interests of ultimate consumers.

It should be noted however that judicial decisions differing from that line of argumentation (i.e. associating public interest with direct impact on a wider circle of market participants) are also present in Polish jurisprudence. However, it seems that their importance has diminished¹¹.

Interpretation of the antitrust statute of limitations

The Supreme Court was right to state that the limitations period, after which antitrust proceedings could not have been initiated, has not lapsed in this case.

Two differing approaches were presented during the course of the proceedings concerning this issue: a formalistic and an economic one.

⁹ See also K. Kohutek, *Commentary to the Supreme Court Judgement of 5 January 2007 (III SK 17/06)*, Lex/el 2008.

¹⁰ I CKN 496/01.

¹¹ See more on this subject: D. Miąsik, T. Skoczny [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009, p. 49; see also Supreme Court judgements of 5 June 2008, III SK 40/07 (unpublished) and 26 February 2004, III SK 1/04, (2004) 18 *Orzecznictwo Sądu Najwyższego - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych* 323.

It is true that from a formalistic point of view, KGJ was obligated to enter into an agreement on the gratuitous surrender of infrastructure ownership already in 1996. That obligation was only acted upon in 1997 by virtue of entering into a subsequent agreement. This line of reasoning placed the moment of the abuse of dominance in the year 1996; hence, at the time of the initiation of the UOKiK proceedings, the case was already past the period specified in the statute of limitations (under this variant, the prescription period lapsed on 31 December 1997).

Nonetheless, looking at the issue from an economic perspective, it is difficult to disagree with the notion that KGJ entered into the 1997 contract not so much because of having concluded the 1996 agreement, but because of the monopolistic position held by the Supplier, which existed, and in the Court's opinion, was abused at the time of entering into the 1997 contract. In other words, the only reason why the parties entered into agreements of that particular content was that the Supplier held a dominant market position.

Until the considered case, Polish jurisprudence rarely considered the antitrust statute of limitations. The manner of interpreting the limitations period in this case may indicate a trend toward broadening its interpretation. However, this would be at odds with the doctrine stating that where in doubt, the interpretation of limitations provisions should lead toward a shortening, rather than a lengthening, of the period which needs to lapse before the UOKiK President can no longer initiate proceedings¹².

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¹² D. Miąsik, T. Skoczny [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1328.

B O O K S R E V I E W S

**Stanisław Piątek (ed.) *Regulacja rynków telekomunikacyjnych*
[*Regulation of Telecommunications Markets*]
Wydawnictwo Naukowe
Wydziału Zarządzania Uniwersytetu Warszawskiego
[*Warsaw University Faculty of Management Press*], Warszawa 2007, 395 p.**

The collective work entitled *Regulation of Telecommunications Markets* edited by Prof. Stanisław Piątek is the first publication in Poland to present a comprehensive overview of the regulatory practice concerning the Polish electronic communication market and, at the same time, to assess the efficiency of the undertaken regulatory measures. The first part of the book is dedicated to the presentation of the status of regulatory proceedings in particular telecoms markets: access to a fixed telecoms network (FTN), exchange calls services, leased lines, originating and terminating calls as well as transit in FTNs, local loop access and broadband access services, mobile phones as well as transmission of radio and TV programmes. The second part is dedicated to specific problems of telecoms market regulation in Poland.

In light of the presented problems, a few reflections are in order. A detailed overview of both the regulatory proceedings and the regulatory problems described by the individual Authors in relation to the issues originating from such proceedings suggests a need to consider whether current regulations resulting from the implementation of the EU Telecoms Directive Package of 2002, are adequate to the development of the market in Poland. The 2002 package was introduced on the assumption that electronic communications markets have already been de-monopolised in particular Member States and so, that a modification of existing regulatory instruments is needed.

The Polish Telecommunications Law of 2004 (TP), which follows the 2002 EU telecoms package, equipped the national regulator with “manual” market steering instruments, as opposed to the former model that provided an automatic imposition of regulatory obligations whenever a dominant market position was ascertained (thus, the role of the regulator used to be smaller than it currently is). On one hand, Poland was bound to implement the package, but on the other, the situation on the local market might have seemed not mature enough to adopt a new regulatory model which, as rightly emphasised by Szpringer and Piątek¹, assigns many powers based on comprehensive discretion of the regulatory authority.

¹ S. Piątek, W. Springer, Efektywność regulacji rynków telekomunikacyjnych [*Efficiency of Telecoms Markets Regulation*], p. 354.

In 2004, many Polish markets were still dominated by a single entity – Telekomunikacja Polska S.A. (TP SA). As Piątek pointed out, the share of TP SA in both the consumer and non-consumer markets for connections to a fixed network (market 1 and 2) was over 90% in the years 2002-2005. This situation made it necessary for the regulator (first the President of the Office of Telecommunications and Post Regulation and later the President of the Office of Electronic Communications: UKE) to take strong actions to compensate for the delays, as compared to other markets. However, using discretionary decisions to make up for them often induced controversies (*inter alia*, the fact that the UKE President “extended” market 1 and 2 to cover access to all telecoms services rather than telephone only² etc., as described by Piątek).

It should be stressed however that the position of the UKE President, his/her appointment procedure and procedural aspects of proceedings before that authority (reviewed by Kosmala³) lead to a conclusion that the Polish regulator enjoys a rather independent position and, in practice, is not subject to a large degree of control. This is illustrated by the fact that the decisions of the UKE President are immediately enforceable, even concerning key matters such as the determination of the market position, the imposition of regulation obligations and dispute resolution, while the mechanism of court supervision over these decisions has been purely theoretical so far. Administrative courts (which only adjudicate in some telecoms cases) scrutinise decisions exclusively from the perspective of their legality. The entire regulatory activities area (implementation of regulation policy) lies outside of the scope of their scrutiny. The control exercised by the Court of Competition and Consumer Protection (SOKiK) does not safeguard the basic rights of telecoms companies either. This fact is attributable primarily to the drawn-out duration of the proceedings combined with the immediate enforceability of regulatory decisions and the fact that the annulment of a decision, if appropriate, does not equal the possibility of seeking damages for the losses incurred. Together these factors constitute a breach of the fundamental standards associated with the rule of law.

While SOKiK should not only verify the validity but also the legitimacy of actions taken by the regulator, the inconsistency of its judgments as well as frequent lack of a content-related analysis should be mentioned (e.g. in cases concerning the WLR (*Wholesale Line Rental*) service). The lack of an explicit approach of SOKiK towards controlling the actions of the UKE President greatly contributes to the growth in the number of litigations (several hundred in 2009) since operators count on a change in juridical approach in a given type of cases.

Consequently, in exercising its powers, the European Commission is the only body that may correct the actions of the Polish regulator, first and foremost, within the consolidation proceedings. Therefore, there is a justified concern about the loss of control by State authorities over the activities of the UKE President and the

² S. Piątek, *Rynki dostępu do stacjonarnej sieci telefonicznej [Markets of Access to a Fixed Telephone Network]*, p. 22.

³ K. Kosmala, *Procedury regulacji rynków telekomunikacyjnych [Telecoms Market Regulation Procedures]*, p. 175.

arbitrary nature of some of the moves undertaken by this regulator. Given the fact that Poland lacks a comprehensive and clear governmental policy concerning electronic communications, the UKE President became a self-dependent authority who decides about the shape of that market, regardless of whether the regulator's policy pertaining to a given sector is different than the state policy in that sector. This is because both, in principle, differ as to their goals⁴.

Moreover, legislative actions strengthen the position of the UKE President continuously extending the scope of his/her powers as illustrated by one of the most important problems in telecoms – the way of shaping the rates on the wholesale market. Adamski⁵ dedicates a major part of his paper to this very problem. Wholesale market price control and the obligations concerning cost calculations are meant to stop those with significant market power from charging extortionate prices and to prevent a related phenomenon of a market position transfer via price squeeze and internal subsidy mechanisms⁶. Before the 24 April 2009⁷ amendment to the PT, regulatory obligations relating to wholesale rates were formulated insofar as Article 39 (pertaining to the obligation of applying charges based on reasonable costs) set forth a principle of auditing of reasonable costs by a chartered accountant, provided that the UKE President could apply other methods of cost calculation than those used by the operator. On the other hand, Article 40 (concerning the obligation to apply charges based on the costs incurred) used to stipulate that the UKE President could verify the amount of charges based on benchmarks.

By contrast, Article 39 makes it now possible to verify the amount of the rates based on any method, including benchmarks. In turn, Article 40 extends the power to verify the amount of the rates based on incurred costs by giving the regulator the possibility to consider other methods to assess the regularity of such charges (apart from benchmarks). Prior to the amendment, it was thus inadmissible to use, based on Article 39, the “retail minus” method, which Adamski identified as one of price control methods alongside cost orientation and benchmarks⁸. However, the UKE President applied this method (*inter alia*, in cases pertinent to the WLR service). The regulator has now been granted such powers.

Still, concerns might arise because of the amended wording of Article 39 and 40, which gives the UKE President practically unlimited freedom to choose the methods of controlling the amount of the rates. This can be the case, *inter alia*, given that,

⁴ W. Szpringer and S. Piątek drew attention to the doubtful legal basis of the Regulation Strategy 2006-2007 on the telecommunications markets, as published by the Council of Ministers (Monitor Polski 2006 No. 65, item 674). They pointed out that the government made for other criteria than the regulator. See S. Piątek, W. Szpringer, *Efektywność regulacji rynków telekomunikacyjnych [Efficiency of Telecoms Market Regulation]*, p. 342.

⁵ D. Adamski, *Dobór obowiązków regulacyjnych na rynkach hurtowych [Choice of Regulation Obligations on Wholesale Markets]*, p. 238.

⁶ *Ibidem*, p. 244.

⁷ The Act of 24 April 2009 on Amendments to the Act – the Telecommunications Law and Certain Other Acts of Law (Journal of Laws No. 85, item 716).

⁸ D. Adamski, *Dobór obowiązków... [Choice of Regulation Obligations...]*, p. 245.

when using the “retail minus” method, the regulator calculated the “minus” side based on average costs of alternative operators. Such an approach does not seem to be consistent with the assumption referred to by Adamski, namely, that the minus should be calculated from the standpoint of “an effectively operating entrepreneur”, which is not always the case with an alternative operator⁹.

Attention should also be drawn to UKE President’s actions inconsistent with EU law (at present sanctioned by virtue of the amendments of 24 April 2009) whereby the regulator questions the outcome of a cost calculation audit performed by a chartered accountant. Pursuant to Article 13(4) of the Access Directive 2002/19/EC¹⁰, interpreted in the light of point 21 of its preamble, a regulatory authority may reject the results of a cost calculation solely in the case of a negative outcome of a control process over how the obligation to introduce an accounting system of cost calculation is performed by such authority or any other qualified authority independent from the operator to which the audit applies (a chartered accountant). Therefore, in the light of EU law, a regulator may not “verify” an audit performed earlier by a self-dependent chartered accountant.

The publication under review here refers to all key regulatory problems concerning telecoms. Among other contributions not mentioned so far, special attentions should be paid to Skoczny’s analysis of competitive market power assessment, Rzeszotarski’s paper on regulatory obligations on retail markets and Kubasik’s interesting economic analysis concerning the methods of telecoms services price regulation. Moreover, the aforementioned paper by Piątek and Szpringer gives the reader a specific recapitulation of the efficiency of Polish telecoms regulation which, even though included in the “problem-part” of the publication, constitutes a good summary of the whole book.

This extremely interesting publication closes with Szydło’s discussion on the prospected changes to the telecoms regulation system. Reviewed here are the most important trends identified by the European Commission in its document of 29 June 2006 *et al.* Some of the suggestions suffered then certain changes, but it is proper to bring forward, *inter alia*, the change in the way of managing radio spectrum (including a possibility of transferring powers to other subjects in this respect), and to all suggestions aiming to build up users’ rights.

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⁹ Ibidem, p. 246. The Author points out, *inter alia*, that a market subject may be less effective than an entrepreneur with a significant market power.

¹⁰ Directive 2002/19/EC of the European Parliament and European Council of 7 March 2002 on access to the electronic communication networks and associated facilities, and interconnections (directive on access) (OJ [2002] L 108; OJ, Polish special edition [2004] chapter 13, vol. 29/323).

Agata Jurkowska, Tadeusz Skoczny (eds.),
Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję
we Wspólnocie Europejskiej i w Polsce [Group Exemptions From
the Prohibition of Competition Restricting Agreements in the EC and Poland]
Wydawnictwo Naukowe
Wydziału Zarządzania Uniwersytetu Warszawskiego
[Warsaw University Faculty of Management Press], Warszawa 2008, 576 p.

The reviewed book contains a detailed and comprehensive analysis of the EU and Polish legal system enabling the exemption of certain categories of agreements from the general prohibition on competition restricting agreements based on Article 81(3) EC and Article 8(1) of the Act of 16 February 2007 regarding competition and consumer protection (Competition Act) respectively. The authors do not analyse the applicable laws as regards the prohibitions *per se* (Article 81(1) EC, Article 6 of the Competition Act) or their enforcement systems. They also do not dwell on *de minimis* agreements exempted from the prohibition on account of the small market share of the contracting parties. Instead, this publication concerns itself with a certain aspect of this system – block exemptions. Such narrow focus facilitates an in-depth analysis of the issues at hand and thus produces some valuable insights.

Emphasis is placed first of all on the special legal status of group exemption regulations (those promulgated at the EU level as well as domestically in Poland). This is a very important issue here because reaching a consensus on the exact nature of these acts has proven elusive even among legal practitioners. Regulations concerning group exemptions amount to a *de facto* elaboration of Article 81(3) EC and/or of Article 8(1) of the Competition Act since they apply these basic competition law rules to certain recurring sets of circumstances (specific kinds of agreement). What can be said with certainty about these circumstances is that they do not translate into a material inhibition of competition and that, at the same time, they amount to a desirable solution which is beneficial for the market. In other words, group exemptions constitute a type of “hint” for businesses as to the possibility – or not – of including certain contractual clauses in their agreements. The very nature of these regulations means that only some companies – those that opt for a certain form of cooperation (distribution arrangements, franchise, joint research or specialisation) – are eligible to benefit from them. In this light, group exemptions may be thought of as “quasi-guidelines” suggesting what may be permitted and what may be prohibited

(and, consequently, contrary to Article 81(1) EC and/or to Article 6 of the Competition Act) for a given form of cooperation between enterprises.

The publication also elaborates upon the relationship between exemption regulations currently in force and the provisions of Article 81(3) EC and of Article 8(1) of the Competition Act (which constitute the material basis for their promulgation). In this context, the authors refer to the previous system of individual exemptions granted by the European Commission on an *ex ante* basis. They explain that its significance is now purely historical. Presently, Article 81(3) EC and Article 8(1) of the Competition Act may provide an individual basis for assessing a specific agreement from the perspective of its pro-competitive aspects. They may no longer however provide the basis for a formal evaluation (decision) by a competition authority handed down before the proposed agreement is actually executed. The publication analyses this relationship in great detail.

Discussed is also the issue of parallel application of EC and Polish group exemptions since it is not unheard of for both to be in force at the same time for the same category of agreement. This fact is clear to the authors but not so for some market participants and legal practitioners. Some lawyers are inclined to view EC group exemptions from the perspective of the primacy and direct applicability of EC law principles, leading them to argue that “implementation” or “transposition” of such regulations into the Polish legal system must be erroneous as well as pointless. Yet antitrust experts and literature agree that the fact that Polish law includes legal acts which are nearly identical to similar instruments promulgated at the EU level is not the result of their “implementation”. Instead, it illustrates the need to extend the benefit of block exemptions to certain categories of agreement which may not fulfil the EC prerequisite of “influence on trade between Member States” (even if only potentially) since it is only to those that the EC-wide exemptions may be applied.

The authors have divided the publication into chapters thematically corresponding to the various group exemptions and thus the consecutive parts discuss the group exemption of: cooperation agreements, vertical agreements, agreements concerning the motor vehicle sector, technology transfer agreements, insurance cooperation agreements and maritime and air transport aviation agreements. Such a subdivision is quite natural, it is also reflected in actual legal practice. On this basis, general exemptions (referring to a certain category of cooperation between businesses whatever their sector) are differentiated from sector-specific ones (concerning a specific relevant market, e.g. motor vehicle sector). Such an approach provides a logical exploration of the subject matter to its readers who also benefit from the fact that the book contains the texts of relevant Polish and EU legal acts; these can be found in the subsequent chapters.

First to be discussed are the exemptions for cooperation agreements including those whose object comprises R&D or specialisation. It is worth noting that unlike EU law which regulates the exemptions for R&D and specialisation agreements separately, Polish law deals with both in a single Council of Ministers regulation. The authors present a detailed discussion of the criteria which need to be met in order to qualify for a group exemption under EU and under Polish law. In doing so, they

explain the importance of the market share criterion (where it exceeds the threshold values set in the appropriate regulation, the agreement does not qualify and, at best, may be subject to an individual evaluation under Article 81(3) EC or Article 8(1) of the Competition Act). The authors then proceed to discuss the qualitative criteria the fulfilment of which is a prerequisite for deeming a given agreement to be legal in spite of the prohibition. In doing so, they make it clear (and rightly so) that cooperation agreements containing even one of the prohibited “black list” clauses disqualify its parties from seeking the benefit of a group exemption. The value of this chapter lies in its outline of the emergence of exemptions for cooperation agreements in EU and Polish law and in their juxtaposition.

The publication proceeds to a presentation of exemptions for vertical agreements. This chapter centres on an analysis of Commission Regulation No. 2790/1999 concerning the exemption of vertical agreements and of the analogous Polish act – the Council of Minister regulation from 2007. In addition, the authors cite the extremely important pointers laid down in the Commission’s Guidelines concerning the application of Article 81(3) EC to vertical agreements. The chapter opens with some historical references concerning the development of group exemptions for vertical agreements under EU law. This introduction helps explain their origins and nature as well as the absolute necessity of regulations instituting some exceptions from the general prohibition of competition restricting agreements in recognition of the fact that some business practices are very important for the market in that they actually stimulate competition. The authors also discuss the most common categories of vertical cooperation which may qualify for a block exemption such as: exclusive distribution contracts, selective distribution contracts and franchising. They explain that, despite the various limitations, such forms of cooperation can be legal provided that they do not include any hard core restrictions such as minimum price fixing for the sale of goods considered to be the most important of those unconditionally prohibited clauses. Special attention is devoted to selective distribution of a qualitative or quantitative character, already established as having a positive impact on the market.

An extensive analysis of the exemptions for vertical agreements in the automotive industry is presented in a separate chapter. As a sector-specific exemption, its effects are clearly felt in the market for the production and distribution of motor vehicles. Companies often rely on the EU Regulation on the group exemptions for the automotive sector as well as the corresponding Polish act even though their application occasionally gives rise to controversy. Accordingly, a detailed analysis of the pertinent rules, as endeavoured by the authors, may provide important insights for automotive sector players. The authors elaborate upon the conditions that must be met in order to benefit from an exemption. As with most of the group exemptions, the market share of the participants is presented as a key factor in this context also since only if the prohibited threshold values are not exceeded may a group exemption be sought on the basis of these acts. If, meanwhile, the market share of the participants is too high, only an individual assessment pursuant to Article 81(3) EC or Article 8(1) of the Competition Act remains. The authors also list certain “black listed” clauses which may not be used because of their restrictive effect and may not benefit from an

exemption; as in other areas, such clauses include those which attempt to fix minimum prices. The fact that the authors choose to analyse the automotive sector agreements separately is laudable even though, technically speaking, this is a category of vertical agreement and could be discussed as such; this solution follows from the systemic approach which the authors do well to follow throughout the book.

The publication undertakes also a separate discussion of the rules concerning the exemptions for technology transfer agreements (at EU level as well as in Poland). Such agreements may be either horizontal or vertical in nature. In their various guises (e.g. patent licence agreements, agreements for the provision of know-how etc), technology transfer agreements are very important for the market, facilitating the optimum use of technological achievements and innovations and thus further progress. Generally, antitrust law adopts a positive view of technology transfer agreements, provided that they do not incorporate serious impediments to competition deemed to be redundant to their pro-competitive objectives. The authors indicate that benefiting from a group exemption is conditional first and foremost, upon the market share of the parties. In order to make the nature of the technology transfer exemption more approachable for their readers, the authors include some historical notes. They also offer, justifiably enough, a positive appraisal of the newest legislative instrument regulating this subject matter – Commission Regulation No. 772/2004, which adopts a more economic approach to technology transfer issues. The publication also cites the EU Guidelines on technology transfer – a valuable interpretative tool in this context, especially seeing as question concerning technology transfer issues tend to be very complex.

The consecutive chapters discuss sector-specific exemptions in the areas of insurance, maritime transport and air transport industries (indicating in the latter case that the aviation sector no longer benefits from group exemptions). The authors provide a detailed discussion of the exemption criteria applicable in each case. Such thorough discussion of group exemptions for the insurance, maritime transport and air transport industries is important. While many earlier publications tended to gloss over these issues (focusing instead on vertical agreements or cooperation agreements as a general category), the authors of this book consider and evaluate the entire block exemption system.

To summarise, the reviewed publication presents a solid source of comprehensive knowledge about Polish and EU competition law in the area of group exemptions from the prohibition of competition restricting agreements. Its structured approach leads it to analyse the covered areas in detail one by one in a manner conducive to a serious, in-depth study. The book may well provide a foundation for the further development of antitrust doctrine as well as a useful tool for practitioners. Its clear added value lies in the fact that it includes the full texts of the various legislative instruments discussed in the publication.

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**Dawid Miąsik, Tadeusz Skoczny, Małgorzata Surdek (eds.),
*Sprawa Microsoft – studium przypadku. Prawo konkurencji na rynkach
nowych technologii [Microsoft – Case Study. Competition Law on New
Technology Markets]*
Wydawnictwo Naukowe
Wydziału Zarządzania Uniwersytetu Warszawskiego
[Warsaw University Faculty of Management Press], Warszawa 2008, 377 p.**

The publication entitled *Microsoft – case study. Competition Law on New Technology Markets* presents a comprehensive, analytical discussion of the widely discussed decision of the European Commission in its proceedings concerning the abuse by Microsoft of its dominant position on PC software and workgroup server software markets as well as on related issues. The charges brought by the Commission (and upheld by the CFI following an appeal) alleged that Microsoft was limiting market access for other business enterprises by refusing to grant access to technical information concerning its own products necessary for other software providers to achieve interoperability with the Windows system and by tying the Windows operating system with Windows Media Player. The Microsoft case posed important competition law and intellectual property rights (IPR) questions and provided food for thought as regards the definition of “tying sales”. Moreover, it illustrated the practical workings of the “more economic approach” principle professed to by EU authorities.

The book opens with a chronological summary of the actions taken in this case by EU authorities, followed by an exhaustive overview of the relevant factual circumstances. This extensive introduction is very useful for the readers. It not only renders the subsequent parts of the publication much easier to understand but also makes it possible for those, who are not familiar with all the details of the case, to follow the particular elements of the ruling and the presented analysis. The book is then thematically divided according to the individual competition-inhibiting practices which the European Commission accused Microsoft of engaging in.

The authors analyse first Microsoft’s refusal to release to its competitors the necessary information (source codes) which would make it possible for them to ensure the compatibility of their operating systems with servers using the Windows platform. They analyse the decision of the Commission and the judgment of the CFI and consider their impact upon cases where a dominant business enterprise refuses to grant a licence. The authors explain that the very nature of Microsoft’s

actions called for the delineation of the boundaries within which prohibitions on competition-inhibiting practices could – and should – interfere with the classic formulation of copyright. For comparative purposes, the authors include an analysis of other decisions concerning refusal to grant copyright licences; they also include their projections as to how the Microsoft case might shape further judicial practice at the nexus of competition law and IPR. In doing so, they quite correctly point out that issues arising at the junction of competition law and IPR have already been the object of many papers and publications.

They set the stage for their following discussion by stating that there are no *a priori* grounds for giving precedence to one branch of a legal system over another. The European as well as American legal systems enshrine IPR as a constitutional right of the entitled party. At the same time, exercise of such rights may be subject to certain limitations arising from competition law. As a general rule, IPR provisions – primarily designed to safeguard the interests of patent holders – are recognised as being conducive to innovation and contributing to the development of more advanced or new products. So, from the perspective of market development, stringent IPR protection is beneficial and desirable.

The situation might be different however if an undertaking, which is perfectly entitled to IPR, exercises them by refusing to contract with an entity seeking a licence. The objective of market and technological development, improved efficiency and innovation may be thwarted in such cases giving rise to the need for competition law to step in. The authors cite here the economists O'Donoghue and J. Padilla in arguing that the legal duty of contract (also as regards extension of licences), resulting from the application of competition law, should only be imposed under exceptional circumstances since it amounts to an interference with the very essence of ownership rights. According to the authors, such exceptional circumstances would include, in particular, situations where the sought-after licence is necessary for developing a new (another) product and where, if the licence is withheld, such development is prevented and competition in a neighbouring market is distorted.

The authors undertake an analysis of American jurisprudence concerning the relationship between IPR and competition law arguing that the approach of US courts has been a fairly liberal one. They conclude that the invocation of IPR constitutes sufficient grounds for a legal refusal to grant a licence with respect to those rights, unless that is, the IPR are invoked only as a pretext or a *post factum* justification. The authors continue on to demonstrate that the European Commission's original decision in the Microsoft case and (consequently) the CFI ruling, are far from the above. The EU authorities abandoned the concept of a "new product" in favour of a criterion of stunting technical progress to the detriment of consumers. The impediment of technical progress clearly comprises the prevention of the perfection of competing software because, given the lack of inter-operability with the Windows system, Microsoft's competitors were unable to sell their products no matter what their other virtues may have been. Thus, competing software developers had their motivation to work on newer, better products significantly undermined, with the end result that consumer interests suffered.

Be that as it may, the Microsoft ruling – as the authors duly point out – concentrates on protecting the interests of competitors operating in the relevant market. In other words, the ruling extended antitrust protection over a desired structure of the market because it was this very structure that was seen as guaranteeing consumer welfare. Thus, in the Commission’s first decision and the CFI ruling upholding it, the premises of the Chicago school, which concentrates on direct benefit to consumers rather than on upholding a market structure, are only considered to a limited extent, and in an oblique fashion at that. The authors include a concise and well-chosen remark by a official of the US Department who stated in this context that “in the United States, companies are allowed to make their way in the market ‘cowboy style’ while the EU expects its enterprises to compete in a ‘gentlemanly’ fashion”.

In the following part of the book, the authors present a thorough analysis of the other charges brought against Microsoft by the European Commission namely tying sales of two distinct products – the Windows operating system and Windows Media Player. They provide exhaustive definitions of tied and package sales which are helpful not only with respect to the discussed case but also in the broader context of antitrust law as applied to tied agreements. Conscientiously noted are the positive aspects of tied agreements in business dealing: the satisfaction of customer needs, the variety of business offer, increased revenue, economies of scale and cost savings. On this basis, the authors prove that tied agreements need not necessarily inhibit competition and that they do not warrant a blanket ban. Still, the fact is acknowledged that bans are necessary with respect to contracts which expand a monopolistic or dominant position onto new markets, close a market or exclude an enterprise from it, discriminate with regard to price or increase the operating costs of competitors.

As they embark on their treatment of tied sales in reference to the Microsoft case, the authors refer to other similar EU rulings (e.g. *Hilti* or *Tetra Pak II*) widening the context of the discussion and rendering their subsequent remarks more accessible for the readers. The analysis of the Microsoft case considers the “tying test” and the “distinctiveness test” adopted by the European Commission. In the latter case, the distinctiveness of a product is evaluated from the perspective of customers and of demand for the tied product. Such an approach is different from the test employed in US antitrust law which considers whether the tied product is normally sold separately (without the “companion”). As a result, EU jurisprudence concentrates on assessing the demand side on the market while US jurisprudence focuses on the supply side. Also here is it worth noting the more liberal attitude adopted by the American authorities, and the authors do this; as they do, they also weigh in favour of this “soft touch” as more desirable from the perspective of market development.

The publication focuses also on the exclusion of competition through bundling of Windows and Windows Media Player, dissecting the arguments put forth in this context by EU authorities. It is worth noting that neither the Commission nor the CFI deemed the notion relevant that users who have both Windows as well as Windows Media Player installed on their PCs benefit from the use of more than one playback programme. Similarly, the EU authorities were not impressed by the argument that,

despite the presence of Windows Media Player on every PC, Microsoft did not hold a dominant position on the multimedia player market.

The analysis of the Microsoft case concerning illegal tying of products concludes with an intriguing summary which provides the reader with a comprehensive insight into the attitude adopted by EU authorities in this regard. The reader's attention is drawn to the liberal approach taken by the EU to the application of competition protection laws. In line with the aforementioned treatment of Microsoft's refusal to grant a licence, EU's assessment of tying also concentrated on consumer protection rather than on competition, as an institutional phenomenon whose existence is supposed to directly serve consumer interests. It is this very goal which the application of competition protection laws ought to further.

One of the chapters of this publication is devoted to the history of antitrust proceedings conducted against Microsoft in the US. Discussed on this basis is the operation of the *per se* rule and of the rule of reason in antitrust cases. As the authors explain, these two principles lie at the foundation of the two basic types of analyses of whether a given behaviour does, or does not, amount to limitation of business dealing. The application of the *per se* rule is limited to those violations which do not necessitate a painstaking study in order to establish that they are anti-competitive in nature and are not mitigated by any broader benefits. Meanwhile, the rule of reason is an instrument for differentiating between permitted and forbidden anti-competitive behaviours in less obvious circumstances. Still, in actual market realities and day to day practice of competition watchdogs, the division between these two rules is not always clear-cut. The *per se* rule, as correctly noted by the authors, is generally applied in cases of grave breaches of competition rules such as price fixing among competitors, horizontal market division, irregular cooperation in tender procedures or collective boycotts. On the other hand, the application of the rule of reason is often based on the premise that the given behaviour can not, at the outset, be condemned as having a negative influence on competition (perhaps because some of its effects in the given relevant market are actually positive).

Also cited are the judgments of US courts in tied sales cases including *Northern Pacific* and *Jefferson Parish*. This provides the starting point for the authors' own analysis of Microsoft's actions and of the measures they elicited on the part of the US authorities. Along the way, the authors analyse tied arrangements as understood in the American legal system (citing the Department of Justice as well as the judiciary) as well as the concept of integrated products in the context of antitrust cases involving Microsoft. The care devoted in this publication to American law is a welcome contribution in this context because it facilitates a comparative analysis of the varying approaches followed in European and American practice to what are, in essence, very similar legal constructs.

As they discuss the finer points of the Microsoft case, the authors provide their readers with a helpful explanation of certain basic relationships and business mechanisms characterising the PC software industry. The usefulness of this additional information cannot be overestimated – while most readers with a legal background will readily grasp the legal concepts central to this publication, some will surely be

at a loss when it comes to the technical vocabulary of the IT sector. Apart from its comprehensive treatment of the Microsoft case in all its legal and economic aspects, the book also includes, on its margins so to speak, various pieces of trivia and anecdotes intended to illustrate the realities of antitrust law in practice (see, for instance, p. 157).

While dealing with a single major case, in doing so this publication manages to present a genuine compendium of knowledge concerning competition law in its various aspects. Its narration is matter-of-factly and densely supported by legal and economic information. The Microsoft case is not only discussed in a logical and coherent way, it is also placed in a wider historical context of proceedings involving not only Microsoft but also other companies charged with similar offences. This is certainly a book worthy of recommendation.

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Rajmund Molski,
Prawo antymonopolowe w obliczu globalizacji. Kierunki rozwoju
[*Antitrust Law in the Face of Globalization. Directions of Development*],
Oficyna Wydawnicza Branta, Bydgoszcz-Szczecin 2008, 336 p.

The majority of Polish competition law publications focus on domestic and/or European, and exceptionally American, enforcement practice. Many have a comparative nature whereby EC or US experiences are considered to be a point of reference for domestic (Polish) solutions. The reviewed book is the first on the Polish market that concerns itself exclusively with international aspects of antitrust which, as a title suggests, means in this case a “world” (global) context. Molski’s book surely contributes to the growth of legal literature dedicated to international competition law¹. It focuses on problems of past, present and future developments of antitrust in the context of the challenges posed by globalization. The author is absolutely right claiming that domestic law cannot be an adequate means of solving antitrust problems of an international dimension (p. 172). Still, he also stipulates that “[s]ingle international (global) competition rules would not be a panacea to world antitrust problems” (p. 177). These two statements create the analytical framework of this book.

The publication centres on two basic notions: competition law (antitrust law) and globalization. The author declares that the first concept refers to “[t]hose legal systems (orders) that impose legal sanctions on activities restricting competition on the market (or creating such a danger)” (p. 18). Antitrust law as understood in this book refers to competition restricting practices (anti-competitive agreements and abuse of dominance) and to the control of economic concentration (consolidation). However, issues connected to combating unfair competition, as such included in competition law *sensu largo*, are outside the scope of this publication. Such defined antitrust law is analyzed in the context of globalization, predefined by the Author (following Th. Levitt²) in the **Introduction** to the book as „[a] process of realizing a free of borders

¹ See e.g.: D.A. Crane, “Substance, Procedure and Institution in the International Harmonization of Competition Policy” (2009) 10(1) *The Chicago Journal of International Law* 143; J. Drexler (ed.), *The Future of Transnational Antitrust – From Comparative to Common Competition Law*, Berne 2003; E. M. Graham, “Internationalizing” competition policy: an assessment of the two main alternatives” (2003) 48(4) *Antitrust Bulletin*. The reviewed book provides a good record of the resources available on that issue.

² Th. Levitt, “The globalization of markets” (1983) 61(3) *Harvard Business Review* 92.

global economy where undertakings engage in activities on the international arena, regardless of national frontiers” (p. 19).

Aware of the multitude of aspects of globalization, Molski correctly stipulates that the considerations presented in the book are limited to its economic and legal aspects only. A separate part of the book (2.1. Phenomenon of globalization and its attributes) is dedicated to the qualification and interpretation of the concept of globalization. The impossibility of presenting a rigid and universal definition of globalization is pointed out in there. The lack of such a definition cannot be irrelevant for a scope of the content of the reviewed book. The context of problems analyzed in the book should be seen mainly as a phenomenon defined by dynamic processes (such as e.g. the globalization of law, the redefinition of the functions of the state, the increasing role of multinational corporations or the appearance of global competition). Simultaneously, the global dimension of the problems described in this book requires the consideration of several levels of the functioning of legal systems (making and applying the law): domestic, regional, supra-regional and the world (global) level.

The discussion is based on the assumption that if, in the globalization era, anti-competitive effects of the actions of undertakings go beyond territorial borders, this may lead to two types of dangers: first, legal gaps with the result of “[a]voiding an adequate antitrust reaction” in relation to some anti-competitive behaviours; and second, “[e]xcessive regulation aimed at harmless or even desired market behaviors (mainly when it is a result of activities of a bigger number of states)” (p. 20).

Molski’s book is divided into five chapters. The first two arrange the area of the author’s interests: antitrust of law (Chapter 1) and the phenomenon of globalization (Chapter 2). The subsequent chapters deal with particular problems occurring in this context: the sovereignty of states and the development of competition law in the globalization era (Chapter 3), positive and negative co-relationships between antitrust law and international trade law (Chapter 4), and optimizing competition law under the conditions of globalization (Chapter 5). I believe the last of these to be the key point of the author’s considerations and, simultaneously, the most important and creative part of the book.

Chapter 1: On the genesis, justification and specificity of competition law starts with a historical overview presenting the beginnings of antitrust interventions in ancient Greece, Rome, India, mediaeval England and XIXth Century Japan (p. 26–29). On this basis it is possible to see that the development of societies has always been accompanied by “[a] disapproval for oppressive use of economic power” (the basis for contemporary competition rules). Next to be discussed is the shaping of antitrust law and yet this is done on a somewhat surprising choice of examples (Chapter 1.1.2. p. 29–46) – the global context of this book suggests that its analysis should make reference to countries representing all of the continents, or at least their majority. Unfortunately, the author limits his assessment to the US, three European (Austria, Germany, Poland) and one African state (Kenya), omitting both Asia and Latin America. Though it is rather difficult not to share Molski’s opinion that the cradle of modern antitrust law is in the US and the EC, it does not seem convincing to say that this fact alone constitutes a sufficient reason for dedicating all

the considerations of this chapter to those legal systems only. While most readers will be rather familiar with the US and EC experiences, knowledge of the genesis of, for instance, Chinese competition law is pretty low even though it seems essential in the context of the globalization of antitrust.

The following part is dedicated to the development of bilateral and regional cooperation in antitrust cases (p. 46–60) whereby EC competition law is regarded as its clearest example. Molski accurately identifies the characteristics of EC competition law as “[a] paradigm of regional antitrust law, fully integrating not only its procedural but also material (single competition rules) and institutional (common competition authority) substratum (....)” (p. 50). On the other hand, he points out that supra-regional initiatives aimed at the creation of an international (supra-regional) system of antitrust law (under the auspices of the League of Nations, UN, OECD or WTO) turned out to be far less effective (p. 60–74). Still, Molski stresses that they cannot be overlooked, even if they were ultimately unsuccessful, since they have certainly advanced the debate on the internationalization of competition policy. Nevertheless, I share the Author’s doubts that the development of antitrust policy and cooperation in two directions – within the WTO and the International Competition Network (promoted by EC) – indeed weakens the effectiveness of the process of the internationalization of antitrust regulation.

Further on, Molski formulates a catalogue of goals and priorities of antitrust law – in that way the Author seems to reject opinions contesting a ratio of existence of antitrust law. He directly supports the opinion that „[a]ntitrust intervention may be justified as neither economic freedom nor free competition is a constant attribute of the market economy” (p. 78). Working out a list of goals is a *sine qua non* condition of the rationalization of the process of shaping competition law. The author speaks of three groups of goals of antitrust law: (a) economic, (b) social, (c) political as well as of either definite or indefinite objectives of competition law (p. 81). He also stipulates that the categorization presented in his book refers to a “sufficiently representative” group of goals even though the classifications of goals of antitrust law are only conventional (p. 82). Among these sufficiently representative goals Molski lists: competition protection, increase of economic effectiveness, support of small and medium enterprises, promotion of national market leaders, support of economic reforms, consumer interest protection, support of foreign investments, assistance of integration processes, deregulation of markets, political and social issues, justice-related issues. In my opinion, the analysis of the latter is an interesting contribution to the antitrust doctrine. It is a pity however that the Author, making an interesting analysis of the goals of antitrust, does not express his own opinion concerning which of those objectives should be the basis for global competition law.

Chapter 1 closes with some deliberations on competition as an object of legal protection (p. 120–134) and on the specifics of antitrust law (p. 134–148) stressing such of its features as: interdisciplinary and discretionary character, high costs as well as national and negative character of competition law. It is a shame that while assessing the particular characteristics of antitrust, Molski does not explain how they could function in the area of global competition law.

In **Chapter 2: Globalization and its implications for antitrust law**, the Author presents the definition of globalization (p. 149–156) and its attributes (p. 156–172). He also refers to the phenomenon of the globalization of law. The process of creating soft laws on an ever growing scale is identified as one of the specific features of global (also antitrust) law. However, this in turn results in a desired elasticity of law but it also weakens the traditional role of law, transparency and stability of legal systems (p. 169). Molski appropriately notes that the most important challenges relating to the globalization of modern antitrust law are found in “a disjunction between the generally national character of this branch of law and the increasingly international or global dimension of the economic processes and phenomena regulated by that law” (p. 172).

The author moves on to analyse a few selected problems that constitute challenges for the functioning of modern competition law in the conditions of globalization. He divides them into four groups: challenges resulting from domestic antitrust rules (p. 178–186), international conflicts in the context of applying competition law (p. 187–190), anti-competitive restraints in the access to foreign investments by undertakings (p. 190–195), problems deriving from the inconsistencies of domestic antitrust systems (p. 195–201). Such categorization and generalization fosters the transparency of Molski’s analysis, a fact that seems particularly important in the context of the extremely wide and multidimensional meaning of globalization. Their presentation and assessment is in my opinion complex and exhaustive – the Author presents both procedural issues (e.g. co-operation of national competition authorities) as well as material problems (e.g. differences between leniency rules), but he correctly does not limit the analysis to such a simple dichotomy of challenges of global antitrust law.

In **Chapter 3: Antitrust law of the global era and State sovereignty**, Molski revives a dominant (in his view) opinion that “[a]n idea of international antitrust law implies too many deficiencies in the sovereignty of states” (p. 223). The author convincingly argues that “creating an international (global) antitrust system, especially if it was to be administered by an international institution, would be probably bound to a necessity of limiting (at least to a certain degree) the sovereign prerogatives of States participating in that system” (p. 223/224). Nonetheless, States may benefit from the system for instance by “eliminating negative repercussions of unilateral, extraterritorial antitrust interventions (frequently with protectionist character)” (p. 223). The author considers EC competition law as an example of an effective international antitrust system where, apart from transferring competences from Member States to the European Commission, a reverse process may be also noticed, that is, strengthening the participation of States in the implementation of competition law. He concludes that a deficit of multilateral co-operation in competition matters *de facto* leads to the weakening of real sovereignty (understood as a practical ability to implement “theoretically owned” prerogatives).

Chapter 4: Antitrust law versus international trade law is concluded with a statement that those two areas of law are subsidiary and complementary to each other and none of them is able to achieve its goals autonomously. The author stresses

the fact that the relationships between antitrust law and international trade law are multidimensional – they are reflected either in a convergence or in conflicts of those two legal branches. Molski points out that a lack of effective competition law could eliminate the benefits of trade liberalization (they may disappear as a result of individual anti-competitive practices). Still, a conflict between them may occur in a case of an anti-dumping intervention when practices, to which anti-dumping measures are applied, are actually harmless in the import country (p. 258).

Chapter 5: Ideas on the optimization of antitrust law inspired by the challenges of globalization constitutes, without a doubt, the most important and most interesting part of the reviewed book. Molski analyzes here two key models: competing (decentralized) antitrust systems (p. 259–267) and international co-operation in antitrust matters (p. 268–317). Among the advantages of the former is its “[e]lasticity and ability to react to new challenges that can generate the endogenously evolutionary character of market competition” (p. 267). However, as the author stresses, the “competing” model can easily become a source of conflict and it may be incoherent.

The co-operative model may be implemented on a bilateral, regional, plurilateral or multilateral basis at various levels of advance. Most of Molski’s attention is dedicated to a multilateral antitrust agreement that seems to be, in his opinion, the most ambitious way of optimizing competition law but, simultaneously, also the best out of all the available options (p. 283). The author remains rather sceptic towards the possibilities of actually working an effective multilateral agreement, finding difficulties, among other things, in Article 34 of the Vienna Convention according to which a treaty can create neither duties nor rights for third states without their consent (p. 286). The co-operative model is analyzed on the basis of, and with reference to, the Competition Policy Doha Ministerial Declaration, Official Positions on Multilateral Framework on Competition and the views expressed in legal doctrine.

An international antitrust agreement should be based on transparency, non-discrimination and procedural justice rules. The basic material provision of such an agreement should be a prohibition of hardcore cartels, though its formula (*per se* or rule of reason?) is open to discussion. While a prohibition of hardcore cartels is commonly accepted, a prohibition of other anti-competitive practices causes significant doubts. The author tries to analyze the potential of harmonizing key areas of competition law (agreements other than hardcore cartels; abuse of dominance; merger control) but the results of this analysis are not unequivocal. Molski’s doubts seem to be justified taking into account the directions of the evolution of competition law e.g. over the last decade in the EC. Finally, considering the institutional dimension of such a multilateral agreement, Molski speaks of basic problems relating to its implementation. Three models are described in the book: (1) implementation by existing domestic/regional competition authorities and courts; (2) centralized implementation of antitrust law by a newly created organization (authority); (3) implementation by one of the existing bodies. The author seems to be in favour of the latter model with WTO at its centre (p. 312–317). The reviewed publication touches upon a wide spectrum of issues relating to the globalization of antitrust law, exhaustively analyzing and summarizing worldwide research records on this issue. Appreciating the fact that

the Author thoroughly presents all the “pros” and “cons” relevant in this context, I am slightly disappointed that the book has a past- rather than future orientation. Molski does not state his own detailed views on the anticipated development of the globalization of antitrust law – the predictions presented in the summary of this book are nothing more but a gathering of the various arguments and opinions presented in earlier chapters. Being aware of all the restraints (they are known to readers as well), Molski could have nevertheless tried to present his own vision, a sort of a roadmap for the hypothetical development of competition law in the era of globalization of the 21st century. As a reader, I would be also interested in his detailed assessment of the anticipated role either of the EC or of the “Asian tigers” in the future development (or underdevelopment) of global antitrust law.

The Author is certainly entitled to take on such a challenge, which would undoubtedly increase the attractiveness of this publication, considering his high level of competence, knowledge and a thorough research workshop. It is likely that Molski decided that an analysis of that type would have gone far beyond the main scope of this book, which I guess was the identification of the basic problems relating to the functioning of antitrust law in the era of globalization. Still, the high scientific value of the reviewed publication is not decreased by this recommendation. One must also note the impressive bibliography used in this book which constitutes its important additional quality. Molski’s book should certainly be recommended as a point of reference for other authors dealing with globalization problems of antitrust law.

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**Filip Elżanowski, *Polityka energetyczna. Prawne instrumenty realizacji*
[*The Energy Policy. Legal Instruments of its Implementation*]
LexisNexis, Warszawa 2008, 240 p.**

The subject matter of Dr. Elżanowski's book is not a novel one. It is, however, also not an easy topic despite the considerable literature already devoted to it. Very different views on the merits of energy policy and liberalisation, including its feasibility and desirability, are expressed by legal and political science experts, not to mention economists, environmental scientists, engineers and, increasingly, international relations experts. Polish energy policy obviously poses its own questions as well as practical challenges stemming from its specific energy consumption patterns, fuel mixes, supply sources, and natural resources endowments. Furthermore, due to its heavy dependence on oil and gas imports, Poland faces different problems stemming from its proximity to and specific relationship with Russia, the main gas partner of the EU. This fact strongly influences the formation of Polish energy policy. Nevertheless, the key legal issues concerning the creation and implementation of energy policy remain common to the whole of continental Europe.

Looking at energy policy from the EU perspective, it is easy to realize that the need to establish an integrated energy market, governed by a common energy policy, can be clearly derived from the three fundamental Treaties. However, it took a long time for the political will to develop to translate this idea into practice at the EC level. As correctly observed by the Author, the decades up to the mid 1980s have seen the Member States' energy sectors strongly dominated by public monopolies, heavily dependent on the command and control of governments and thus very resistant to change. Cross-border energy trade has been limited to wholesale transactions among incumbent utilities; cross-subsidies between different parties have been tolerated even though they constituted state aids. In the case of the energy sector, be it electricity or gas, all Member States have granted *de jure* or *de facto* exclusive or special rights to sell, import, export, or construct infrastructure. As a result, competition among utilities did not exist and consumers had little or no choice in relation to the price or quality of energy service they acquired. Moreover, network access by third parties did not enjoy special legal protection in the majority of Member States. Unsurprisingly therefore, EC steps meant to facilitate the development of a common energy policy did not generate much progress – domestic interests prevailed over the community goals with regard to the energy sector. This has resulted in a strong State presence in the energy field of almost all EU Member States, Poland included.

The book under review here presents the results of an in-depth research on the legal tools and methods of formulating and implementing energy policy, the restraints placed on the fundamental right of business freedom (freedom of economic activity) in particular. The Author is a lawyer and his analysis is primarily a legal one, albeit somewhat enriched by policy studies. The book considers the energy market from the perspective of administrative rather than competition law or international relations, even though some remarks in this direction are made (chapter five and six) in an elegant manner.

The book is composed of six chapters: 1. Energy in Poland and the European Union – Introduction; 2. Restraints on the freedom of economic activity in the energy sector; 3. Competences of public administration in regulating the energy sector; 4. Legal methods of implementing the energy policy in regard to environmental protection; 5. Legal methods of implementing the energy policy in regard to competition protection; 6. Legal methods of implementing the energy policy in regard to energy security. The structure is logical, showing that the Author has a very good grasp of the sector and the discussed issues.

Chapter 2: Restraints to the freedom of economic activity in the energy sector – touches upon several important issues such as, most importantly, the constitutional legal order and the proportionality rule. The Author claims that the legislator may introduce restraints to business freedom only when they pass the proportionality test: a) the restraint will lead to the desired effects; b) it is necessary to protect public interest; c) there is correlation and proportionality between the restraint and the goal to be achieved. Dr. Elżanowski highlights in this context the often overlooked in Poland issue of public service obligations (service of general economic interest). Still, this matter could have taken an even more central stage in this chapter. Although PSOs are perceived to be a strong force for liberalization, the Author correctly points out that there is an element of conflict between the obligation to fulfil the public interest and the fundamental right of business freedom. Liberals would claim that every obligation imposed by a State on an enterprise restricts competition and entrepreneurship, even those respecting the proportionality test. It is true on the other hand that imposing obligations on enterprises (e.g. public service obligations) is a requirement that derives from public security considerations, if not from economic necessity.

The electricity and gas directives declare that respect for the public service requirements is a fundamental requirement¹. Thus, the establishment, monitoring and fulfilment of public service obligations cannot be left to the market itself – they are the purview of Member States that develop them according to their national particularities. For example, gas system operators may refuse third party access to

¹ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ [2003] L 176/37, Recital 26; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ [2003] L 176/57, Recital 27.

the system if such access would prevent them from carrying out their public service obligations or would endanger the security of supply. As a result, countries dominated by vertically integrated undertakings might rely on PSOs to limit competition or slow down market opening.

The EU understands this dilemma, at least implicitly, and has directed much effort toward ensuring that PSOs should not be used so as to favour one system operator or energy producer over another or to hinder competition. And yet companies are able to engage in such discriminatory or anti-competitive activities due to the discrepancies among the notion of public service obligations, Europe's competition rules and Article 86 EC. The impression might even present itself that Article 86 itself might constitute an incentive for undertakings to accept public service obligations in order to obtain an exemption from the application of competition rules considering that Article 86(2) states that: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, **insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.** The development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

However, those providing public service obligations or services of general economic interest may be exempted from the Treaty rules only to the extent that such an exemption is absolutely necessary to enable them to fulfil their general economic interest mission. In the *Commission v. Netherlands*² case (presented by the Author in chapter two), the ECJ upheld the exclusive import rights of the Netherlands³ on the grounds of the public service exceptions contained in Article 86(2), provided that trade will not be affected to an extent contrary to EC interests. The Court phrased Article 86(2) as follows: "[P]aragraph 2 may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of service of general economic interest, of exclusive rights which are contrary to, in particular (Article 31) of the Treaty, to the extent to which performance of the particular tasks assigned to it can be achieved only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community(...)"⁴.

Unfortunately, assessing Article 82 in conjunction with Article 86 EC might create an additional dilemma for energy companies. This is the case for an undertaking which has been granted an exclusive right to transport and/or distribute electricity or gas in a given territory, based on the public service obligation (e.g. relating to the security of supply, regularity of supply, quantity and prices of supplies or environmental protection). Such an energy company might in practice be regarded as dominant in comparison to other market players and thus, potentially, in breach of Article

² Case C-157/94 *Commission v The Netherlands* [1997] ECR I-5699.

³ In the Netherlands electricity could only be imported (for public supply) by Samenwerkende Elektriciteits Productiebedrijven (SEP).

⁴ See Case C-157/94 *Commission v The Netherlands*, para 32.

82. Although the prohibition of Article 82(1) are designed to apply to all dominant undertakings, some of them may be exempted from it by the provisions of Article 86(2) that apply to those entrusted with the provision of services of general economic interest⁵. This is an area of some sensitivity for the Internal Energy Market since it raises the possibility of avoiding market opening on the grounds that the security of supply, or public security in general, must be protected. Article 86(2) exemptions are a source of actual or potential constraint on the efforts to promote competition in the EC energy markets. They are thus vulnerable to scrutiny under Articles 81 and 82 EC. On one hand therefore, Member States are allowed to establish exclusive and special rights, but on the other, they must observe the rules of the Treaty, in particular the rules on free movement and competition.

Chapter 3: Competences of public administration in regulating the energy sector – discusses the main players involved in the formulation of Polish energy policy: the Minister responsible for the economy, the President of the Energy Regulatory Office (URE), the Council of Ministers and, indirectly, the Minister of Treasury as the owner of the key energy companies. In a well-designed style, the Author presents the complexity of the relationship between public administration and those companies subject to regulation. While the position of ministerial agencies in creating energy policy is made clear, the position of the independent regulator could have been given more attention.

Statutory regulation is still a fairly new concept in Poland. Moreover, there is neither a general legal framework nor a commonly held view concerning the question of how should regulatory agencies function in practice. Limits to the political independence of regulators and to the scope of their powers are still being debated. However, the trend is clear: in spite of residual constitutional doubts and democratic concerns, independent regulators have become a necessary component of effective governance in all industrialized countries. The Author's awareness of this problem becomes apparent in his discussion regarding the tenure of the URE President. Until 2006, the Polish energy regulator was appointed for a fixed term of five years. Unfortunately, this provision was removed by the Act on State Human Resources and Senior Higher State Offices of 24 August 2006⁶. As precisely observed by Dr. Elżanowski, this fact has effectively eliminated one of the main pillars of the independence of the energy regulator and, by doing so, violated the requirements of the electricity and gas directives. This legal act should thus be perceived as a major step backwards on Poland's road to an independent energy regulator. The third energy package proposed by the Commission might remedy this concern since it envisages, among other things, mandatory tenures for the heads of national regulators.

Chapter 4: Legal methods of implementing the energy policy in regard to environmental protection – discusses the problem of restraining the freedom of

⁵ Specific grounds for exemption include public policy and public security. Public security is also ground for exemption under Article 30 EC. In general Member States can impose restrictions on import or export of energy if these restrictions can be justified under Article 30 EC.

⁶ Journal of Laws 2006 No. 170, item 1271.

economic activity on environmental protection grounds, perceived to be a public good for present and future generations. Unmistakably, the operation of the energy sector carries with it various clear threats to the sustainability of the environment. The Polish 1997 Energy Law Act is thus a real milestone in the environmental protection process – it provides the necessary legal conditions for economic activity in the area of energy production, transmission, distribution and trade, introduces third party access and sets the general framework for gradual market opening. In light of environmental protection needs – it is aimed at a sustainable development of the country, energy security, efficient and rational use of fuels and energy and the development of competition. It defines the relevant responsibilities of the Government, ERA, energy companies, local government units and manufacturers, including specific mandates and duties to promote energy efficiency and renewable energies.

Dr. Elżanowski emphasizes in his discussion the promotion of renewables which translates, more colloquially, into the obligation imposed on energy undertakings to buy electricity from renewable resources. This obligation clearly represents a restraint to the freedom of economic activity in the energy sector (limits the possibility of choosing a cheaper supplier e.g. supplier of electricity produced from coal). However, in the opinion of the Author, the doctrine and EC institutions, it is a justified (e.g. on the ground of public service obligations) and necessary tool in combating global warming and pollution in general.

Chapter 5: Legal methods of implementing the energy policy in regard to competition protection – is particularly interesting. Although competition can expose energy companies to the risk of losing market share if they are not sufficiently efficient and innovative, it is also a force that benefits customers by lowering prices, costs and improving service quality. As a result, competition in the energy market should be seen as an essential means of enhancing Poland's overall competitiveness, especially since energy is a key input for the national industry to compete on European markets. Only competitive markets generate the right investment signals, offer fair network access for all potential investors and provide effective incentives to both system operators and generators to invest billions of Euros in infrastructure. A competitive and efficient energy market is also a precondition for tackling climate change – developing an effective emission trading mechanism and a renewable energy industry is only possible on a well-functioning market.

The Author correctly points out that the protection of competition on the energy market should serve a general public interest. The creation of competition might be therefore seen as a restraint to the freedom of economic activity according to Article 22 of the Polish Constitution. However, this has to be done based on the constitutional proportionality test partially expressed in its Article 31(3). Still, the analysis contained in Chapter 5 is not limited to Polish legislation only, it also touches upon directives and regulations adopted by the EU aimed at the protection of competition in Member States. The discussion is centred on third party access, unbundling and actions against cross-subsidies considering the fact that, while competition can be promoted in the generation/production and supply side of the vertical chain, the transmission and distribution segments remain natural monopolies where market mechanisms

do not work properly. On this basis, Dr. Elżanowski concludes that transmission and distribution require regulation, for instance, by means of legal and functional unbundling of system operators and third party access.

Chapter 6: Legal methods of implementing the energy policy in regard to energy security. Energy security seems to be the most complex issue in the book – it involves many domestic, international, legal, business and geopolitical considerations. The Author presents a well thought through analysis of Polish energy policy with regard to energy security considering the issue from an administrative law perspective. Relevant legislation (e.g. the Energy Law or the Act on fuel supplies and reserves⁷) receive adequate attention highlighting restraints on the freedom of economic activity by way of concessions as well as those occurring on the basis of public service obligations and, in particular, energy security as a public good.

I have read Dr. Elżanowski's book with particular interest since it concerns issues with which I have been closely involved with as an academic for many years. In light of the existing academic literature and jurisprudence on this subject, I believe this book to constitute an important input into the Polish energy law doctrine. It gives the reader essential information on the methods, main players and tools at the disposal of the State involved in creating its energy policy as well as on the restraints to the freedom of energy activity which fulfils the public interest, security and constitutional criteria. All of this has been done in a very precise and elegant manner.

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⁷ Act of 16 February 2007 on Reserves of Oil, Oil Products, Natural Gas and on Procedures in Case of Emergency in Security of Fuel Supply and Disturbance on Oil Market (Journal of Laws No. 52, item 343).

**Waldemar Hoff, *Prawny model regulacji sektorowej*
[*The Legal Model of Sector-specific Regulation*],
Difin, Warszawa 2008, 302 p.**

The book under review here deals with one of the most dynamically developing forms of state interventionism – sector-specific regulation. Regulation has been the subject matter of many important and highly scientific works. However, most of them treat it, especially regulation for competition, as a transitory phenomenon. In the opinion of Hoff, the transitory nature of regulation is only hypothetical. Viewing regulation as a form of an imperious influence of the state on the economy, the author claims that there are no significant indicators suggesting the abandonment of regulation. Moreover, drawing attention to the fact that restrictions to competition remerge in new forms, Hoff declares that regulation will become a permanent part of a legal order.

Hoff's book is one of the first publications to primarily deal with the political position of public authorities responsible for the regulation of the telecoms and energy sectors. Special attention is paid to the supposition that the Polish regulatory model is not consistent with EU requirements. The main reason for this discrepancy is found in recent amendments of Polish political laws. The author describes and analyses those legislative changes as they ultimately led to a considerable weakening of the position of the President of the Office of Electronic Communications (UKE) and the President of the Energy Regulatory Office (URE). An interesting and well structured discussion shows the gradual development of the political position of these regulators. Hoff concludes that the weakening of the position of the UKE President and URE Chairman was caused by the fact that their independence was restricted, due to change in political norms, rather than by the limitation of their regulatory competences.

In the first chapter, Hoff conceptualizes the idea of sector-specific regulation. He describes the development of regulation both in the US and EU, paying close attention to earlier regulation of mid-19th century Britain. One has to agree with the author that "The concept of regulation should be sought in Community law and its execution in national laws". Indeed, regulation is – similarly to competition protection – an institution simultaneously governed by EU and national legal regimes. Hoff rightly divides regulation for competition from regulation for social obligations, a separation supported by literature. His comments on the distinction between regulation and administration are also valuable.

Hoff notes that regulatory authorities apply the law (i.e. make regulatory decisions) in a different way to the traditional model of public administration because of the considerable scope of discretionary powers which they hold. Significant discretion is justified here by the complexity and variability of the market situations faced by regulators. Acknowledging that sector-specific regulation is characterized by the fact that regulators are given administrative discretion (even though it is never totally free), Hoff explains the latter concept on the basis of the Polish and other EU countries' doctrine. While administrative discretion represents one of the basic concepts of the theory of administrative law, the author's analysis confirms that this notion has not been satisfactorily clarified yet. However, his conclusion, which approves of a "[b]road understanding of discretion which includes all its specific forms, i.e. the conscious legislative policy, interpretative leeway and legislative errors", is not fully convincing. It blurs existing precise views concerning, in particular, the relationship between administrative discretion and factual assessment. The question remains also of whether it is possible to perceive legislative errors as a form of administrative discretion seeing as this would make the concept of administrative discretion lose its operability – it becomes everything and thus nothing.

In the second chapter, the supposition is stressed that regulators have been given considerable discretion and the sources of its restrictions analysed. Hoff perceives regulatory discretion as the first of the two elements indicating *differentia specifica* of sector-specific regulation. He presents in detail the specific factors restricting the discretionary powers of the UKE Presidents and URE Chairman within their respective *ex ante* activities. Considering *ex ante* activities to be a feature of regulatory discretion, he pays special attention to the fact that regulators are obliged to observe the procedure of imposing regulatory obligations specified by EU law as well as relevant guidelines and recommendations of the European Commission. Regulatory authorities are also said to be bound by: the goals and general principles of regulation; agreements concluded between the regulators of EU Member States; the opinions of antitrust authorities; results of consultation processes (if there are bound by a legal duty to hold them) and; a restrictive interpretation of the law.

When analyzing the sources of the restriction of administrative discretion of regulators, Hoff discusses numerous interesting issues such as the binding force of the acts issued by EU institutions (in particular EU soft law, that is, guidelines and recommendations issued by the Commission) and their relationship to Polish legal sources. Taking into account the terminology of the types of legal acts listed in the EC Treaty, Hoff argues that not all Commission recommendations are in fact "recommendations" as stated in Article 249 TEC. Furthermore, he correctly notices the difference between the administrative discretion given to the UKE President and that given to the URE Chairman seeing as it reflects the difference between the concept of "regulated activities" in the telecoms sector and "licensed activities" in the energy sector. Finally, he indicates that the discretion given to regulators is restricted by the scope of the so-called "extraordinary measures" where regulatory obligations, other than those listed in sector-specific directives, are imposed.

In spite of the fact that regulatory discretion in national law is determined by the concept of discretion adopted in EU secondary legislation, the actual scope of discretionary powers of the UKE Presidents and URE Chairman is based on national laws. Focusing on the problem of imposing regulatory obligations in the telecoms sector, Hoff correctly notices that, controversially, Polish law solves this issue differently than the EU legal regime. While the latter orders regulatory obligation to be imposed in specific market situation, Polish law merely authorizes to do so. Hoff compares also the rules affecting the energy sector with those relating to telecoms. On this basis, he points out that the URE President – within the boundaries of his/her discretion – is not bound as strongly by the obligation to analyze the competitiveness of the energy sector as is the case with the UKE President in the telecoms sector.

The last but not least issue considered by Hoff in the second chapter is the issue of sectorial policy. The author raises a question of whether sectorial policy may be considered a source of generally binding law and whether it may be seen as a source of restriction on regulatory discretion. In spite of the statement that the Polish legislator in fact aimed to make sectorial policies binding, the author convincingly emphasizes arguments which speak again the classification of energy or telecoms policy (called “the regulation policy” in the Polish Telecommunications Act) as a source of generally binding law.

According to Hoff, the independence of regulatory authorities constitutes the second element of *differentia specifica* of sector-specific regulation. Regulatory independence and its determinants are analyzed in the third chapter. The assessment is enriched with a presentation of regulatory models applied in other Member States, increasing not only the theoretical but also practical value of this book. One of the most important problems discussed by Hoff in this context is the question of whether Poland has actually fulfilled the EU demand for regulatory independence? The author considers here: 1) the position of the regulator among other authorities of public administration; 2) the appointment and dismissal procedure of the regulator; 3) the principle of tenure; 4) the structure of the regulatory offices; 5) its financial independence and; 6) the functioning of independent advisory bodies associated with the regulator. Hoff analyses all of these factors in great detail, confronting the independence of regulators stressed in EU legislation and case-law with the level of regulatory independence set out in the Polish legal system.

Hoff’s opening observation is particularly remarkable. He emphasises that the very qualification of Polish regulators as a central authority of government administration “cannot be reconciled with the dictate of independence.” Their independence is additionally said to be undermined by: the departure from the principle of tenure; the fact that head of a regulator has no influence over the appointment of his/her deputies and only limited influence over the functioning of the regulatory office; the politisation of civil servants; the rules on the remuneration of the employees of regulatory offices and; the elimination of advisory bodies attached to regulatory authorities. Among the numerous important conclusions drawn by Hoff, special attention should be paid to the finding that the departure from the principle of tenure not only indicates the

weakening of the regulators' independence but also the decline of independent sector-specific regulation in Poland.

Within the assessment of the independence of regulatory authorities, Hoff carries out a detailed analysis of Polish political laws. On the one hand, he emphasises that political law states that regulators hold the position of central authorities of government administration and thus **are supervised** by supreme authorities of government administration. On the other hand however, the provisions of the political system provide that central authorities of government administration **are subordinate** to supreme authorities of government administration. The additional lack of a uniform doctrinal stand concerning the concepts of supervision, direction, control and subordination found by Hoff, leads him to the conclusion that central authorities of government administration **are in fact dependent** on supreme authorities of government administration. Therefore, in the closing pages of the third chapter, he formulates a demand to treat regulators as a separate category of authorities within the Polish political system. In his opinion, they should hold a unique position alongside central and supreme authorities of government administration. In order to emphasize the significance of regulators, he states that their position should be regulated by constitutional norms. Hoff's discussion concerning the independence of regulators should be given special attention. In his opinion, regulatory independence belongs – together with regulatory discretion – to the most important structural elements of the legal model of sector-specific regulation.

In the fourth chapter, Hoff focuses the reader's attention on EU regulatory instruments and the legal forms in which Polish regulator operate. However, these forms, unlike regulatory discretion and independence, do not constitute a *differentia specifica* of sector-specific regulation. Hoff's analysis of the forms in which regulators exercise their imperious influence over the economy does not reveal any particularities. Polish regulators are said to make use of typical forms of operation provided by administrative law. However, the author does point out that it is possible that unique forms of operation of regulatory authorities will develop in the future. Both in the telecoms and energy sector, regulators issue strictly regulatory decisions (that depend on the level of the competitiveness of the market) and typical administrative decisions. They also make use of different auxiliary activities. It's worth stressing that Hoff does not include normative acts relating to regulated sectors in the list of forms of operation of regulators because he does not consider government ministers (competent in the matters of telecoms or the energy sector) to be regulatory authorities.

In the fifth, chapter, Hoff summarises his earlier considerations concerning the model of sector-specific regulation with its two basic elements: the way of authorizing the regulatory authority to act (regulatory discretion) and the independence of the regulator. On this basis, he presents some *de lege ferenda* demands concerning primarily political changes to the position of regulators which would strengthen their currently restricted independence. In particular, Hoff explicitly advocates the constitutionalization of regulatory authorities.

The reviewed work is very valuable and useful to the reader, enriching the achievements of Polish administrative law in the context of sector-specific regulation.

The author creatively constructs an analytical model of sector-specific regulation in line with EU imperatives. At the same time, his work adds many valuable points to the discussion of the independence of regulatory authorities in Poland. These observations are especially important in light of the reservations concerning the independence of the UKE President expressed by the European Commission. They are also relevant in the context of the reform of the model of the organization and cooperation of national regulators prepared by the EU.

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A C T I V I T I E S O F C S A I R

CSAiR Activity Report 2008

1. Basic information

In 2008, the Centre of Antitrust and Regulatory Studies primarily focused on external activities directed at the wider public such as conferences and publications pursuing a strategy to enhance the institutional visibility of CSAiR. Efforts were exerted to gain new partners, for instance, through the joint organization of workshops, as well as to intensify co-operation with existing partners such as the Energy Regulatory Office (URE). As a result, in 2008 CSAiR organized a conference of its own, co-organized a series of three joint conferences with URE, held two joint workshops in partnership with distinguished Polish law firms and carried out three PhD seminars. CSAiR's publishing series entitled 'Studies and Monographs on Antitrust and Regulation' gained two new entries.

2. Conferences

2.1. Conference "*Regulation of telecommunications markets*"

A conference entitled: "Regulation of telecommunications markets" was held on 23 April 2008. Its programme consisted of the presentations of scientific papers and a panel discussion. The first part of the conference was moderated by Prof. M. Wierzbowski (Warsaw University Faculty of Law; member of the Advisory Board of YARS). The presented papers focused on the assessment of the competitiveness of telecoms markets, duties imposed on companies with a significant market position and procedural problems associated with market regulation. The following panel discussion was moderated by Prof. S. Piątek (Warsaw University Faculty of Management; Vice Chairman of the Advisory Board of YARS). It concentrated on the analysis of the effects of telecoms markets regulation. The conference provided the opportunity to present the first book from CSAiR's publishing series "Studies and Monographs on Antitrust and Regulation" entitled "Regulation of telecommunications markets" published in 2007 and edited by Prof. S. Piątek. Its review as well as a detailed conference report can be found in the current YARS volume 2(2).

2.2. *Series of conferences on energy markets: “What competition model for the energy sector?”*

The co-operation of CSAiR with the President of URE resulted in a series of conferences dedicated to energy policy overall and the regulation of energy markets in Poland in particular. They were held in 2008 and early 2009 under the joint title “What competition model for the energy sector?” as a platform for the exchange of opinions of researchers and representatives of the energy sector.

The first meeting was held on 21 February 2008. The papers and following discussion focused on the assessment of competition after the consolidation of the energy sector and on the position of buyers after the liberalization of energy prices for industrial purchasers. The second conference was held on 20 May 2008. It was dedicated to selected issues contained in the Polish energy policy till 2030, the envisaged evolution of the energy sector and methods for financing new investments. The third conference, held on 28 January 2009, focused on problems associated with regulating energy prices as well as costs and benefits of liberalization. A detailed conference report can be found in the current YARS volume 2(2).

3. Workshops

3.1. *“Antitrust law and copyright law – a point of crosscutting”*

CSAiR and the Markiewicz & Sroczynski law firm jointly organized a workshop held on 6 March 2008. It was directly inspired by the *ZAIKS/Brathanki* antitrust case which ended with the Polish Supreme Court’s judgment confirming the existence of an infringement of the domestic Competition and Consumer Protection Act by the national collecting society ZAIKS. Papers presented during the workshops focused on Polish and EC experiences surrounding collecting societies. The workshop gathered antitrust and copyright law practitioners, researchers and representatives of various collecting societies.

3.2. *“Antitrust protection and sector-specific regulation: confrontation or co-operation?”*

On 23 October 2008 another workshop was held jointly organised by CSAiR and the Wierzbowski Eversheds law firm. Its key focus – the confrontation of antitrust protection and regulation – was presented on the example of the telecoms sector. The programme consisted of two speeches and a discussion focusing on the objectives and values of the Polish Competition and Consumer Protection Act and relevant regulatory acts. The meeting was attended by legal practitioners, representatives of regulatory authorities and researchers. A detailed workshop report can be found in the current YARS volume 2(2).

4. PhD seminars

CSAiR PhD seminars are open to the wider public. They are organized in the form of a discussion surrounding the thesis presented by a speaker who does not need to be a member of CSAiR. During the seminars either a specific research problem or methodological issues connected to the preparation of a PhD dissertation are debated on.

CSAiR organised three PhD seminars in 2008. The first was held on 30 January and focused on the competences of the Polish competition authority in issuing decisions in proceedings initiated on the basis of Article 81 and 82 of EC Treaty. Subject to discussion was primarily the 29 October 2007 *Tele 2 v the President of the Office of Competition and Consumer Protection* judgment of the Polish Court of Competition and Consumer Protection. The discussion was preceded by an introduction made by Dr. Monika Bychowska – Director of the Department of Competition Protection at the Polish Office of Competition and Consumer Protection. The seminar focused on the interpretation of Article 5 of Regulation 1/2003 and, in particular, on the question whether it constituted a proper legal basis for the Polish competition authority to take a decision declaring a non-infringement of Article 82.

The second seminar was held on 27 June. In his presentation, Dr. Konrad Kohutek focused on problems linked to the concept of abuse considering in particular a series of documents published by the European Commission within the process of Article 82 of EC Treaty reform. The discussion that followed concentrated on issues such as: establishing the fact and the scope of consumer damage, the relationship between consumer damage and competition damage and the possibilities of achieving an acceptable level of legal certainty for dominant undertakings regarding their market activities.

The third PhD seminar was organized on 3 December 2008. It was dedicated to the limits of antitrust intervention in the form of an imposition of a duty to licence IPR as a remedy for competition restricting practices. The presentation of Małgorzata Surdek focused on the relationship between competition law and IPRs. Issues that were raised by the speaker, and then subject to a vivid discussion, included: the refusal to license on a basic and neighboring market, economic effects of a refusal to license, conditions for objective justification of a refusal to license, criteria for imposing a duty to license by a competition authority.

5. Publications

5.1. *“Block exemptions from the prohibition of restrictive agreements in the EC and Poland” (ISBN: 978-83-61276-10-4)*

The second publication of the CSAiR’s series “Studies and Monographs on Antitrust and Regulation” contains a series of articles edited by A. Jurkowska and T. Skoczny concerning the existence, validity and necessity of issuing domestic block exemptions from the prohibition of anti-competitive agreements. It is the culmination

of an extensive research project pursued by CSAiR since 2007 on request of the Polish Office of Competition and Consumer Protection. It illustrates the evolution and current state of EC and Polish block exemptions considered to be the basic tool of normative relativisation of the prohibition of anti-competitive agreements.

The book contains an analysis of group exemptions in Polish and EC law concerning: co-operation, vertical and technology transfer agreements as well as agreements in the motor vehicle, insurance, maritime transport and air transport sectors. It also includes the texts of key Polish and EC legal acts. A full review of this book can be found in the current YARS volume 2(2).

5.2. “Microsoft – Case Study. Competition Law on New Technology Markets”
(ISBN: 978-83-61276-16-6)

The third publication of the CSAiR’s series ‘Studies and Monographs on Antitrust and Regulation’ edited by D. Miąsik, T. Skoczny and M. Surdek is the product of a 2007 workshop organised jointly by CSAiR and the law firm CMS Cameron McKenna. Aside from a detailed presentation of the EU Microsoft case, the book contains two key articles dedicated to Microsoft’s refusal to grant access to information guarantying its competitors the interoperability of their operational systems with the Windows platform and, to tied sales of the Windows operational system with Windows Media Player. An article on the US Microsoft case and the analysis of economic and strategic challenges of IT markets in the context of the Microsoft case is also included. Finally, a list of publications dedicated to the Microsoft case and a shortened version of the CFI judgment can also be found in the book. A full review of this book can be found in the current YARS vol. 2(2).

6. Research

In 2008, CSAiR conducted on request of Telekomunikacja Polska S.A. a new research project concerning antitrust aspects of non-price discrimination. The resulting report, entitled: ‘Non-price discrimination – legal analysis of the problem in Polish and EC competition law’, interpreted the concept and presented the prerequisites and criteria of non-price discrimination seen as abuse of dominance in Polish and EC antitrust case law. The research project led to the identification of a number of parameters for non-price discrimination including: quality (of a product/service), time, access to information, para-regulatory competences of a dominant undertaking and quantity. It was concluded that the varying character of these criteria imposes a special duty on competition authorities to observe high standards of proof in proceedings concerning abuse by discrimination. Criteria for discrimination can be quantified, especially time and quantity, thus competition authorities should indicate quantitative proofs when declaring the existence of non-price discrimination practices.

The application of antitrust law may be successfully supported by the experiences contained in regulatory cases in the telecoms sector. The report noted in particular

that telecoms operators – on the basis of previous case law and the positions taken by regulators – are able to self monitor the indicators deciding on the implementation by an operator of a duty of non-discrimination. The specific character of discrimination by a vertically integrated operator requires the analysis of indicators for potential discrimination either on wholesale (where it acts as a ‘deliverer’ for undertakings acting on retail markets and thus, the vertically integrated operator is not acting as their competitor) or retail markets (where it competes directly with purchasers of its services on a wholesale market).

Dr. Agata Jurkowska

CSAiR Scientific Secretary

Regulation of Telecommunications Markets. Conference Report

On 23 April 2008 the Centre of Antitrust and Regulatory Studies (CSAiR) organised at the Warsaw University Faculty of Management a conference entitled “Regulation of Telecommunications Markets”. The conference was organised by Prof. Tadeusz Skoczny, the Head of the Centre of Antitrust and Regulatory Studies and Prof. Stanisław Piątek, the Head of the Department of Administrative and Legal Problems of Management, both part of the Warsaw University Faculty of Management.

The primary purpose of this conference was to analyse current problems concerning the regulation of the telecommunications sector in Poland. The prior publication of a monograph entitled *Regulation of Telecommunications Markets*, edited by Prof. Stanisław Piątek, constituted an additional incentive to begin a wider debate on this subject.

The conference was divided into two parts. The first part of this conference was chaired by Prof. Marek Wierzbowski, the director of the Chair of Law and Administrative Procedure at the Faculty of Law and Administration of the University of Warsaw. In part I, four papers were presented by Prof. Tadeusz Skoczny, Dr. Dariusz Adamski, Kamil Kosmala and Prof. Stanisław Piątek. The speeches focused on problems relating to the assessment of the competitiveness of telecoms markets, on the duties imposed on companies holding a significant market position, and on procedural problems concerning market regulation. Part II, chaired by Prof. Stanisław Piątek, was entirely dedicated to a panel discussion, concerning the effects of regulating telecoms markets. Many invited representatives of the telecoms sector and independent experts participated in this discussion. During the closing session, all participants had an opportunity to voice their opinions and comments.

The conference was opened by Prof. Tadeusz Skoczny, who presented a paper regarding the assessment of the competitiveness of telecoms markets. In his speech, he considered both, the overlaps between competition law and regulation as well as their differences. Prof. Skoczny stressed that while consumer welfare is a paradigm of the law on the protection of competition, a fact reflected by an analysis of the jurisprudence of the ECJ and CFI, in a practice of sector-specific regulation, competitors (operators) are foremost directly benefited. An excellent example of the latter is the effect of asymmetrically imposed, regulatory duties, whose direct beneficiaries are other market participants (competitors). In addition, Prof Skoczny emphasised how difficult it is to identify, which markets should be regulated. The reason for this is the fact that the

assessment of telecoms markets is performed on the basis of data that, in light of the very dynamic development rate of this sector, has already turned historical on the day of the assessment. Therefore, according to Prof. Skoczny, it is impossible to define markets for regulation using legal instruments specific to competition law.

In his presentation, Prof. Skoczny also analysed the role of public authorities in defining markets and assessing their competitiveness. He indicated an increasing influence on the telecommunications operators exercised by the President of the Office of Competition and Consumer Protection (UOKiK), whose competence covers deregulated telecoms markets. He also emphasised the increasing role of the European Commission as the body responsible for both, the protection of competition as well as for the regulation of this sector.

In conclusion, Prof. Skoczny stated that telecoms regulation is not really or fully based on competition law, as evidenced by the application of different *ex post* and *ex ante* instruments. Furthermore, according to Prof. Skoczny, a uniform axiology of the activities of regulatory bodies and bodies responsible for competition protection has not yet been established. At the end of his presentation, Prof. Skoczny stressed an increasing demand for creating cooperative administration in the EU.

Dr. Adamski was the second speaker of the conference. Primarily, he commented on the duties imposed on companies holding a significant market position. He also presented a theory, in which regulation is considered to be a form of therapy for telecoms markets. To make the therapy effective, it is essential to not only correctly diagnose the situation on the market and to select appropriate remedies, but also to impact the sector psychologically, in other words, to make market participants aware of the necessity for their participation in the regulatory activity (therapy).

Dr. Adamski emphasised that the most important regulatory problem at the moment is to counteract the activities of those companies, which aim to protect their position on retail markets and weaken competition by binding services. The European Commission approaches, however, the issue of imposing duties on retail markets with reserve, shown by the fact that even if the aforementioned duties are adequate, the national regulator must also apply a strict criterion of proportionality in imposing them. The situation looks different on wholesale markets where the Commission agrees to impose disproportionate measures provided that the solutions applied there, will also lead to a resolution of problems existing on retail markets.

Keeping in line with the comparison of the process of imposition regulatory duties to a therapy, Dr. Adamski analysed also the activities of the President of the Polish Office of Electronic Communications (URE) on the basis of an example from the broadband internet access market. Considered were also the mechanisms used to fight price discrimination. The actions of the British regulator, the Office of Communications (OFCOM), towards the incumbent English operator, British Telecom (BT), were presented as an example of sector-specific regulation. The actions taken by OFCOM were meant to motivate BT to cooperate with the regulator. A promise to abolish a part of earlier regulatory duties in exchange for BT's cooperation in the process of its functional separation was an incentive meant to boost BT's motivation (will to cooperate). At the end, Dr. Adamski stressed once more the psychological aspect of regulation,

namely the need of appropriate encouragement for the incumbent to cooperate with the regulator – analogues to the relationship between ‘a patient and a doctor’.

The next speaker, Mr Kosmala, focused on procedural problems of market regulation. He emphasised first of all, the hybrid character of regulatory procedures, which comprise some measures similar to an antitrust analysis as well as some completely innovative solutions such as public consultations of draft decisions, a gradual model of proceedings and an inconsistent appeal system. As a result, it is necessary to consider the functioning of many regulatory procedures rather than just one. Closely scrutinised were also procedural aspects concerning the delineation of the ‘circle of the participants’ of regulatory proceedings and, as a consequence, the identification of entities entitled to appeal a regulatory decision. This analysis was performed on the basis of current jurisprudence of Polish courts as well as the European Court of Justice (ECJ). According to the ECJ, a right to appeal a regulatory decision should not be reserved to its addressee but should also encompass all market participants and users. In his presentation Mr Kosmala considered: the not consistent appeal system, the incomprehensible construction of the appeal mechanisms concerning regulatory decisions, and the role of the Polish Court of Competition and Consumers Protection acting as a court of first instance in cases of appeal against regulatory decisions.

The final paper of this part of the conference was presented by Prof. Stanisław Piątek. In his speech, conclusions were drawn from an analysis of markets subjected to regulation covering issues such as: regulatory decisions, the assessment of data used for market definition and competition harm, the results of consolidation proceedings and interventions by the European Commission; the assessment of contentious issues in light of the Polish Telecommunication Law as well as relevant Community directives. The suppositions presented by Prof. Piątek implied that, according to the assessments of regulated markets performed by the authors of the *Regulation of Telecommunications Markets* monograph, the decisions taken by UKE generally deserve approval, provided their legitimacy is verified.

Prof. Piątek spoke about the way to identify regulatory problems and the controversy concerning it. He analysed the consultation as well as the consolidation procedures where it became evident that often comments, which were submitted during a consultation procedure coincided with the opinions later expressed by the European Commission in the consolidation procedure. Prof. Piątek noted, therefore, that it is worth suggesting to UKE to take such comments into consideration more often in the future.

Characterising the main areas of controversy, Prof. Piątek emphasised the following issues: defining a subjective scope of markets for services in broadband access, seeing as this later determines the scope of regulation; an assessment of the competitiveness of the mobile communications markets (markets 15 and 16); the credibility of data seen as the basis for an assessment of the competitiveness of markets (market 10); the scope and form of regulatory duties imposed; and the controversy over regulatory accounting and cost calculation.

Prof. Piątek also presented the conclusions drawn by the employees and collaborators of CSAiR in the *Regulation of Telecommunications Markets* monograph. Their studies

suggested that particular emphasis should be placed on, firstly, a more thorough analysis of the views presented during the consultation procedure, secondly, solving contentious issues as soon as possible within the consolidation procedure, thirdly, the necessity, after a decision has been already issued, to formulate appropriate mechanisms necessary to move from the legal instruments used during the transition period, to duties anticipated in it. In relation to the time horizon of regulation, conclusions diverged. Some authors were of the opinion that few markets are permanently uncompetitive (e.g. an access market). However, clearly pro-competitive changes on some markets were also noted. In conclusion, the huge potential of regulation at Community level was stressed, as illustrated by the regulation of roaming. Moreover, any attempt to impose new regulatory duties 'through the back door' was found unacceptable. At the end of the first part of the conference it was concluded that it is the way in which the fulfilment of regulatory duties is enforced, which will determine the result of regulation, and not the content of a regulatory decision (e.g. market 16).

In part II of this conference, many of the invited guest participated in a discussion concerning the economic and market results of regulation. The president of Netia S.A., Eugeniusz Gaca, was the first to speak. He presented a short outline of the history of the liberalisation of telecoms markets in Poland. Then, the president of Exatel S.A., Sławomir Chmielewski, analysed three aspects of regulation: the support of competition, the protection of consumers and infrastructure investments. He also emphasised the lack of regulation in Poland before 2005. The effects of liberalisation were shown on the example of price reductions of telecoms services and the development of infrastructure. Dr. Jerzy Kubasik was the next to speak. Among the examples of regulatory success, he listed: the implementation process of the wholesale license fee procedure, the liberation of the local loop and the reduction of mobile communications rates. He positively assessed attempts to organise the national numbering plan and number porting. He pointed out, however, that at this moment it is too early to say that regulatory actions have contributed to the development of the telecoms infrastructure. The next speaker, Prof. Maciej Rogalski, a representative of Telekomunikacja Polska S.A. (TP S.A.), described a preferred model of regulation based on close cooperation between the regulator and leading market participants. According to Prof. Rogalski, such a model favors the minimising of legal and economic uncertainty on the market. Moreover, he criticised the Polish regulator UKE for its treatment of TP S.A.

The next thread of the discussion concerned mobile communications. The director of Polkomtel S.A., Jerzy Sadowski, spoke of the results of regulation from the perspective of a mobile operator. He stressed that mobile communications does not have the qualities of a non-competitive market. In his opinion, the most important challenge currently facing telecoms companies providing mobile communications services is adaptation to the requirements of technological revolution. He noted that the key challenge for the regulator is the appropriate regulation of market 16 (call termination in public mobile telephone networks).

The next speaker, Kamil Kosmala from the Grynhoff Woźny Maliński Law Firm, commented on the prior contributions to this discussion. In his opinion, the fulfillment

of the regulation strategy by the Polish regulator UKE deserves a positive assessment. He then raised the issue of the European Commission's refusal to consent to the demands of TP S.A., mainly in the context of requiring special state protection (a so-called, 'regulatory holiday') while its new-generation infrastructure is being build. Mr. Kosmala expressed his approval of the Commission's decision, which found the expectations of TP S.A. groundless. Further, he referred to the problem of a strict discipline of immediate 'executability' of a decision taken by the President of UKE, noting in particular that the clause of immediate enforcement was acknowledged to be legitimate in all cases examined by Polish courts. Referring to the regulation of mobile communications, Kamil Kosmala presented arguments in favor of using regulatory asymmetry on the mobile communications market.

Arwid Mednis from the Wierzbowski Eversheds Law Office and Tadeusz Piątek from the White & Case Law Firm also participated in this discussion. They argued in favour of taking actions on increasing both legal certainty of the regulatory practice of UKE and Polish courts. T. Piątek stressed that regulation is an exception to the constitutional rule of the freedom of contract, which uplifts standards related to the quality of regulation in Poland. Grzegorz Grabowski, a representative of Tele2, scrutinised then the strategy of Telekomunikacja Polska S.A.

In conclusion, Dr. Jerzy Kubasik referred to Dr. Dariusz Adamski's comparison of the conduct of an incumbent company and the actions of an unruly patient. He considered this comparison to be the best example to show the true meaning of the influence of regulation on the activity of companies subjected to regulation.

During the conference many postulates and comments concerning both, the legal status and regulatory practice were made. It is apparent that one of the most important general conclusions of this conference is the fact that Poland is on the right track to create a coherent telecoms market system. The large number of *de lege ferenda* suggestions made during this conference demonstrates a strong need for similar meetings in the future.

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Model of Competition in the Energy Sector. CSAiR and URE Seminars. Report

I. Introduction

In 2008 and early 2009, the President of the Polish Energy Regulatory Office (Urząd Regulacji Energetyki, URE), a central body of public administration competent in the energy field, and the Centre of Antitrust and Regulatory Studies (CSAiR), organized three seminars under the collective title “A model of competition in the energy sector”. Their aim was to act as a platform for discussion and exchange of experiences and opinions on the energy sector overall, and its regulatory aspects in particular. The seminars were attended by government officials, academics interested in sector-specific regulation, experts from law and consulting firms as well as numerous representatives of energy companies and consumer. The first seminar was opened by Prof. Alojzy Nowak, the Dean of the Warsaw University Faculty of Management, who sincerely welcomed this new forum for scientific cooperation between practitioners and researchers in the field of regulation, competition law and the energy sector.

II. First seminar

The first seminar was held on 21 February 2008 at the Warsaw University Faculty of Management. Its aim was to discuss competition and regulation related issues relevant to the energy sector. The seminar was moderated by Anna Fornalczyk, the first President of the Polish competition authority, who introduced the chances and risks associated with the development of competition in the electricity market.

The seminar started with a brief description by Dr. Mariusz Swora, the President of URE, of a recent decision taken by the energy regulator that has proven to have strongly influenced the electricity field. The decision was taken on the basis of Article 49 of the Polish Energy Law. According to this rule, the URE President may free energy suppliers from the obligation to submit their tariffs for his approval if a market analysis proves that the energy market is competitive. While the regulator analysed the relevant market and evaluated the customer service standards of the energy suppliers, the evaluation did not clearly prove that the Polish electricity market is functioning adequately. Serious doubts were caused by the position of Distribution System Operators (DSOs) within the vertically integrated structure of existing energy groups. After a thorough examination, the URE President decided that tariffs for household

consumers must remain subject to his approval, however he lifted this requirement in relation to other tariffs. In his opinion, there is a need for a competitive and tariff-free energy market. However, this is possible only after the implementation of a number of conditions. Dr. Swora concluded his presentation with an outline of the National Roadmap¹ developed by the URE according to the European Regulators' Group for Electricity and Gas (ERGEG) Position Paper on End-user Energy Price Regulation².

How to enhance the energy consumers' position on the energy market?

The first panel discussion entitled "How to enhance the energy consumers' position on the energy market?" was moderated by Prof. Tadeusz Skoczny. He stressed that competition is a market phenomenon that drives prices down. He rejected the assumption that the recent rise of electricity prices was caused by the aforementioned decision lifting administrative controls of energy tariffs. In his opinion, the increase was due to the fact that prices were kept on an artificially low level for a long period of time. He supported the idea of reinforcing the position of energy consumers on the market. The following questions were subject to discussion by the participants of this panel: Who should take what actions in order to enhance the position of energy consumers on the market? What actions are necessary in order to support vulnerable consumers? What responsibilities does the State have towards energy consumers?

Sławomir Ulatowski (Federacja Konsumentów) and Tomasz Odziemczyk (Stowarzyszenie Konsumentów Polskich), representatives of Polish consumer associations, drew the audience's attention to the fact that Polish energy consumers are unaware of their rights. They associated this fact primarily with information deficit concerning new market possibilities such as the right to switch energy suppliers. They noted also that consumers might find it very difficult to compare electricity prices. According to the speakers, even if consumers do know how and wish to switch suppliers, they might be afraid to do so. This fear can be attributed to the fact that, in case of a dispute, consumers would have to take the case to court since there are no alternative ways to resolve disputes (ADR) in this field.

Large energy consumers, represented by Joanna Baczewska (Tramwaje Warszawskie SA), Henryk Kaliś (ZGH Bolesław SA), Andrzej Zielaskowski (PCC Rokita SA), have made it clear that they are ready and willing to switch electricity suppliers. However, they have not received any competitive offers due to their long-lasting and rigid "tariffication". They agreed that the situation has changed recently but antitrust and regulatory authorities must pay close attention to the energy market in order to protect consumers against the abuse of market power by energy companies. The speakers argued that an administrative action is needed to force

¹ Roadmap of prices liberalisation for all electricity consumers. Towards the customers' rights and effective competition in the power industry sector. Available at: http://www.ure.gov.pl/portal/en/1/18/Roadmap_of_prices_liberalisation_for_all_electricity_consumers.html

² End-user energy price regulation; ERGEG position paper E07-CPR-10-03, 18 July 2007.

electricity producers to sell more energy on the Power Exchange, rather than selling it *via* vertically integrated channels.

Grzegorz Grabowski, a representative of an electricity wholesaler (PKP Energetyka SA), stressed that the energy market is not liquid enough and that it is characterised by lack of available energy. The situation has worsened due to growing demand and lack of investments in new power plants.

Jacek Dziel (Caritas Archidiecezja Gnieźnieńska) spoke of vulnerable consumers. He noted first that it is nearly impossible to live without electricity in the modern world – electricity powers not only appliances but also all electronic information and communication devices. Thus, lack of electricity is synonymous with social exclusion. However, not all consumers are able to deal with the cost of energy. The State should therefore help them in a way that brings vulnerable consumers back to society. In his opinion, energy companies might help vulnerable consumers if they accept Corporate Social Responsibility towards the environment, their business partners and consumers.

Privatization of vertically integrated energy groups

The second panel discussion was devoted to the privatization of vertically integrated energy groups. It was led by Prof. Jan Popczyk (Politechnika Śląska) with the participation of energy companies' representatives: Jerzy Topolski (Enion SA), Piotr Gołębiowski (Vattenfall Sales Poland Sp. z o.o.) and Tadeusz Skobel (PKP Energetyka SA) as well as Daniel Borsucki, a spokesman for a large energy consumer (Katowicki Holding Węglowy SA), Prof. Tadeusz Skoczkowski, the Chairman of the Polish National Energy Conservation Agency (Krajowa Agencja Poszanowania Energii SA, KAPE SA), Grzegorz Onichimowski, the Chairman of the Polish Power Exchange SA (Towarowa Giełda Energii SA), Bartłomiej Nowak (European University Institute, Florence) and Aleksander Stawicki (Wierciński, Kwieciński Baehr Sp. Komandytowa).

Prof. Popczyk stated that the re-monopolization of the energy sector might result in a misallocation of income since the new groups might spend their profits on other things rather than additional energy generation sources. Mergers and consolidation of energy companies might not lead to the growth of the value of the groups. It is necessary to introduce reference energy prices dedicated to each energy production technology and to fully unbundle DSOs.

The participants of the panel generally agreed with the thesis proposed by Prof. Jan Popczyk. In their opinions, the energy sector is shaped by the “Energy sector program”³ which, rather than facilitating a competitive energy market, not only caused price increases but also lowered the value of the energy companies before their privatization (social packages given to their employees by the government as a price for their agreement for consolidation). In addition, the assets of the energy companies were not properly balanced. As a result, some have a surplus of energy productions while some suffer from the lack of energy sources.

³ „Energy Sector Program” – accepted by the Council of Ministers 26 March 2006.

In the opinion of the participants of the panel, subsequent Polish governments did not have a clear vision of the energy sector and thus their policies were never consistent. Additionally, no one has ever evaluated the undertaken actions. Currently, for instance, the DSOs have not enough independence within the vertically integrated structures of the energy groups. Moreover, due to the incorrect formulation of the integrated contracts (Polish: *umowa kompleksowa*), the DSOs are losing touch with consumers. For that reason, the position of the latter worsens because they are not treated equally, because their right to switch suppliers is being restricted and because the operational risk associated with vertically integrated energy groups is transferred to them. Thus, in order to increase competition in the energy market, it is necessary to fully unbundle DSOs from the structure of the energy groups before their privatization. The view was also formulated that the recent increase in electricity prices was unavoidable since it resulted from the rise of the total costs of energy companies, investments plans and the limitation of CO₂ emissions. Considering the market power enjoyed by the groups, their willingness to increase the final price of electricity, even with a higher limit of CO₂ emissions would not guarantee that additional income would be spend on new power generation sources or the replacement of the old ones.

National energy champions on the European energy market

Prof. Andrzej Szablewski (Polish Academy of Science) moderated the third panel discussion which was devoted to the regulation of national energy champions on the European energy market. Among the question raised by Prof. Szablewski were: how should the recent revival of “energy nationalism” in Europe be explained (governments defending existing national champion or wishing to create them)? How do national champions function in practice considering, on the one hand, market opening enforced by the EC and, on the other hand, the security of supply? Is it possible to create national champions through further consolidation of the State-owned power sector (having regard to the actions undertaken by the Commission against the growing concentration of national energy markets and the declaration of the Polish governments to create a competitive energy market)? What would creating a national champion mean in the Polish context: further consolidation on the basis of the largest energy undertaking and if so, to what an extent or; would it mean the consolidation of undertakings operating in various branches of the energy sector e.g. Polish Oil and Gas Company (PGNiG) or coal mining companies? In light of a decade long experiences of vertical and horizontal consolidation, is it possible to build a Polish national champion, which would be able to compete on the regional and European market, and which would not run the risk of impeding the security of energy supply?

The aforementioned issues were discussed by Tomasz Chmal (The Sobieski Institute), Łukasz Dziekoński (Forum for Development of Economic Education - Forum Rozwoju Edukacji Ekonomicznej: FREE), Wojciech Kułagowski (Tauron Polska Energia SA), Krzysztof Rozen (Zespół Energii i Zasobów Naturalnych, KPMG) and Wojciech Tabiś (Endesa Polska). They stated that examples of successful consolidation

can be found in Europe considering the Czech national champion (CEZ) in particular. Poland, one of the biggest EU countries, should also promote its energy companies in order to raise its European position. However, consolidation was so far based on political considerations and thus burdened by additional social costs making the energy groups not as effective as they should be. Still, in the opinion of the participants of the panel, consolidation should not be reversed. Instead, the vertically integrated groups should be privatized, in order to obtain the necessary development and investment resources, otherwise Poland will be threatened by the collapse of its power supply, which would clearly endanger its economic growth. Despite the positive aspects of consolidation considering the EU dimension, the opinion was voiced that its benefits are mostly invisible on the domestic market. Large energy groups might use their market power in a way which is detrimental to competition on the national markets, thus it is necessary to enforce regulatory and antitrust authorities.

On the basis of the discussion between the participants of the panels and guests, the following conclusions can be drawn:

- The regulatory concept for the Polish electricity market, adopted in the early nineties in order to increase competition, was never realized. Thus, the conditions necessary for the liberalization of electricity prices were not met. In a competitive market, energy consumers can effectively switch suppliers. However, free energy prices for industrial consumers do not mean the freedom to choose their energy supplier since they still have to face significant difficulties arising from problems with billing and metering technologies as well as from lack of competitive offers.
- Vertically integrated groups limit the independence of DSOs. Energy suppliers without energy production sources are in a worse market position than vertically integrated energy groups due to the shortage of energy and difficulties with gaining grid access. DSOs prefer companies from their own energy groups, a fact that limits the choice of energy suppliers and thus also competition and puts pressure on prices.
- The consolidation of national energy sectors into vertical structures should be viewed within the framework of the common EC energy market based on cross-border transmission interconnection and the operation of the Union for the Co-ordination of Transmission of Electricity (UCTE). In this way, national champions are subject to competitive pressure (the possibility of supplying their consumers with imported energy). However, Poland does not have sufficient cross-border interconnections, a fact that strengthens the market position of its national champions.

III. Second seminar

Prof. Tadeusz Skoczny moderated the second seminar which took place on 20 May 2008. It was devoted to the priorities of the Polish energy policy until 2030 in light of the EU package 3x20. The seminar focused on financing of new investments in the energy sector and the directions of further market development.

3x20 energy and climate package

The first panel was chaired by Prof. Janusz Lewandowski (Warsaw University of Technology, Politechnika Warszawska) with the participation of: Mikołaj Budzanowski (Ministry of the Environment), Łukasz Dziekoński (FREE), Prof. Tadeusz Skoczkowski (KAPE SA), Tomasz Sommer (Globalization Institute, Instytut Globalizacji) and Wojciech Stępniewski (WWF Polska). Prof. Lewandowski opened the discussion by stating that the energy package 3x20, especially in terms of CO₂ emissions, is extremely detrimental to the Polish economy. He also noted that there is an urgent need to formulate a reliable forecast of the national economic potential in terms of renewable energy and to develop a strategy that will realize it. He pointed out that it is likely that CCS (Carbon Capture and Storage) is a blind path for energy development – planting forests seems a more effective way to reduce the level of CO₂ in the atmosphere.

Mikołaj Budzanowski emphasised that the Polish government is lobbying for a change of the allocation system of CO₂ emissions. He stressed the threat that some segments of the Polish (or more broadly the EU) economy might be relocated to other countries such as Ukraine or Belarus. Poland is trying to convince the Commission that the energy sector should be on the list of industries which are at risk of relocation to the outside of the EU. If these efforts prove successful, Poland will be able to count on the protective system from 2013 to 2020 involving gaining at least some free allocation of allowances for CO₂ emissions as of 2013. Poland proposed that 10% of CO₂ emission allowances, which will be sold from 2013 through auctions, should be divided between the EU countries with the best reduction system comparing the national results. The revenue generated by these auctions could be used for the energy sector and its adaptation to the requirements of the new energy-climate package.

The participants of the panel stressed the dilemmas surrounding EU's implementation of rigid sustainable policies considering that other areas (e.g. USA and China) do not impose such restrictions. For that reason, they were of the opinion that it would be far more beneficial and effective to spread CCS technology among the largest CO₂ producers, such as China and India, than implementing it in the EU. An open and liberalized market was said to be the best model guaranteeing energy security. Considered was also "white-certification" of basic instruments to promote energy efficiency.

Financing the new investments in power sector

The second panel was led by Prof. Krzysztof Żmijewski (Politechnika Warszawska) with the participation of: Remigiusz Chlewicki (Ernst & Young), Tomasz Chmal (Sobieski Institute), Piotr Łuba (PriceWaterhouseCoopers), Grzegorz Onichimowski (Polish Power Exchange SA) and Tomasz Wieczorek (Polish Society for the Certification of Energy, Polskie Towarzystwo Certyfikacji Energii). The discussion was dedicated to the financing of new investments in power sources, white/blue certificates, long-term contracts and the risk of stranded costs. Prof. Żmijewski stressed that the capacity of Polish power plants is rapidly aging (40% of power stations are more than 35 years old) but the current price level does not encourage investment. Investors expect a

surplus of 16 €/MWh net (i.e. 23€/MWh gross). Domestic prices do not guarantee that the investment will automatically appear. As a result, we are threatened by the Czech syndrome where an internal price increase indeed generated a budget surplus for the Czech champion CEZ but the energy company has invested that surplus abroad. There are no investors on the horizon willing to reconstitute power sources, decreasing the chances for privatization. Stage III of the EU ETS (Emission Trading Scheme) drastically increases the cost of CO₂ and hence the level of investment risk (no one knows how the economy will react to a 100% or a 300% increases in energy prices).

The participants of the panel generally agreed that the market does not generate economic incentives. In their opinion, the Treasury should be more pro-active not only in favor of energy companies but also considering consumer interests. Closer harmonization with other EU markets is necessary in relation to market products, principles of balancing and the RUS contracting rules. After the implementation of technical and commercial rules, it would be possible to introduce market coupling with Sweden or the Ukraine. Still, national solutions inconsistent with the EC model take us away from effective investments. The speakers stressed URE's role in the creation of an environment for investments in the energy sector. Blue certificates (for now, an idea to gather funds to finance investments in new power capacity) should be issued through tenders organized by the URE President (using the existing provisions of the energy law). They should make it possible to spread the cost of investments on all electricity consumers. White certificates (energy efficiency certificates) should serve as a tool to stimulate energy efficiency. They might be issued for investments aimed at: reducing energy consumption, increasing the efficiency of energy production or reducing losses in transmission and distribution systems.

Everyone agreed that the Polish energy sector was not a good environment for foreign investments. Poland tries to protect national champions and to create ways to give preferential treatment to domestic energy producers, which are still not able to exploit it in full. For example, largest European energy companies have signed contracts with suppliers of power units and thus any other company might find it difficult to buy power units on the market. Without incentives from the Polish market, these European companies, deterred from plans to build new capacity in Poland, can pursue investments in other locations, a fact which is clearly not in the Polish best interest. There is a great need to convince investors that it pays to invest in Polish energy, especially in power generation. At the same time, the Polish Transmission System Operator should be more transparent in relation to potential investors indicating the potential locations of necessary investments.

Development of the Polish energy market

The third panel was moderated by Prof. Eugeniusz Toczyłowski (Warsaw University of Technology) with the participation of: Janusz Bill (Vatenfall Poland AB SA), Robert Guzik (URE), Dr Mariusz Kaleta (Warsaw University of Technology), Marek Kulesa (Association of Energy Trading, Towarzystwo Obrotu Energią), Roman Korab Ph.D. (Politechnika Śląska), Leszek Rojczyk (Everen Sp. z o. o.) and Tomasz Sikorski (PSE

Operator SA). The panel considered the further development of the Polish energy market: reserve markets, day-ahead markets, intra-day markets, nodal tariffs (taryfa węzłowa), the liquidity of power exchange and market integration through market coupling.

Prof. Toczyłowski focused everyone's attention on the fundamental risks of delaying reforms. He stressed the expectations regarding the desired market and regulatory mechanisms such as correct economic short- and long-term signals (to ensure economic efficiency, to support short- and long-term system security) and compliance with the development of the European energy market (and perhaps future IV EU energy package as a "Standard Market Design" for the EU). He identified the need to harmonize the rules for integrating national markets as a key directional action alongside the necessity of fundamental changes in the balancing market (new balancing mechanisms, limiting TSOs' liability for ensuring the security and efficiency of network use; terminating TSO's liability for the efficiency of electricity generation, creating favourable conditions for energy producers for efficient and economical planning of production). Prof. Toczyłowski stated also that it is necessary to harmonize support mechanisms for environmental objectives or effectiveness goals and to improve pro-regulatory principles of effectiveness: nodal/area tariffs, mitigation of local market power and improvement of market transparency.

In response to his arguments, the participants of the panel agreed that the averaging of prices in current tariffs (no location signals) must be perceived as barrier, with nodal tariffs as the solution. Apart from energy prices, a reference network and system model should be published. The balancing market effectively inhibits price signals (prices are stable and low). The participants agreed that a new market model is necessary. In the first stage, it is essential to run an intra-day market and to remove price regulation for household consumers. The second step should be a remodeling of the overall market, including the introduction of charge location and the market for generation capacity as well as of marginal prices. Subsidies should be abolished by the transmission tariff (settlement and quality rate as well as marginal prices).

CSAIR and URE cooperation agreement

On 1 September 2008, Dr. Mariusz Swora and Prof. Tadeusz Skoczny signed a cooperation agreement on the basis of which, CSAiR will support the URE President by initiating research and development projects concerning the regulation of the energy market. Both institutions will co-organize conferences and seminars meant to facilitate the exchange of ideas, opinions and experience between academics, public authorities and energy companies.

IV. Third seminar

Costs and benefits of a regulated and a liberalized energy market

Dr. Mariusz Swora and Prof. Tadeusz Skoczny opened the third seminar held on 28 January 2009 under the title: “Model of competition in the energy sector”. It focused on factors affecting electricity prices and the respective costs and benefits of a regulated and a liberalized energy market. The discussion was led by Prof. Krzysztof Żmijewski (Politechnika Warszawska) who compared the two alternative models stating: “we have an obvious conflict between these two worlds. On the one hand, the world of global competition operating during a time of crisis. The second world is functioning in a golden cage, not knowing the fight, danger and fear, and bearing only a heavy effort to justify its functioning”.

The URE President presented his vision of the energy regulator stating that an independent and strong public authority promotes competition. Paradoxically, the road to competition and liberalization leads through the strengthening of the regulator.

Zofia Janiszewska, the Deputy Director of the URE Competition Promotion Department, outlined the EC background regarding market regulation and liberalization. She noted that 15 EU Member States currently regulate electricity prices (at least in one segment of the market) while some are considering the possibility of returning to price regulation. In the vast majority of Member States, customers have the right to switch energy suppliers (Polish households acquired this right on 1 July 2007). She stressed that Poland is one of the few countries which has formulated and is implementing a “roadmap” (a document which describes what shall be done in order to remove tariffs) concerning administrative controls of electricity prices. Aside from Poland, only the Irish NRA and the Spanish Government fulfilled this ERGEG recommendation.

Halina Bownik-Trymucha, the Director of the URE Competition Promotion Department, presented the arguments in favour of upholding the requirement stating that all energy suppliers must present their household tariffs for approval by the URE President. She pointed out that the current market structure does not give consumers any incentives to actively participate in the market. The differences between the Polish energy market and many others in the EU is well illustrated by the switching supplier ratio: 400,000 UK households switch suppliers every month in comparison to 1018 Polish customers (households as well as medium and large industrial customers) in the whole of 2008. This is primarily caused by the strategy pursued in Poland by its vertically integrated energy companies regarding the sale of energy, which is extremely beneficial to them but limits the development of competition.

Henryk Kaliś, the Chairman of the Electricity and Gas Consumer Forum (*Forum Odbiorców Energii Elektrycznej i Gazu*), blamed the energy sector for failing to understand the market needs of its clients. He pointed out that energy in Poland is more expensive than in other Member States. Furthermore, industrial customers in the EU do not pay the costs associated with the implementation of the State energy policy.

Grażyna Rokicka, the President of the Polish Consumer Association (*Stowarzyszenie Konsumentów Polskich*), doubted whether the higher energy bills paid by Polish consumers will be used by energy companies on investments, long since promised by the industry.

Marek Dietl Ph.D. (Sobieski Institute) noted that energy producers impose very high margins. On a well-functioning unbundled energy market, he said the price rises for final consumers are expected to go hand in hand with reductions on the production level. He stated that the market could be improved by expanding the scope of available regulatory tools such as a right for the URE President to determine maximum prices and an improved and faster supplier switching procedure.

Dr. Filip Elżanowski (an expert on energy markets) and Mirosław Barszcz (tax law expert) saw the strengthening of the regulatory tools and role of the URE President as very important factors for improving the competitiveness of the Polish energy market. They argued for the introduction of an obligation for all electricity sales to go through the power exchange.

The discussion was also attended by Dr. Andrzej Pawłęga (Institute of Electric Power Engineering, Warsaw University of Technology – Instytut Elektroenergetyki Politechniki Warszawskiej), Jacek Brandt (Commodity Exchange Energy SA) and Mirosław Duda, Ph.D., from the Energy Market Agency.

V. Conclusions

All three seminars proved to be very fruitful. They gave their participants a unique opportunity to meet and exchange their opinions in order to enhance their respective knowledge and understanding of the energy sector. Their particular value is also expressed in the fact that URE's and CSAiR's initiative made it possible for all interested parties to consider the problems, opportunities and challenges of energy regulation and liberalization from various perspectives.

Arkadiusz Falecki, M.A. (Law), L.L.M. (Amsterdam)
Chief expert at the Energy Regulatory Office

Antitrust or Regulation in Telecommunications. CSAiR & Wierzbowski Eversheds Workshop

On 23 October 2008, the Centre of Antitrust and Regulatory Studies (CSAiR) organised together with the Wierzbowski Eversheds law firm a workshop on the relationship between sector-specific regulation and antitrust law. The workshop consisted of two parts:

- a joint presentation by Attorney Małgorzata Modzelewska de Raad and Dr Arwid Mednis of the Wierzbowski Eversheds law firm and
- a discussion moderated by Professor Tadeusz Skoczny, Head of CSAiR.

The presentation by Att. Małgorzata Modzelewska de Raad and Dr. Arwid Mednis

In the first part of their presentation, Att. Modzelewska and Dr. Mednis presented the aims of antitrust law and sector-specific regulation and basic differences between them. They also presented regulated industries, legal instruments of industry regulators, safeguards of their independence and key characteristics of the regulators. Three areas of overlap between antitrust law and sector-specific regulations were identified: law, organs (competence disputes) and individual decisions (“preliminary decision” disputes). Also presented were examples and principles of systemic resolutions of competence disputes in various countries.

The following part of the speech addressed the regulation of the Polish telecoms sector and, in particular, the cooperation patterns between the President of the Office of Competition and Consumer Protection (UOKiK) and the President of Office of Electronic Communications (UKE). A review was then presented of Polish and EC judgments concerning the relationship between competition law and sector-specific regulations in their horizontal (overlap between sector-specific and competition rules) and vertical (Community and national regulations) aspect. Listed among the issues addressed by the courts in individual cases of conflict were: the effectiveness of the “regulated conduct defence”, the scope of cross-application of rules by each of the authorities, the extent to which the competence of a regulator is limited by a decision of a competition authority and the influence of regulatory decision on the final decision of a competition authority.

This part of the speech described the approach of the Supreme Court presented in two of its judgments concerning the telecoms sector (i.e. resolution of the Supreme Court of 7 December 2005, III SZP 3/05, and Supreme Court judgment

of 19 October 2006, III SK 15/05) as well as judgments of EC and Member States' courts that addressed competence disputes between these two types of authorities. The presentation concluded with a detailed analysis of the Commission's decision of 4 July 2007 concerning Telefónica (COMP/38.784) and the CFI's judgment of 10 April 2008 concerning Deutsche Telekom (T-271/03).

Discussion

To start with, Prof. Skoczny identified three levels of sector-specific regulation (applicable also to telecoms):

- primary regulation (by the Parliament),
- intermediary regulation (by the Minister of Economy),
- regulation by regulatory authorities.

Prof. Skoczny mentioned that in fact only the latter level of regulation reflects the essence of individual *ex ante* regulation, especially of sector-specific competition-aimed regulation. Talking about the relationship between competition-aimed regulation in telecoms and competition protection itself, Prof. Skoczny highlighted the significance of disputes over the meaning of antitrust axiology. He also stressed the importance of the question whether the aim of competition protection is to protect the freedom of undertakings to compete on the market (ordoliberal approach) or to protect consumer welfare. He emphasised Article 3 of the Polish Competition Act and mentioned the relationship between Polish and EC law regarding the "regulated conduct defence". Finally, he introduced the problem of whether the overlapping authority between regulators and competition authorities concerns also competition restricting agreements.

The next to speak was Dr. Dawid Miąsik of the Competition Department of the Institute of Law of the Polish Academy of Science. He noted that Article 1(3) of the Polish Telecommunications Act (PT), concerning the non-interference with the Competition Act, delimitates the competence of the UKE President. If an undertaking's action is regulated by sector-specific regulation but also infringes the Competition Act, it has to be determined whether the practice complies with sector-specific norms or whether it is prohibited by the Competition Act. According to Dr. Miąsik, it can be argued that the relationship between Article 1(3) PT and Article 3 of the Competition Act is not a classical relationship between *lex specialis* – *lex generalis*. If two administrative proceedings are conducted and it is possible that one activity will be sanctioned twice, it is possible to argue *ne bis in idem*. Dr Miąsik argued that even though there still is a large area of legal uncertainty, general solutions should be avoided. Instead, good, case-based practice should be developed since the relationship between sector-specific regulation and antitrust law should not be delineated without taking in to account actual circumstances of each case.

In the opinion of Counsel Urszula Zaroń of Telekomunikacja Polska (TP), the UKE President does not seem to think that Article 1(3) PT delimits sector-specific regulation from competition law. Instead, the UKE President seems to regard this provision to be the source of the regulator's competence to apply competition law -

the UKE President does not refer in her decisions to consumer welfare but interprets competition law instead. Counsel Zaroń pointed out that antitrust proceedings are sometimes lacking in instruments to examine issues that are specific to the telecoms or the energy sector. In addition, while the UOKiK President seems to be open to discuss the overlapping authority between the two organs, the regulator is rather reluctant.

Prof. Tadeusz Skoczny pointed towards the second EC regulatory package as the source of antitrust orientation for regulatory activity. Under the new rules, the telecoms regulator is obliged to base its decisions on antitrust case-law. Such approach is right on the condition that the same axiology lies at the heart of both legal systems. Prof. Skoczny mentioned that the current Commission's Guidelines suggest that ordoliberal axiology has lost on impact.

Att. Modzelewska stated, the overlap between rules may also occur in relation to competition restricting agreements (prohibited by Article 6 of the Competition Act) since a regulatory obligation to shape agreements in a specific manner may be imposed on non-dominant undertakings as well.

Prof. Tadeusz Skoczny disagreed arguing that according to German literature the conflict does not occur in the area of competition restricting agreements or in the field of merger control.

According to Att. Modzelewska, the confrontation between regulatory and antitrust authority does sometimes results in their cooperation in the exercise of their competence. For instance, there is an EU case law relating to mergers where the antitrust authority sets out the conditions under which a merger can take place while the control of their execution is attributed to the regulator. Moreover, Att. Modzelewska pointed out that the aim of the legal formula "does not interfere with the provisions of the law", included in Article 1(3) PT, is to resolve the conflict which occurs in three fields:

- law interpretation: telecoms law should be interpreted by the regulator with consideration of competition law.
- normative: can the regulator apply competition law?
- administrative proceedings: should access proceedings be stayed pending proceedings before the antitrust authority and can proceedings before the UKE President and before the UOKiK President be initiated simultaneously?

Professor Skoczny responded that in German practice competition law precedes other regulations. However, in his opinion, such an approach is correct only where competition protection is considered in the perspective of economic values.

Att. Przemysław Rosiak of D. Dobkowski law firm stressed that undertakings must take competition law requirements into account within the scope of their freedom of action. As regards the relationship between the possibility to impose double sanctions and the prohibition to judge the case twice, he claimed that in order to apply the *ne bis in idem* rule, it is necessary to prove that the subject, event and protected goods are identical in both proceedings. However, the issue of the identity of the protected goods is still open.

Att. Modzelewska addressed the question whether competition law fulfils economic goals only. In her opinion, the "public interest" criteria set out in Article 1 of the

Competition Act, determines that competition law protects the interests of ultimate consumers. In her speeches, Commissioner Nelly Kroes has always declared consumer interest to be the ultimate goal of a competitive economy. Also the Polish antitrust authority goes beyond pursuing economic goals. This approach is supported by the existence of block exemptions for certain agreements and innovation-protecting rules. The “Social package TP” (in Polish: Plan socjalny tp) built an interesting case. The offer was examined by the regulator, the competition authority, the Competition Court and common courts (abusive clause). Seeing as the PT is concerned with a whole range of various goals and that competition is protected “in the public interest”, it has to be stressed that the UOKiK President has not found an anti-competitive practice to have taken place because the “Social package TP” served well various groups of consumers. Thus, in this case, the aim of the competition authority was not limited to pure competition protection.

Dr Arwid Mednis added that the “Social package TP” limited the possibility for consumers to use the services of other operators in return for a low subscription fee paid to TP. Details of the decision regarding this offer might be presented against goals of particular authorities.

Prof. Tadeusz Skoczny was of the opinion that as much as sector-specific regulation may indeed not be limited to the protection of competition in its economic aspect only but instead have more varied goals including social aims or security protection, the admissibility of other goals for competition law is disputable. In other words, the question has to be posed of whether “public interest” may comprise other aims than ensuring effective competition. In the opinion of Prof. Skoczny, the essence of the new economic approach to competition law is that “competition”, in the economic sense of the word, is the key aim of antitrust intervention since “competition” results in consumer welfare.

In conclusion Prof. Skoczny noted that public intervention based on the Competition Act taken in the name of a more broadly defined “public interest” has sometimes gone too far in Poland. For example, the approval of the consolidation of a large part of the Polish energy sector (creating the Polish Energy Group) due to the merger’s positive impact on the employment market, strays far away from antitrust axiology even if it is formally based on Article 20 section 2 of the Competition Act. Such decision significantly restricts competition, while it is the later that increases the level of consumer welfare. In comparison, the German Bundeskartellamt is only driven by economic axiology in its antitrust decisions while it is left to the Minister of the Economy to decide on mergers of extraordinary cartels based on a different axiology. In Prof. Skoczny’s opinion, it would be best if competition law intervention was structured and exercised from the economic perspective.

Finally, Att. Przemysław Rosiak pointed out that the European Commission sees undisturbed competition as the principal goal.

Joanna Kruk-Kubarska
Wierzbowski Eversheds

Antitrust and Copyright Laws – the Overlap. CSAiR and Markiewicz & Sroczyński GP Scientific Workshop

On 6 March 2008, a scientific workshop was organized in the Foksal Press Centre in Warsaw by the Centre of Antitrust and Regulatory Studies of the Warsaw University (CSAiR) in co-operation with the law firm Markiewicz & Sroczyński GP (M&S). The subject of the workshop was devoted to the legal issues of the overlap between antitrust and copyright laws.

The discussed topics were closely connected with the jurisprudence of the President of the Office of Competition and Consumer Protection (UOKiK), the Polish courts and the European Community institutions, in relation to the activities of societies for the collective management in the field of copyright and neighbouring rights. The raised issues concerned, among other things, the latest judgements on *ZAiKS/Brathanki* case¹ as well as *CISAC* case². Last but not least, there were several *de lege ferenda* comments regarding the development of the Polish legislation in copyright and competition laws.

The workshop was opened by Professor Tadeusz Skoczny, director of CSAiR. After his welcoming and introductory comments, the debate of the workshop began.

The speakers were representatives of the pertinent regulatory institutions, university professors and legal practitioners. It was thus a splendid occasion to discuss the topic of the workshop from the different points of view, giving the chance to face theory and practice of law.

The following speakers known for their expertise in the copyright and competition laws made presentations during the workshop: Mr. Grzegorz Materna, Director of the UOKiK, Dr. Kamil Kiljański of DG COMP in Brussels, Professor Janusz Barta, Professor Ryszard Markiewicz of the Jagiellonian University and M&S, and Mr. Jarosław Sroczyński of M&S.

The workshop was moderated by Professor Tadeusz Skoczny, director of CSAiR.

The first presentation, given by Mr. Grzegorz Materna, concerned the status of societies for the collective management in the field of copyright in the Polish antitrust

¹ Judgment of the Supreme Court of 6 December 2007, III SK 16/07, in the matter covered by decision of the President of the UOKiK, RWA-21/2004, dated 16 July 2004.

² On the date of the workshop this case was in its final stage before the Commission, with investigation originating in 2000 upon the complaint lodged by the RTL Group against GEMA. The statement of objections was issued by the Commission on 7 February 2006. The Commission's decision in *CISAC* case was adopted on 16 July 2008 (Case COMP/C238.698 – *CISAC*) and published on 18 November 2008 (<http://ec.europa.eu/competition/antitrust/cases/decisions/38698/en.pdf>).

law. The speaker concentrated on the definitions of “collective management” and “undertaking” in competition law, arguing that ZAiKS is the subject of antitrust regulations. In particular, he pointed out that the collective management of copyrights constitutes a service resulting in the economic activity of collecting societies.

Mr. Materna supported his assertions with the findings of the Polish Supreme Court in the *ZAiKS/Brathanki* case. He concluded that the judgement in question corresponds to the business practice in Poland.

The next presentation was given by Professor Janusz Barta, who made introductory remarks to the confrontation between copyright and antitrust laws. Professor Barta delivered a very interesting speech on the historical roots of the above areas of law, taking listeners back to the Middle Ages. This was where he perceives the very beginning of today’s competition law.

Subsequently, Professor Ryszard Markiewicz continued the issue in detail. He discussed, in particular, the provisions of the pending amendment process of the Polish Copyright Act in the context of competition law. Professor Markiewicz expressed his view on possible consequences of the proposed reforms, focusing on the situation of societies for collective copyright management.

The next speaker was Dr. Kamil Kiljański who considered the collective management in the field of copyright law from the European Community point of view. The problem he tried to solve was the balance between regulation and competition in relation to the collective management societies.

First, Dr. Kiljański noted that the system of individual copyrights management would not be fully beneficial for authors, so the existence of collecting societies is an unavoidable alternative. However, it is essential to promote competition among collecting societies. The speaker was of the opinion that such entities as the *CELAS* model (*EMI/PRS+GEMA*) or the *Radiohead* model (1F clause) could help to develop competition between collective societies. He discussed several European Community acts and decisions referring to the societies for collective management.

An important part of Dr. Kiljański’s presentation were his comments on the recent judgement of the European Court of Justice in *CISAC* case. He thoroughly studied the practical aspects of this judgement for both EC member states and authors.

The last presentation was given by Dr. Jarosław Sroczyński on practises restricting competition in the business activities of collecting societies. In particular, he discussed the issue of licensing and management of authors’ copyrights by collecting societies and the related possible infringements of antitrust law.

In his presentation, Dr. Sroczyński defined the areas of confrontation between copyright and competition laws. Principally, he pointed out a few provisions of the Copyright Law Act which are closely connected with the antitrust law and are the possible source of conflicts and infringements.

In the second part of his speech, Dr. Sroczyński concentrated on several cases settled so far by the President of the UOKiK, including *ZAiKS/Brathanki* and *Hologram* case³.

³ Judgment of the Supreme Court of 20 June 2006, III SK 8/2006, in the matter covered by decision of the President of the UOKiK, DDI-83/2002, dated 25 September 2002.

The speaker underlined the possibility of holding a dominant position by the societies for the collective management. In this context, on the basis of *Hologram* case, Dr. Sroczyński gave examples of practices restraining competition such as tie-in or refusal to deal.

Further conclusions referred to the prerogatives of the President of the UOKiK in the field of copyright law.

After the presentations, there was a vivid discussion focusing on many issues raised by the speakers.

Representatives of the collective societies argued that the approach of the competition regulator was in certain cases overly strict and that the degree of antitrust scrutiny should be determined taking into account the social role played by the collective societies. This evoked heated discussion as to what extent the copyright collective societies should be treated as “normal” undertakings.

The discussion concentrated also on role of the Government (Minister of Culture) in the prospected reforms of the copyright regulations. In particular, the necessity and scope of ministerial intervention in the area of setting the copyright remuneration tables was discussed.

Other participants referred to the European practice in the regulation of the overlap between antitrust and copyright laws, pointing out to various similar problems dealt with by the Commission and the national competition agencies, including the Polish UOKiK. It has been stated that the body of the antitrust case law consists altogether a sound base for understanding the main legal ramifications of the overlap in Poland.

In his closing remarks, Prof. Tadeusz Skoczny emphasized the need for further research of the topics elaborated during the workshop, in light of the current process of the legislative changes in the Polish copyright system. He also called for the need to use the feedback offered by the recent developments of the EU jurisprudence.

Over one hundred participants attended the workshop, representing the scientific environment, state and regulatory institutions, the collective management societies, companies (especially from the media sector), law firms and economic consultancies. Furthermore, it was a special honour to host the President of the National Chamber of Legal Counsellors Mr. Maciej Bobrowicz.

The workshop was also an occasion to present the current legal publications of the law publishing house, Wolters Kluwer.

Following the scientific part of the workshop, there was a memorable celebration of the launch of a new law firm, Markiewicz & Sroczyński GP. It was established by two speakers attending the workshop – Professor Ryszard Markiewicz and Dr. Jarosław Sroczyński. This additional event turned out to be another opportunity for sociable meeting of many specialists in various branches of law, economy and business.

Dr. Jarosław Sroczyński

Partner, Markiewicz & Sroczyński GP

Lukasz Wiczorek

Legal Assistant, Markiewicz & Sroczyński GP

Books (2008)

- Bossak J., *Instytucje, rynki i konkurencja we współczesnym świecie [Institutions, Markets and Competition in Modern World]*, Akademicka Oficyna Wydawnicza, SGH, Warszawa 2008.
- Czaplewski R., Flaga-Gieruszyńska K. (eds.), *Rynek usług pocztowych [Market of Postal Services]*, Oficyna Wolters Kluwer business, Warszawa 2008.
- Domagała M., *Bezpieczeństwo energetyczne. Aspekty administracyjno – prawne [Energy safety. Administrative and Legal Aspects]*, Wydawnictwo KUL, Lublin 2008.
- Elżanowski F., *Polityka energetyczna. Prawne instrumenty realizacji [The Energy Policy. Legal Instruments of its Implementation]*, LexisNexis, Warszawa 2008.
- Herden A.(ed.), *Fuzje i przejęcia. Wybrane aspekty integracji [Mergers and Acquisitions. Selected Aspects of Ontegration]*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2008.
- Hof W., *Prawny model regulacji sektorowej [Legal Model of Sector-specific Regulation]*, Difin, Warszawa 2008.
- Jarocki T., *Ewolucja polityki konkurencji we Wspólnocie Europejskiej [Evolution of Competition Policy in the EC]*, Wydawnictwo Uniwersytetu Humanistyczno-Przyrodniczego Jana Kochanowskiego w Kielcach, 2008.
- Jurkowska A., Skoczny T. (ed.), *Wylączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce [Group Exemptions From the Prohibition of Competition Restricting Agreements in the EC and Poland]*, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2008.
- Kohutek K., Sieradzka M., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, LEX a Wolters Kluwer business, Warszawa 2008.
- Krasuski A., *Prawo telekomunikacyjne. Komentarz [Telecommunications Law. Commentary]*, LexisNexis, Warszawa 2008.
- Miąsik D., Skoczny T., Surdek M. (eds.), *Sprawa Microsoft – studium przypadku. Prawo konkurencji na rynkach nowych technologii [Microsoft – case study. Competition Law on New Technology Markets]*, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2008.
- Michalak A., *Przeciwdziałanie nieuczciwym praktykom rynkowym. Komentarz [Counterfailing Unfair Commercial Practices. Commentary]*, C.H. Beck, Warszawa 2008.
- Molski R., *Prawo antymonopolowe w obliczu globalizacji. Kierunki rozwoju [Antitrust Law in the Face of Globalization. Directions of Development]*, Oficyna Wydawnicza Branta, Bydgoszcz-Szczecin 2008.
- Nestoruk I.B., *Prawo konkurencji (testy, kazusy, tablice) [Competition Law (tests, cases, tables)]*, C.H.Beck, Warszawa 2008.

- Noga M., *Globalizacja a konkurencyjność w gospodarce światowej* [*Globalization and Competitiveness in World Economy*], CeDeWu, Warszawa 2008.
- Noga M., Stawicka A. (eds.), *Co decyduje o konkurencyjności polskiej gospodarki?* [*What Determines Competitiveness of Polish economy?*], CeDeWu, Warszawa 2008.
- Nowińska E., Du Vall M., *Komentarz do ustawy o zwalczaniu nieuczciwej konkurencji* [*Act on Combating Unfair Competition – commentary*], Lexis Nexis, Warszawa 2008.
- Piontek E. (ed.), *Nowe tendencje w prawie konkurencji UE* [*New Tendencies in EU Competition Law*], Oficyna Wolters Kluwer business, Warszawa 2008.
- Prawo konkurencji w procesie zmian (publikacja pokonferencyjna)* [*Competition Law in a Process of Changes (post conference proceedings)*] (2008) 1(17) *Ius at Administratio*.
- Ptak P., *Ile państwa w gospodarce? Milton Friedman o ekonomicznej roli państwa* [*How Much State in Economy? Milton Friedman on Economic Role of a State*], C.H. Beck, Warszawa 2008.
- Rydzkowski W., Wojewódzka-Król K. (red.), *Transport. Problemy transportu w rozszerzonej UE* [*Transport. Transport Problems in Enlarged EU*], PWN, Warszawa 2008.
- Sieradzka M., *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym. Komentarz* [*Counterfailing Unfair Commercial Practices. Commentary*], Wolters Kluwer Polska-OFICYNA, Warszawa 2008.
- Skoczny T. (ed.), *Prokonkurencyjna regulacja sektorowa* [*Procompetitive Sector-specific Regulation*] (2008) 1(19) *Problemy Zarządzania*.
- Szafrański A., *Przedsiębiorca publiczny wobec wolności gospodarczej* [*Public Enterprise Facing Economic Freedom*], C.H. Beck, Warszawa 2008.
- Szydło M., *Konkurencja regulacyjna w prawie spółek* [*Regulatory Competition in Company Law*], Wydawnictwo Wolters Kluwer, Warszawa 2008.
- Szydło M., *Ustawa o gospodarce komunalnej. Komentarz* [*Act on Communal Economy. Commentary*], Wydawnictwo Wolters Kluwer, Warszawa 2008.
- Werner A., Postuła I., *Prawo pomocy publicznej* [*State Aid Law*], Lexis Nexis, Warszawa 2008.
- Zabłocka A., *Polityka konkurencji Unii Europejskiej wobec koncentracji przedsiębiorstw* [*EU Competition Policy Regarding Concentrations*], Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2008.
- Żuk M., Lankamer-Prasolek A., Skibińska E., *Transgraniczne łączenie się spółek kapitałowych* [*Crossborder mergers of companies*], C.H. Beck, Warszawa 2008.

Essays in books or book chapters (2008)

- Będkowski-Koziół M., “Energie” [in:] Merli F., Huster S. (eds.), *Die Verträge zur EU-Osterweiterung*, Berliner Wissenschaftsverlag Berlin 2008 / Neuer Wissenschaftsverlag Wien 2008, pp. 365-383.
- Foszczynski A., Stobiecka-Kuik A., “Agriculture in EU Competition Law” [in:] Mederer W., Pesaresi N., Van Hoof M.(eds.), *EU Competition Law*, Volume IV - State Aid, Book One, Clays & Casteels 2008.
- Jarosz-Friis A., Scharf T., “External aspects of State aid policy (part 1 – WTO)” [in:] Mederer W., Pesaresi N., Van Hoof M.(eds.), *EU Competition Law*, Volume IV - State Aid, Book One, Clays & Casteels 2008.
- Jurkowska A., „Funkcjonowanie sektora ochrony zdrowia z perspektywy zakazu praktyk ograniczających konkurencję” [Functioning of health protection sector from a perspective

- of a prohibition of practices restricting competition] [in:] Skrzypczak Z., Ryc K. (eds.), *Ochrona zdrowia i gospodarka. Mechanizmy rynkowe a regulacje publiczne [Health protection and economy. Market mechanisms and public regulations]*, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2008, p. 264–277.
- Stobiecka-Kuik A., Bomhoff A., “External aspects of State aid policy” (part 2 – Accession) [in:] Mederer W., Pesaresi N., Van Hoof M.(eds.), *EU Competition Law*, Volume IV – State Aid, Book One, Clays & Casteels 2008.
- Włudyka T., “Ochrona konkurencji” [Competition protection] [in:] Włudyka T., *Dwa dwudziestolecia gospodarki rynkowej w Polsce [Two decades of market economy in Poland]*, Wolters Kluwer Polska – OFICYNA, Warszawa 2008. pp. 293-310.
- Zabłocka A., “Wspólnotowa kontrola koncentracji przedsiębiorstw” [EC control of concentration] [in:] Stępiak A., Stefaniak J., Taraszkiewicz J. (eds.), *Wybrane problemy integracji europejskiej [Selected problems of European integration]*, Uniwersytet Gdański, Sopot 2008, pp. 201-220.
- Zdyb M., „Ochrona konkurencji. Policynno-administracyjne ograniczenia przedsiębiorców” [Competition Protection. Police and administrative restraints of enterprises] [in:] Zdyb M., *Wspólnotowe i polskie publiczne prawo gospodarcze, tom II [EC and Polish public economic law]*, vol. II, Wolters Kluwer Polska – OFICYNA, Warszawa 2008.

Articles (2008)

- Ahsbahs S., „Deregulacja przeładunków na europejskich lotniskach” [Deregulation of Groundhandling Market at European Airports] (2008) 1 *Ekonomika i Organizacja Przedsiębiorstwa*.
- Adamski D., „Liberalizacja widma radiowego – gospodarka widmem w dobie konwergencji” [Radio Spectrum Liberalization – Spectrum Management in the Age of Convergence] (2008) 1(19) *Problemy Zarządzania*.
- Antonowicz M., „Strategia regulacyjna dla rynku transport kolejowego” [Regulating Strategy for Railways Transport Market] (2008) 1(19) *Problemy Zarządzania*.
- Banasiński C., Bychowska M., „Utrudnianie dostępu do rynku poprzez pobieranie innych niż marża handlowa opłat za przyjęcie towarów do sprzedaży” [Rendering access to the market difficult by charging fees for accepting goods for sale other than commercial mark-up] (2008) 4 *Przegląd Prawa Handlowego*.
- Banaszczyk T., Król M., „Dostęp do infrastruktury transport kolejowego w Polsce. Założenia i praktyka” [Access to the Railway Infrastructure in Poland. Principles and Practice] (2008) 1(19) *Problemy Zarządzania*.
- Bem D. J., „Trzeci przełom w rozwoju telekomunikacji: Internet i systemy komórkowe” [Third breakthrough in telecommunication: Internet and cell systems] (2008) 8-9 *Przegląd Telekomunikacyjny i Wiadomości Telekomunikacyjne*.
- Bernat M., “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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Będkowski-Koziół M., „Odmowa świadczenia usług (dostępu do sieci) na gruncie Prawa energetycznego” [Refusal of providing transmission services (grid access) under the energy law] (2008) 7 *Przegląd Ustawodawstwa Gospodarczego*.

- Będkowski-Koziół M., "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)" (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Białek T., Zajączkowska-Weremczuk K., „Nieuczciwe praktyki rynkowe” [Unfair commercial practices] (2008) 3 *Przegląd Ustawodawstwa Gospodarczego*.
- Bieliński A., „Wybrane aspekty problematyki odnoszącej się do ochrony konkurencji i konsumenta w okresie zmian – na gruncie prawa wspólnotowego i polskiego” [Selected Aspects Concerning Competition and Consumer Protection in the Period of Change – on the Ground of EU and Polish Law] (2008) 1(17) *Ius et Administratio*.
- Bitner M., „Przypisywalność pomocy państwu jako warunek uznania wsparcia za pomoc publiczną” [Attribution of aid to a state as a condition for assessing a support as a state aid] (2008) 2(12) *Przegląd Prawa Publicznego*.
- Bobińska K., "The Defense of Monopoly as a Determinant of the Process of Transformation of State-owned Infrastructure Sectors in Poland" (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Bolesta K., „Wysokie ceny ropy naftowej – wpływ na gospodarkę UE i reakcja Komisji” [High oil prices – impact on the EU's economy and the Commission's reaction] (2008) 4 *Wspólnoty Europejskie*.
- Borowski P.F., „Biomasa jako odpowiedź na wzrost bezpieczeństwa energetycznego i zmiany klimatyczne” [Biomass as the answer for increase of energy safety and climate change] (2008) 7-8 *Przegląd Organizacji*.
- Borowski P.F., „Konkurencyjność przedsiębiorstw energetycznych w Polsce” [Competitiveness of energy companies in Poland] (2008) 4 *Organizacja i Kierowanie*.
- Borowski P.F., „Rola banków inwestycyjnych w procesie M&A” [The role of investment bank in Mergers and Acquisitions process] (2008) 1 *Organizacja i Kierowanie*.
- Czyżak M., „Kilka uwag o administracyjnej karze pieniężnej na gruncie ustawy Prawo telekomunikacyjne z 2004 r.” [Some remarks on administrative pecuniary penalty in the light of the telecommunications act of 2004] (2008) 2 *Studia Prawnicze KUL*.
- Długosz T., „Prawo wyboru sprzedawcy oraz prawo do usługi kompleksowej odbiorcy końcowego w prawie energetycznym” [End user's right to choose a seller and a right to a complex service] (2008) 9(19) *Przegląd Prawa Publicznego*.
- Dobaczewska A., „Sankcje w prawie pomocy publicznej” [Sanctions in state aid law] (2008) XIX *Gdańskie Studia Prawnicze*.
- Dudzik S., "Enforceability of Regulatory Decisions and Protection of Rights of Telecommunications Undertakings" (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Dudzik S., "The Role of National Courts in Ensuring the Effectiveness of the Standstill Clause in State Aid Cases (Article 88(3) EC)" (2008) XLI *Archivum Iuridicum Cracoviense*.
- Duszek M., Olender-Skorek M., Bartoszevska B., „Przyszłość polskiego rynku telefonii mobilnej na tle wybranych krajów UE” [The future of the Polish mobile telephone market against the background of selected EU countries] (2009) 10 *Przegląd Telekomunikacyjny i Wiadomości Telekomunikacyjne*.
- Dziwulski P., „Konkurencja na rynku telekomunikacyjnym przy asymetrycznym dostępie do infrastruktury” [Competition on the telecommunications market under asymmetric access to infrastructure] (2008) 5-6 *Gospodarka Narodowa*.

- Elżanowski F., „Obowiązek zapewnienia ciągłości dostaw paliw i energii” [Duty to guarantee a continuity of delivering oils and energy] (2008) 11(21) *Przegląd Prawa Publicznego*.
- Elżanowski F., “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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Etel L., „Pomoc publiczna w ordynacji podatkowej” [State aid in tax law] (2008) 11 *Finanse Komunalne*.
- Etel L., „Ulgi w spłacie podatków a pomoc publiczna” [Relieves concerning repayment of tax obligations and the public aid] (2008) 4 *Przegląd Ustawodawstwa Gospodarczego*.
- Filipowski O., „Efekty monopolistyczne w wirtualnej rzeczywistości: jak dokonać analizy ekonomicznej na potrzeby prawa antymonopolowego?” [Antitrust effects in virtual reality: how to make economic analysis for the sake of antitrust law?] (2008) 1-2 *Kwartalnik Prawa Publicznego*.
- Galewska E., “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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Galewska E., „Stosowanie wzorców w umowach o świadczenie usług telekomunikacyjnych - zarys problemu” [Using of patterns in the contracts on provision of telecommunications services - draft of problem] (2008) 12 *Przegląd Ustawodawstwa Gospodarczego*.
- Gawlikowska-Fyk A., „Bezpieczeństwo energetyczne Unii Europejskiej” [EU Energy safety] (2008) 1 *Wspólnoty Europejskie*.
- Gliniecki B., „Wprowadzające w błąd oznaczenie przedsiębiorcy jako nieuczciwa praktyka rynkowa” [Misleading denomination of an entrepreneur as an unfair market practice] (2008) 2 *Radca Prawny*.
- Gonet W., „Kredyt konsumencki. Polska regulacja na tle prawa UE - wybrane zagadnienia” [Consumers credit. Polish regulation on the against the background of EU law – selected aspects] (2008) 4 *Prawo Bankowe*.
- Hof W., „Prawo wobec zjawisk ekonomicznych – regulacja sektorowa” [Law in front of economic phenomena – sector-specific situation] (2008) 3(92) *Master of Business Administration*.
- Hof W., „Regulacja sektorowa – komplementarna metoda ochrony konkurencji” [Sector Regulation – A Complimentary Method of Protecting Competition] (2008) 1(17) *Ius et Administratio*.
- Hof W., „Uznanie regulacyjne” [Regulatory Discretion] (2008) 1(19) *Problemy Zarządzania*.
- Janik M., Janik E., „System sprzedaży lawinowej jako typ zachowania nieuczciwej konkurencji” [The Avalanche Sales as Unfair Competition] (2008) 1(17) *Ius et Administratio*.
- Jaworski Ł., „Strategiczne kierunki polityki energetycznej nowych państw Unii Europejskiej” [Strategic direction of energy policy in the new EU Member States] (2008) 1 *Wspólnoty Europejskie*.
- Jurkowska A., “A courier service as a postal universal service – can a court asses 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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.

- Jurkowska A., "Antitrust Private Enforcement – Case of Poland" (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Jurkowska A., „Kompensacja świadczenia usług powszechnych w sektorze usług pocztowych” [Compensation for Providing Universal Services in Postal Sector] (2008) 1(19) *Problemy Zarządzania*.
- Jurkowska A., „Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej” [Perspectives of private implementation of the competition protection law in Poland basing on the European Community experience] (2008) 1 *Przegląd Ustawodawstwa Gospodarczego*.
- Jurkowska A., „Prywatnoprawne wdrażanie wspólnotowego prawa konkurencji z perspektywy orzeczenia ETS w sprawie Manfredi” [Enforcement of the Community Competition Law in the Light of ECJ Manfredi Case – Private Law Perspective] (2008) 1(17) *Ius et Administratio*.
- Kawka I., „Nowe technologie jako wyzwanie wspólnotowego prawa łączności elektronicznej” [New technologies as a challenge of EC law of electronic communications] (2008) VI *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*.
- Kawka I., „Rola administracji europejskiej w regulowaniu sektorów infrastrukturalnych” [The Role of European Administration in Regulating Infrastructure Sectors] (2008) 1(19) *Problemy Zarządzania*.
- Kilian P., Krztoń-Królewiecki J., Mikosz K., Porada W., Sowa B., „Wybrane problemy prawa konkurencji w Rosji” [Selected Problems of Competition Law in Russia] (2008) 1(17) *Ius et Administratio*.
- Kloc-Evison K. (co-author with L. Bonova, D. Corriveau, E. Sepulveda Garcia), “Ineos/Kerling: Raising the standard for geographic market definition?” (2008) 1 *EC Competition Policy Newsletter*.
- Kohutek K., “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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Kolasiński M., “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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Kolasiński M.K., „Kontrola koncentracji w prawie wspólnotowym - glosa do wyroku Sądu Pierwszej Instancji z 14 grudnia 2005 r. w sprawie General Electric/Honeywell” [Control of concentration in EC law – a comment on CFI’s judgment dated 14 December 2005 Case General Electric/Honeywell] (2008) 1 *Glosa*.
- Kolasiński M.K., „Nadużywanie pozycji dominującej legalnych monopolii w prawie polskim - glosa do wyroku Sądu Najwyższego z 23.02.2006 r. (III SK 6/05)” [Abuse of a dominant position in Polish law – a comment on the judgment of Supreme Court dated 23 February 2006 (III SK 6/05)] (2008) 4 *Glosa*.
- Kolasiński M.K., „Odpowiedzialność odszkodowawcza Wspólnoty Europejskiej za szkody wyrządzone przy kontroli koncentracji - glosa do wyroku Sądu Pierwszej Instancji z 11.07.2007 r. w sprawie T-351/03 - Schneider Electric przeciwko Komisji” [Liability of EC for damages caused within a control of concentration – a comment on CFI’s judgment dated 11 July 2007 Case T-351/03 - Schneider Electric v Commission] (2008) 3 *Glosa*.

- Kolasiński M.K., „Perspektywy międzynarodowej harmonizacji prawa antymonopolowego” [Prospects of international harmonization of antitrust law] (2008) 10 *Państwo i Prawo*.
- Kolasiński M.K., „Strukturalne środki zaradcze stosowane w razie naruszenia wspólnotowych zakazów nadużywania pozycji dominującej i zmowy kartelowej” [Structural remedies used in case of infringement of Community prohibition of abuse of dominant position and cartel prohibition] (2008) 4 *Przegląd Prawa Handlowego*.
- Kolasiński M.K., „Wspólnotowa polityka zwalniania z grzywien i zmniejszania ich wysokości w sprawach kartelowych po reformie z 2006 r.” [The EC Leniency Policy on Immunity from Fines and Reduction of Fines in Cartel Cases after the 2006 Reform] (2008) 6 *Europejski Przegląd Sądowy*.
- Kosiński E., „Środki prawne regulacji prokonkurencyjnej transport kolejowego. Stan dostosowania polskiej regulacji sektorowej do regulacji unijnej” [Legal Measures of Procompetitive Regulation of the Railways Sector. The State of Adjustment of the Polish Regulation to the Community’s Regulation] (2008) 1(19) *Problemy Zarządzania*.
- Kowalik-Bańczyk K., „Pojęcie “wpływu na handel” jako kryterium stosowania przez sądy krajowe wspólnotowego prawa konkurencji” [“Effect on trade” as a criterion for application of European Community competition law by national courts] (2008) 2 *Przegląd Ustawodawstwa Gospodarczego*.
- Kubasik J., „Regulacja cen detalicznych w telekomunikacji” [Retail Price Regulation in Telecommunications] (2008) 1(19) *Problemy Zarządzania*.
- Kuik K., „Gonzalez y Diez - Post-ECSC Temporal Rules Clarified” (2008) 3(7) *European State Aid Law Quarterly*.
- Kuik K., „2007 EC Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Kurcz B., „Kryterium selektywności w definicji pomocy państwa” [A selectivity criterion in the definition of state aid] (2008) 10 *Państwo i Prawo*.
- Kurcz B., „Zasada solidarności a usuwanie skutków bezprawnej pomocy państwa na przykładzie sprawy CELF” [The principle of solidarity and removing the effects of illegal state aid on the example of CELF case] (2008) 10 *Europejski Przegląd Sądowy*.
- Laskowski S., „Nowe podejście do zarządzania widmem radiowym w Unii Europejskiej. Analiza merytoryczna wyników konsultacji” [New approach to radio spectrum management. Results of the consultation - substantial analysis] (2008) 7 *Przegląd Telekomunikacyjny i Wiadomości Telekomunikacyjne*.
- Laskowski S., „Nowe podejście do zarządzania widmem radiowym w Unii Europejskiej. Analiza statystyczna wyników konsultacji” [New approach to radio spectrum management. Results of the consultation - statistical analysis] (2008) 2-3 *Przegląd Telekomunikacyjny i Wiadomości Telekomunikacyjne*.
- Lech A., „Horyzontalna pomoc publiczna w Polsce” (2008) 2(22) *Gospodarka w praktyce i teorii*.
- Lech A., „Niesprawiedliwości rynku jako argumenty na rzecz horyzontalnej pomocy publicznej” (2008) 4(24) *Gospodarka w praktyce i teorii*.
- Marszałek M., „Usunięcie barier rozwoju rynku konkurencyjnego energii elektrycznej” [Deleting barriers in development of competitive market of energy] (2008) 10 *Przegląd Ustawodawstwa Gospodarczego*.
- Materna G., „Czynniki mające wpływ na karę pieniężną za naruszenie przez jednostkę samorządu terytorialnego zakazów praktyk ograniczających konkurencję – glosa do

- wyroku Sądu Najwyższego z 5 stycznia 2007 r. (III SK 16/06)” [Factors influencing a fine for an infringement of prohibitions of competition restricting practices by self-government units] (2008) 1 *Glosa*.
- Materna G., „Ograniczenie prawa wglądu do materiału dowodowego w postępowaniach przed Prezesem UOKiK” [Limiting the right to inspect evidence in proceedings before the President of the Office for Competition and Consumer Protection] (2008) 4 *Przegląd Prawa Handlowego*.
- Miąsik D., “Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Michalski D., „Rynek emisji instrumentem walki ze zmianami klimatu” [Emission market as a tool to fight with climate change] (2008) 3 *Wspólnoty Europejskie*.
- Miśko T., „Pozycja dominująca i zakaz jej nadużywania w świetle prawa konkurencji WE” [(2008) 1(17) [Dominant Position and the Prohibition of Abusing It in the Light of EC Competition Law] (2008) 1(17) *Ius et Administratio*.
- Mokrogulski M., „Dyskryminacja cenowa poprzez sprzedaż pakietową” [Price discrimination through commodity bundling] (2008) 9 *Gospodarka Narodowa*.
- Molski R., “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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Namysłowska M., Sztobryn K., „Ukryta reklama po implementacji dyrektywy o nieuczciwych praktykach handlowych” [Surreptitious advertising after the implementation of the Directive on unfair trade practices] (2008) 11 *Państwo i Prawo*.
- Nesterowicz M.A., „Wyłączenia spod zasad konkurencji w transporcie morskim - orozumienia między armatorskimi klubami ubezpieczeń wzajemnych” [Exemption from the Principles of Competition in Maritime Transport: Understandings among Ship Owners’ Mutual Insurance Clubs] (2008) XXIV *Prawo Morskie*.
- Nestoruk I.B., „Kontrola koncentracji w prawie antymonopolowym - obowiązek zgłoszenia koncentracji” [Control of concentration in antitrust law – a duty of notification of concentration] (2008) 9 *Przegląd Ustawodawstwa Gospodarczego*.
- Niziołek M., Famirska S., „Procedura hybrydowa w sprawach ochrony konkurencji a ostateczność i wykonalność decyzji Prezesa UOKiK” [Hybrid procedure in competition protection cases versus the final character and enforceability of decisions issued by the President of the Office of Competition and Consumer Protection] (2008) 4 *Przegląd Prawa Handlowego*.
- Nowak B. “Adaptation of the Polish Gas and Electricity Sector to the Requirements of the EU Internal Market Directives – How Far to the Competitive Electricity and Gas Market? Legal and Business Perspective” [2008-2007] 11 *Yearbook of Polish European Studies*.
- Pal R.M., „Znacząca pozycja rynkowa jako przesłanka sektorowego trybu ochrony konkurencji na rynkach telekomunikacyjnych” [Significant Market Position as a Condition of a Sector Protection of Competition in Telecommunication Markets] (2008) 1(17) *Ius et Administratio*.
- Piątek S., „Separacja funkcjonalna jako środek regulacyjny w telekomunikacji” [Functional Separation as a Regulatory Obligation in Telecommunications] (2008) 1(19) *Problemy Zarządzania*.

- Pokrzywniak J., „Nielegalne pobieranie energii na gruncie ustawy Prawo energetyczne” [Illegal consumption of fuels or energy under the Energy Law] (2008) 2 *Przegląd Ustawodawstwa Gospodarczego*.
- Postuła I., „Współczesne reguły dopuszczalności pomocy publicznej na badania, rozwój i innowacje” [Community rules for state aid for research, development and innovation] (2008) 6 *Przegląd Ustawodawstwa Gospodarczego*.
- Postuła I., „Wspólnotowe reguły dopuszczalności pomocy publicznej na ochronę środowiska” [Community rules for state aid for environmental protection] (2008) 8 *Przegląd Ustawodawstwa Gospodarczego*.
- Poźdźik R., “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)” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Przybylska M., „Specyfika niezależnych organów regulacyjnych – wyzwanie dla nauki administracji i dla polskiego prawodawcy” [The Specificity of Independent Regulatory Authorities – a Challenge for the Administration Science and the Polish Legislator] (2008) 1(19) *Problemy Zarządzania*.
- Rogowski M., „Agresywne praktyki handlowe oraz ich implementacja do prawa polskiego” [Aggressive commercial practices and their implementation to Polish law] (2008) 1 *Monitor Prawniczy*.
- Rutkowska E., Sieradzka M., „Nieuczciwe praktyki rynkowe stosowane przez banki wobec kredytobiorców - konsumentów (cz.I)” [Unfair commercial practice by banks in their relations with debtors – consumers (part I)] (2008) 2 *Prawo Bankowe*.
- Rutkowska E., Sieradzka M., „Nieuczciwe praktyki rynkowe stosowane przez banki wobec kredytobiorców - konsumentów (cz.II)” [Unfair commercial practice by banks in their relations with debtors – consumers (part II)] (2008) 3 *Prawo Bankowe*.
- Rutkowska E., Sieradzka M., „Ochrona konsumenta bankowych usług kredytowych przed nieuczciwymi praktykami rynkowymi banków na tle dyrektywy 2005/29/WE o nieuczciwych praktykach rynkowych [The protection of consumer using the credit services against bank unfair market practices on the ground of Directive 2005/29/EU on unfair market practices] (2008) 11 *Przegląd Ustawodawstwa Gospodarczego*.
- Sadowska M., „Wyplątać koncerny z sieci – unbundling w energetyce” [Unbundling in the EU energy sector] (2008) 9 *Europejski Przegląd Sądowy*.
- Sagan B., Sagan D., „Ewolucja statusu Prezesa UOKiK” [The Status of the President of the Competition and Consumer Protection Office and Its Evolution] (2008) 1(17) *Ius et Administratio*.
- Salamonowicz M., „Czynniki ekonomiczno-prawne warunkujące ocenę legalności klauzul restrykcyjnych w licencjach patentowych i know-how” [Economic and Legal Factors Affecting the Assessment of Restrictive Clauses Legality in Patent Licences and Know-How] (2008) 1(17) *Ius et Administratio*.
- Samplawski K., „Konkurencja w sektorze odpadowym w świetle praktyki decyzyjnej organu antymonopolowego a wymogi prawa wspólnotowego” [Competition in waste sector in the light of decisions of competition authority and requirements of EC law] (2008) 4(14) *Przegląd Prawa Publicznego*.
- Sieradzka M., „Postępowanie przed Prezesem UOKiK według regulacji nowej ustawy o ochronie konkurencji i konsumentów – cz. II” [Proceeding before the President

- of the Office for Competition and Consumer Protection – part II], (2008) 1 *Monitor Prawniczy*.
- Sieradzka M., „Actio popularis jako instrument ochrony interesów konsumentów przed nieuczciwymi praktykami rynkowymi” [*Actio popularis* as an instrument for protecting consumer interests against unfair market practices] (2008) 3 *Przegląd Prawa Handlowego*.
- Sieradzka M., „Wzorzec „przeciętnego konsumenta” w dyrektywie 2005/29/WE o nieuczciwych praktykach handlowych i jego implikacje dla prawa polskiego” [The standard of an „average consumer” in Directive 2005/29/EC concerning unfair commercial practices and its implications for the Polish law] (2008) 6 *Europejski Przegląd Sądowy*.
- Sokół A., Owidia-Surmacz A., „Kierunki rozwoju oraz czynniki sukcesu i źródła niepowodzeń operacji fuzji i przejęć przedsiębiorstw na świecie” [Development directions as well as success factors and sources of failures concerning mergers and companies’ acquisitions in the World] (2008) 3 *Organizacja i Kierowanie*.
- Sokół A., Owidia-Surmacz A., „Fuzje i przejęcia w krajach Europy Środkowo-Wschodniej” [Mergers and Acquisitions in Central and Eastern Europe] (2008) 1 *Ekonomika i Organizacja Przedsiębiorstwa*.
- Stankiewicz R., „O istocie postępowania antymonopolowego” [On a core of antitrust proceeding] (2008) 49 *Studia Iuridica*.
- Stankiewicz R., „Wspólny przedsiębiorca a regulacja antymonopolowa” [Joint venture and antitrust regulation] (2008) 48 *Studia Iuridica*.
- Stasch S., „Analiza ekonomicznej i ekologicznej opłacalności źródeł energii odnawialnej” [An analysis of the economic and ecologic profitability of the renewable energy sources] (2008) 4(5) *Przegląd Prawno-Ekonomiczny*.
- Stefanicki R., „Konstytucjonalizacja ochrony konsumentów na tle prawa wspólnotowego” [The constitutionalisation of consumer protection in the context of the EC law standards] (2008) 3 *Państwo i Prawo*.
- Stefanicki R., „Miejsce kodeksów postępowania w nowej regulacji dotyczącej nieuczciwych praktyk handlowych” [Place of code of conduct in a new act on unfair commercial practices] (2008) 4 *Rejent*.
- Stefanicki R., „Ochrona konsumenta banku w świetle ustawy o przeciwdziałaniu nieuczciwym praktykom rynkowym (cz.I)” [Consumer protection in banks in the light of the Act on *Counteracting Unfair Market Practices (part I)*] (2008) 6 *Prawo Bankowe*.
- Stefanicki R., „Ochrona konsumenta banku w świetle ustawy o przeciwdziałaniu nieuczciwym praktykom rynkowym (cz.II)” [Consumer protection in banks in the light of the Act on *Counteracting Unfair Market Practices (part II)*] (2008) 7-8 *Prawo Bankowe*.
- Stefaniuk M., “2007 Antitrust and Regulatory Developments in Legislation in Poland” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Stoczkiewicz M., „Koszty osierocone w energetyce a pomoc państwa” [Stranded costs in energy sector and state aid] (2008) 6(16) *Przegląd Prawa Publicznego*
- Szablewski A. T., „Strukturalny aspekt regulacji prokonkurencyjnej w elektroenergetyce” [Structural Aspect of Regulation for Competition in the Electricity Sector] (2008) 1(19) *Problemy Zarządzania*.
- Szafranski A., „Zwolnienie z obowiązku zatwierdzania taryf w obrocie energią elektryczną po 1 lipca 2007 r.” [Releasing from the Obligation of Submission of Tariffs for

- Approval in the Trade of Electric Energy after 1 July 2007] (2008) 1(19) *Problemy Zarządzania*.
- Szydło M., „Regulacja sektorowa a ogólne prawo antymonopolowe” [Sector-specific Regulation and General Competition Law] (2008) 1(19) *Problemy Zarządzania*.
- Tomaszewska M., „Przesłanki wyłączające odpowiedzialność za naruszenie zasad konkurencji” [Conditions precluding liability for infringements of competition rules] (2008) 6 *Przegląd Prawa Handlowego*.
- Trela A., „Zatwierdzanie taryf za zbiorowe zaopatrzenie w wodę i zbiorowe odprowadzanie ścieków jako przykład stosowania środków regulacyjnych w sektorze wodociągowo-kanalizacyjnym (analiza na tle orzecznictwa sądów administracyjnych)” [Approving tariffs for collective provision of water and collective sewage management as an example of applying regulatory measures in water and waste sector (analysis on the basis of caselaw of administrative courts)] (2008) 4 *Administracja – Teoria, Dydaktyka, Praktyka*.
- Trykozko R., „Czy gmina może pobierać od właścicieli nieruchomości opłaty z tytułu partycypacji w kosztach budowy urządzeń wodociągowych i kanalizacyjnych?” [Is a commune allowed to charge owners of real estate for participation in costs of building water and sewage system?] (2008) 5 *Finanse Komunalne*.
- Turno B., Kilka uwag w kwestii terminu na wniesienie odwołania od decyzji Prezesa UOKiK [Some remarks about the time limit for lodging appeal against a decision of the President of the Office of Competition and Consumer Protection] (2008) 6 *Przegląd Prawa Handlowego*.
- Turczyn A., „Reklama jako czynnik kształtujący „marżę handlową” w rozumieniu ustawy o zwalczaniu nieuczciwej konkurencji” [Advertising as a factor which shapes „commercial margin” in the sense of the Act on Suppression of Unfair Competition] (2008) 10 *Przegląd Prawa Handlowego*.
- Tylec G., „Oszukańcze oznaczenie towarów i usług w świetle art. 10 ustawy o zwalczaniu nieuczciwej konkurencji” [Deceitful naming of goods and services within article 10 of the law on unfair competition] (2008) 1(2) *Przegląd Prawno-Ekonomiczny*.
- Strzelecki M., „Klauzula generalna nieuczciwej praktyki rynkowej” [General clause of unfair market practice] (2008) 11 *Przegląd Prawa Handlowego*.
- Wach M., „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” (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Walaszek-Pyziół A., „Kilka refleksji na temat prawnych metod liberalizacji rynku energii elektrycznej” [Some reflections on legal methods of liberalisation on electric energy market] (2008) 11 *Przegląd Ustawodawstwa Gospodarczego*.
- Walaszek-Pyziół A., „Prawna regulacja zapasów ropy naftowej i produktów naftowych. Zagadnienia wybrane” [Legal regulations of crude oil and petroleum products stocks. Selected Issues] (2008) 5 *Przegląd Ustawodawstwa Gospodarczego*.
- Wojtyńska J., „Fuzje przedsiębiorstw” [Mergers of Companies] (2008) 1 *Ekonomika i Organizacja Przedsiębiorstwa*.
- Wójcik J., „Bezpieczeństwo energetyczne” [Energy safety] (2008) 12 *Przegląd Organizacji*.

- Zabłocka A., "Antitrust and Copyright Collectives – an Economic Analysis" (2008) 1(1) *Yearbook of Antitrust and Regulatory Studies*.
- Zajac Cz., „Organizacyjne problemy fuzji i przejęć – wyniki badań” [Organizational problems of Mergers and Acquisitions (M&A) – results of research], (2008) 1 *Organizacja i Kierowanie*.
- Zielińska M., „III dyrektywa pocztowa - ostatni etap reformy sektora pocztowego w Unii Europejskiej” [III Postal Directive - the final step in the reform of the postal sector in the European Union] (2008) 8 *Przegląd Ustawodawstwa Gospodarczego*.

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