

2008 Antitrust Law Developments in Poland

by

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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.

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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