YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
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The editorial board is pleased to present the third volume of the *Yearbook of Antitrust and Regulatory Studies* (YARS 2010, 3(3)). We hope that it will remain 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 the impact of European substantive and procedural competition rules on the national antitrust enforcement systems, especially considering Poland’s position as a “new” EU Member State as well as the challenges posed by the co-existence of antitrust enforcement and sector-specific regulation on infrastructure markets. 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.

The main part of YARS 2010, 3(3) opens with a paper by D. Miąsik that presents a detailed assessment of the influence exercised over the last 20 years by European competition law on the application of Polish antitrust rules by national courts. In the next paper, M. Kolasiński emphasizes the meaning of ‘general principles of Community law’ for the de-centralized system of European competition rules enforcement under Regulation 1/2003 as well as for the Polish enforcement system including the standards applicable to the right of defence. The related paper by M. Bernatt is dedicated to the possible conflict between the various guarantees of procedural fairness that find their expression in the right to be heard and in the protection of confidential information. The aim of the paper by T. Koziel is to analyze the Polish commitments procedure from its legal as well as economic perspective. The paper by K. Kohutek discusses the extent to which the modernized approach to Article 102 TFEU will influence the traditional approach to the abuse of a dominant position employed by Polish antitrust and judiciary institutions. J. Sroczyński’s paper focuses on exclusive rights to broadcast television coverage of sports events in light of a decision adopted by the Polish antitrust authority relating to a long-term licence agreement between the Polish Football Association and Canal+. In the first of the regulatory papers, E.D. Sage considers a specific example of the direct intertwining of telecoms regulation and antitrust enforcement concerning broadcasting transmission services. The final paper by M. Król
shows that the liberalization process of the railway freight transport market in Poland occurred between 1997 and 2009 not because of ‘effective regulation’ but despite its absence.

Aside from its research papers, the current volume of YARS also contains a series of detailed reviews of legislative amendments and case law developments in the antitrust field and in infrastructure sectors. Similarly to YARS 2008, 1(1), D. Koska and K. Kuik consider first the 2008-2009 developments in EU competition and regulatory case law with a nexus to Poland. The following reviews by A. Jurkowska and K. Kosmala were prepared according to a new concept that covers both legislative amendments and essential jurisprudence in the field of antitrust and telecoms regulation respectively. The key changes affecting Polish energy, railway and civil aviation legislation are presented next.

The following part covers the most important Polish antitrust jurisprudence of 2009 including the order of the Polish Supreme Court (III SK 16/09) to refer a preliminary question to the Court of Justice of the European Union (C-410/99 Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej), concerning the publication of the Commission’s guidelines in an official language of a new Member State as a condition for their application. Reviews of Polish books on international co-ordination of competition policy, the antitrust notion of an undertaking and the regulatory function of public administration are presented later. YARS 2010, 3(3) closes with the 2009 CARS Activity Report and a report on the Conference of the Global Competition Law Centre in the Natolin Campus of the College of Europe concerning ‘Competition Law – New Tendencies, New Tools and New Enforcement Methods from an EC and Polish Perspective’.

Finally, the Editorial Board wishes to express its gratitude to the distinguished Professor Jürgen Säcker, Director of the Institute for German and European Business, Competition and Regulation Law at the FU Berlin, for his consent to join the Advisory Board of YARS.

The Editorial Board hopes that YARS will continue to enrich legal and economic libraries concerning antitrust and regulatory issues especially in that it will continue to provided its readers with up to date insights into the workings of antitrust and regulation in a ‘new’ EU Member State. Starting from 2011, we intended to open YARS to foreign authors and their contributions on the models, experiences and challenges facing antitrust and regulation in the emerging markets of Central and Eastern Europe.

Warsaw, December 2009.

Tadeusz Skoczny
Editor-in-chief
List of acronyms

AUTHORITIES:

AMW (Agencja Mienia Wojskowego) – Military Property 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 Energetyki) – 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
Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts

by

Dawid Miąsik*

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VII. Summary

Abstract

The article is devoted to the influence of European competition law on the application of Polish competition rules by Polish courts. It covers references to EU law that has been made throughout 20 years of its history. It aims at identifying various instances where EU law has been invoked to provide Polish competition rules with the actual content as well as different modes of referrals to EU law.

Résumé

L'article concerne l'influence de la loi européenne de la concurrence sur l'application des règles polonaises de concurrence par des tribunaux polonais. L'article couvre les références à la loi de l'UE développée au cours des 20 années de son histoire.

* Dr. Dawid Miąsik, Competition Law Chair, Institute of Legal Studies, Polish Academy of Sciences, Warsaw; member of the Bureau of Studies and Analysis of the Supreme Court of Poland.
Son but est d'identifier des instances où la loi de l'EU a été invoquée pour donner aux règles polonaises de la concurrence le contenu actuel et les modes de référence a la loi de l’UE.

**Key words:** EU competition law; judicial application of competition law; Europe’s Agreement; spontaneous harmonization; relevant market; consumer detriment; restriction of competition

I. Different approaches to the application of EU law in competition proceedings before and after the accession

The application of competition law is very apt for external (foreign) influences due to its specific history, its exportation from the United States to other legal cultures, creeping internationalization of rules as well as extra-territorial jurisdictional issues. Complex economic considerations and market regulation are coupled with the resulting restrictions of fundamental freedoms protected at the national, regional or international level. All these factors encourage both the authorities entrusted with the enforcement of competition rules as well as adjudicating courts to seek guidance on the methods of their application in more developed legal systems. Such an approach allows them to avoid potential instances of incorrect enforcement. It also enables the business community, at least to some extent, to gain clarity as to what types of market practices are likely to be questioned under antitrust rules. Any infant stage of a competition law regime benefits also from technical assistance from the representatives of more advanced jurisdictions. A significant degree of readiness to refer to the jurisprudence and legal doctrine of other legal systems follows such initial help.

Considering that the substantive provisions of Polish competition law have been modelled on Articles 101 and 102 TFEU, the EU has provided Poland with substantial level of technical assistance in the ambit of its national competition law. *Acquis communautaire* is easily accessible and has drawn considerable interest of Polish legal doctrine. Unsurprisingly, national jurisprudence has also frequently referred to EU competition rules in proceedings outside the coverage of Article 3 Regulation 1/2003. This article reviews the influence of EU law on the judicial application of Polish competition law. It will not cover

issues resulting from the parallel application of EU and national competition rules in the same proceedings but try instead, to determine whether and to what an extent has Polish competition law been harmonized with EU law in practice.

The impact of EU law on the judicial application of Polish competition law is of significant practical importance due to the numerous references made to EU law both by the President of the Polish Competition and Consumer Protection office (UOKiK President) and the scrutinized undertakings\(^2\). The impact of EU law on the application of Polish competition rules by the antitrust authority is outside the scope of this study. This is so because of one of the peculiarities of the Polish antitrust enforcement system whereby the courts reviewing the decisions issued by UOKiK have full jurisdiction over the factual and legal considerations contained therein.

Article 68 and 69 of the European Agreement\(^3\) obliged Poland to approximate, among other things, its competition rules\(^4\). However, legal doctrine\(^5\) had inspired referrals to EU competition law long before the actual entry into force of this act. At the time when national legal rules had been interpreted, EU law had been in an auxiliary manner\(^6\). Polish courts continued

\(^{2}\) See for example the judgment of the Competition and Consumer Protection Court (SOKiK) of 29 May 2006, XVII Ama 9/05, UOKiK Official Journal 2006 No. 4, item 58, where some of the arguments raised against the UOKiK decisions dealt with its incompatibility with ‘European case-law’ on the non-compete obligation. In the judgment of 29 May 2008 (XVII Ama 53/07, UOKiK Official Journal 2008 No. 4, item 37), SOKiK did not accept the plea that the UOKiK decision imposing fines for the infringement of Polish competition rules was issued in breach of European guidelines on fine setting.

\(^{3}\) European Agreement establishing association between the Republic of Poland and European Communities and their Member States, Brussels 16 December 1991 (Journal of Laws 1994 No. 11, item 38).


\(^{6}\) ‘Because of the economic importance of such agreements, which generally produce more positive than negative effects from the point of view of competition process, and given the lack of specific legal rules in the Polish act relating to such forms serving to organize the market
making references to EU law after Article 68 and 69 of the European Agreement entered into force. They have avoided somehow to make any references to the approximation duty. Caution in invoking the European Agreement as a potential source of the duty to interpret Polish competition law inline with EU provisions law can be explained by the position of the Supreme Court. The latter has clearly stated in cases concerning intellectual property that the duty to approximate Polish law with European rules did not oblige national courts to use European standards when applying domestic legislation in areas covered by Articles 68 and 69.

Following the accession, a cautious approach towards the Europeanization of Polish antitrust jurisprudence has been noted by the Supreme Court on three occasions. In cases without an effect on intra-Community trade, acquis communitaire in the area of antitrust is said to serve only as ‘a source of intellectual inspiration, example of legal reasoning and understanding of certain legal institutions, which may be helpful in interpreting the provisions of Polish law’. Thus, there is no duty to apply Polish competition rules in conformity with European jurisprudence in purely national cases. Therefore, the failure to deliver a judgment compatible with a specific judgment of the General Court or Court of Justice, or indeed Commission’s guidelines or notices, does not equal a recognizable infringement of the Polish equivalents of Articles 101 or 102 TFEU. This does not mean of course that references to EU law are not necessary or are indeed unwelcome. Instead, there is a constant need to persuade the court that the deviance from European standards leads to the misapplication of Polish law.

Interestingly enough for a foreign reader, albeit not surprising for those familiar with the peculiarities of the Polish legal system, an alternative approach to the impact of EU law on purely national cases can also be identified. In this context, factual harmonization resulting from the ‘genetic’ bond between exchange of goods, there should be no barriers – in the opinion of SOKiK – in interpreting the provisions of the antimonopoly act with due account of the positive experience of the European Union with such agreements’ – judgment of SOKiK of 8 January 1997, XVII Amr 65/96, (1998) 1 Wokanda, item 60; see also judgments of SOKiK of: 6 December 1995 (XVII Amr 47/95, (1997) 1 Wokanda, item 55) and 4 February 1998 (XVII Ama 66/97, LEX nr 56330, for further analysis see E. Wojtaszek-Mik, Umowa franchisingu... , p. 143.


Polish and European competition rules is said to oblige Polish courts to fully recognize *acquis communitaire* when applying relevant provisions of national law\(^{10}\). This approach was adopted in at least one case concerning restrictive agreements whereby SOKiK declined to hold a genuine agency agreement to be a competition restricting practice within the meaning of the Polish equivalent to Article 101 TFEU.

Such an approach is very debatable because the relationship between national and EU competition rules is governed by Regulation 1/2003. The latter act does not however contain a duty of a consistent interpretation and application of national competition rules in cases without an effect on intra-Community trade. The jurisprudence of the ECJ is also clear that such an obligation is applicable where national law directly refers to European competition rules as a benchmark used to examine a specific market conduct\(^{11}\). Still, such an approach is also very pragmatic. The application of different legal standards in European and national proceedings results in a divergent treatment of the undertakings under investigation\(^{12}\), a fact that can by explained only in part by the differences in the goals of the European and the Polish competition law regime.

Full referral to *acquis communitaire* when applying Polish antitrust rules in domestic cases, is also supported by constitutional considerations\(^{13}\). The divergence of the treatment of Polish undertakings in European and national proceedings leads in some cases to the application of stricter national rules and to their disapplication in others. It may be argued therefore that any restriction of the constitutional freedom of entrepreneurship resulting from a decision of the UOKiK President based on national law only, is not warranted by an important public interest within the meaning of Article 22 of the Polish Constitution\(^{14}\). This is particularly true for restrictive agreements where Article 3 Regulation 1/2003 precludes the application of stricter national

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\(^{10}\) With direct reference to article 101 TFEU, judgment of SOKiK of 29 March 2006, XVII Ama 86/04, not reported.


\(^{13}\) This problem was noted by the Supreme Court in judgment of 6 December 2007, III SK 20/07, (2009) 3-4 *OSNP*, item 55.

provisions where an agreements is liable to affect intra-Community trade. This approach is not as convincing in abuse cases seeing as Article 3 Regulation 1/2003 clearly allows for the application of stricter national rules even in cases where an effect on EU trade is present but there is no violation of Article 102 TFEU\textsuperscript{15}.

II. Providing a meaning to imprecise provisions

The judicial application of the notion of a dominant position provides one of the best examples of EU law referrals seeking guidance on how to properly understand basic competition law institutions\textsuperscript{16}. Polish law initially stated\textsuperscript{17} that an undertaking was dominant when it did ‘not meet with substantial competition on the national or local market’. Courts quickly pointed out that this provision failed to determine the essence of ‘market dominance’. In order to fill the gap, the Polish Court for Competition and Consumer Protection (SOKiK) decided to refer to \textit{acquis communitaire}\textsuperscript{18}. On this basis, the definition of dominance was read as concerning a market position allowing the undertaking concerned ‘to prevent effective competition on the relevant market by providing it with the ability of behaving to a significant extent independently of its competitors, customers and ultimately consumers’\textsuperscript{19}. Although minor changes were made later on, this definition was ultimately introduced into the Competition and Consumer Protection Act of 2000 (Competition Act of 2000)\textsuperscript{20}.


\textsuperscript{20} Consolidated text: Journal of Laws 2005 No. 244, item 2080 as amended.
Another example is provided by the judgment of SOKiK\textsuperscript{21} concerning the notion of a ‘decision of association of undertakings’ taking the form of a resolution of the regional attorney’s chamber determining ‘the pattern of optimal service fees’ and ‘recommended price list’. When establishing whether such a resolution constitutes an act of the association of undertakings, SOKiK pointed out that pursuant to European jurisprudence ‘a recommendation of an association of undertakings which, regardless of its legal status (form), accurately states the policy of the association of coordinating the conduct of its members, constitutes a decision of such an association of undertakings within the meaning of article 81 of the EC Treaty’\textsuperscript{22}. In a similar manner, the Supreme Court referred to EU law in its judgment of 9 August 2006\textsuperscript{23} where it accepted that competitors may adapt their policies to changing market conditions and the behaviour of their competitors, including pricing policies; however, price-matching with proof of prior contact between competitors was declared to be covered by the notion of a prohibited price-fixing scheme\textsuperscript{24}.

Most of the references to European law under this heading considered the delineation of the relevant market. They supported the conclusions drawn by the courts from the factual analysis of the cases under consideration. SOKiK referred in its judgment of 14 February 2007\textsuperscript{25} to a decision of the European Commission\textsuperscript{26} when declaring the national market for broadcasting rights to the Polish football league to constitute the relevant market at stake. In the judgment of 5 May 2008\textsuperscript{27}, it also followed closely one of the Commission’s decisions\textsuperscript{28} when determining the geographical extent of the relevant market under consideration. SOKiK ruled that no local market for grain shipment services exists that would include a single port-terminal only. Instead, it confirmed the existence of a national market for grain shipment services that included all sea terminals offering such services. In the same manner, the judgment of 29 October 2009\textsuperscript{29} followed the approach of the European institutions pursuant to which ‘products such as the organization of airport services for carriers in a single airport may constitute a separate relevant

\begin{footnotesize}
\begin{itemize}
\item[26] Decision of the EC of 2 April 2003, COMP/M.2876 – Newsncorp/Telepiu.
\item[27] Judgment of SOKiK of 5 May 2008, XVII Ama 103/07, not reported.
\item[28] Decision of the EC of 14 October 2005, COMP/M.3884 – ADM Poland/Cefetra/BTZ.
\item[29] Judgment of SOKiK of 29 October 2009, XVII Ama 126/08, not reported.
\end{itemize}
\end{footnotesize}
market, since when a carrier intends to offer its services on a given route, the access to the airport infrastructure situated on both ends of the route constitutes an essential factor for the provision of such a service. As a result, each of the three regional airports located in southern and south-eastern Poland (that is, Rzeszów, Krakow and Katowice) was to be considered as a separate relevant market for handling services.

**III. Priority of purposive interpretation**

Furthermore, references to EU law allowed Polish courts to depart from a literal interpretation of Polish competition rules. SOKiK ruled in its judgment of 25 June 1997 that a textual interpretation of Article 4 section 4 of the 1990 Antimonopoly Act led to the conclusion that any vertical agreement establishing a distribution network is a competition restricting practice. On the other hand, a teleological approach based on *acquis communitaire* led SOKiK to the conclusion that exclusive distribution agreements are not anticompetitive *per se*, even if they create distribution networks closed to other resellers. The Court rightly concluded that competition between producers takes place mainly at the retail level and takes the form of competition between the entire distribution networks. Their creation through agreements containing exclusivity clauses leads to ‘an increase of competition on the market and not its reduction’. It followed that exclusive distribution agreements restricted competition only when competitors had been foreclosed from the substantial part of the market.

References to European standards led the courts to the conclusion occasionally that despite the statutory presumption, a 40% market share does not always amount to a dominant position. It is necessary instead to take into account the whole set of the circumstances of the case including the ‘business environment in which the undertaking concerned operates’. Pursuant to this approach, the Courts of Appeals ruled that the financial strength of an undertaking does not warrant a dominant position on its own but that high market shares must be sustained for a longer period of time.

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In the same manner, the Supreme Court ruled on 21 February 2002\textsuperscript{34} that no restriction of competition occurred when a dominant producer and seller of oil and gasoline applied a unified countrywide wholesale price without taking due account of transportation cost differences. Such pricing policy did not aim at the elimination of the competitors of the dominant undertaking even though the latter was said to have enjoyed a competitive advantage over them resulting from its ‘earlier economic expansion in all potential trading levels of oil and gasoline distribution’. This judgment suggests that to establish abuse, it is not enough to show that a vertically integrated undertaking has an economic advantage resulting from its earlier, in comparison to its competitors on the wholesale or retail level, market entry and established market presence. The same applies to competitive advantages resulting from the economies of scope.

European competition law has surely greatly influenced the application of Article 6 of the Competition Act of 1990. This core provision prohibited both restrictive agreements and abuse (listed exhaustively in Articles 4 and 5) but only to the extent that they were ‘not necessary from a technical or economic point of view’. References to EU law led SOKiK to abandon the literal interpretation of this rule, which effectively allowed the interests of the scrutinized entity to be granted a very important role in adjudicating whether a restrictive practice was necessary for furthering the economic interests of the dominant undertaking. SOKiK ruled on several occasions that such an application of Article 6 of the Competition Act of 1990 would be unjust given the incompatibility of such an interpretation with EU law\textsuperscript{35}. Courts focused on the impact of the scrutinized restrictive practices on consumer interests\textsuperscript{36}. This approach had a key practical consequence – the competition authority was obliged by the courts to ‘determine and assess whether and to what an extent can the restriction (...) of competition on the relevant market (...) ultimately contribute to the improvement of consumer interests’\textsuperscript{37}. As a result, both the restrictive agreements and abuses listed in Articles 4 and 5 were examined from the point of view of their impact on the economic benefits of consumers. Practices that restricted market rivalry, but enabled the parties to the agreement or the dominant undertaking to better satisfy consumer needs, were thus declared to be admissible.

\textsuperscript{36} Eg. judgment of SOKiK of 31 May 1995, XVII Amr 9/95, (1995) 6 Wokanda, item 55.
IV. Structure of a competition analysis

Another area of influence of EU law on the judicial application of Polish competition law is the methodology of application. References to EU law led the courts to apply, at least partially, the European method of competition analysis. Most of all, the courts stressed the importance of proper market definition since the very beginning of modern Polish antitrust. Relevant market delineation was considered to be the precondition of a proper legal qualification of the business conduct under consideration. In fact, not only was the definition of relevant market but also the practice of its strict delimitation, established in Hofmann La Roche, adopted from EU law. Following economic fields were declared to constitute a relevant market: coal, carbon coke, etyline, gas; wholesale market for the delivery of pay-tv channels carrying scientific and nature programs in Polish.

The practice of narrow market definition has continued after the accession. It was based on the argumentation that if a broader definition is accepted, then it may be difficult to identify undertakings with dominant position and that such difficulty may threaten the attainment of the goals of competition law. Such reasoning is not convincing. The Court of Appeals has at least on one occasion rightly pointed out that the relevant market must be established not narrowly or widely, but properly.

EU competition law was used by Polish courts to allocate the burden of proof in cases where the collaboration between undertakings took the form of concerted practice. The Supreme Court ruled on 9 August 2006 (III SK 6/06) that it is the competition authority that bears the burden of proving that a concerted price took place. On the other hand, it is up to the scrutinized

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undertakings to provide evidence that the alignment of their pricing policies resulted from parallel behaviour rather than a concerted practice.  

Polish courts adopted also from EU law the notion of agreements restricting competition by their object, before relevant statutory amendments were introduced. In the judgment of 6 July 1994, SOKiK announced that horizontal market sharing agreements restrict competition by the very aim of monopolizing the markets at stake by the participants to the agreement, without the need for the agreement to succeed in attaining its goals.

V. Determining the effect on competition

Reference to *acquis communautaire* is of greatest practical importance when determining whether a certain conduct is capable of restricting competition. It is tempting for the business community, legal practitioners and academics to determine which practices in what circumstances are either anti- or pro-competitive under the prevailing standard applied in EU law. European jurisprudence delivers important suggestions as to how various practices can be analyzed or proven, how can the legal arguments presented by the parties and authorities be evaluated and thus, how can they influence the judgment. EU law’s influence in this context should always be welcomed seeing as it helps improve the quality of national jurisprudence. One should remain cautious however about their straightforward reception due to the existing differences in the legal goals of the two legal systems as well as their statutory language. The latter in particular may suggest that the Polish legislator wanted to achieve certain aims by defining given anticompetitive practices in such a way, that their Europeanization could be considered as *contra legem*.

EU law has indeed made a considerable impact on Polish jurisprudence in their treatment of certain market practices as anticompetitive. It is worth mentioning however that Polish courts have managed to avoid the pitfalls of a direct reception of European standards concerning the notion of a ‘restriction of competition’ that prevailed in the initial stage of Polish competition.

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law. In most cases, they refused to equate the restriction of a freedom of an individual with a restriction of competition\textsuperscript{47} in particular, in the field of vertical agreements. SOKiK swiftly emphasized here the importance of inter-brand competition\textsuperscript{48}, consumer benefits resulting from distribution agreements and the fact that such agreements were at that time subject to a block-exemption from the prohibition of Article 101 section 1 TFEU\textsuperscript{49}. As a result, Polish jurisprudence saw exclusivity clauses contained in distribution agreements as not anticompetitive \textit{per se} (quite contrary to the strict reading of the statutory language used at that time). SOKiK required proof of market foreclosure even though it did not specify whether this requirement applied to the foreclosure of other suppliers or those interested in entering wholesale or retail distribution. Polish jurisprudence was clear however that market foreclosure exists when ‘the majority of resellers, due to the existence of networks of exclusive agreements, are not accessible for undertakings intending to enter a given product market’\textsuperscript{50}. A careful examination of all legal and factual circumstances was required in all cases\textsuperscript{51} resembling a full scale ‘rule of reason’ style of antitrust analysis. Agreements with the participation of a dominant undertaking were also accepted, provided that they allowed the dominant undertaking to better serve consumers\textsuperscript{52}.

It is feasible to try and generalize the impact of EU law on the determination of the anticompetitive character of different market practices. Three broad categories of cases can be identified in this context.

In the first group, the adjudicating court refers explicitly to a specific EU judgment or Commission decision, which would directly support its conclusions regarding the impact of a given practice on competition (negative, positive or neutral). SOKiK declared for instance on the basis of \textit{Commercial Solvents}\textsuperscript{53} that it is prohibited in Poland to refuse to supply another undertaking with input necessary for the production of a final product, if the dominant

\begin{footnotesize}
\begin{itemize}
  \item See an extensive analysis of the case-law in this respect by R. Poźdźik, \textit{Dystrybucja produktów na zasadzie wyłączności w Polsce i Unii Europejskiej}, Lublin 2006, p. 250–262.
  \item Judgment of SOKiK of 8 October 1997, XVII Ama 18/97, LEX nr 56576.
  \item Judgment of SOKiK of 6 December 1995, XVII Amr 44/95, (1997) 1 \textit{Wokanda}, item 49.
\end{itemize}
\end{footnotesize}
undertaking intends to enter the market for the final good by itself\textsuperscript{54}. Referring to \textit{British Sugar} and \textit{Hoffmann la Roche}, differential rebates were declared as discriminatory\textsuperscript{55}.

In the second category, an EU standard concerning a given anticompetitive practice is initially established. The Court refers then to it in order to strengthen the persuasive force of its reasoning. One of its finest examples is provided by the judgment of SOKiK of 6 December 1995\textsuperscript{56} examining whether a selective distribution scheme for fertilizers met the conditions established in European law. In another judgment\textsuperscript{57}, SOKiK signalled that several clauses found in franchising contracts were to be considered as restrictive under European standards\textsuperscript{58}. In the judgment of 4 February 1998\textsuperscript{59}, the Court emphasized that ‘imposing in vertical agreements resale prices, minimum resale price in particular, is treated under EU law as one of the most grievous infringement of competition rules’. SOKiK was also influenced by European standards regarding non-compete obligations. It rules on 29 May 2006\textsuperscript{60} that ‘a non-compete clause is justified when it protects the buyer entering the market occupied by the seller’. However, a non-compete clause is not justified when it is ‘not necessary to conclude the agreement to sell a business’. It is also not acceptable if the ‘term of the non-compete clause is too long’ particularly considering that ‘the longest non-compete obligation allowed in European jurisprudence cannot extend 5 years’. Last but no least, the Supreme Court pointed out in its judgment of 9 August 2006 (III SK 6/06) that price-fixing cartels are considered to be ‘one of the most serious infringements of the prohibition of competition restricting agreements’. They ‘have always been treated very restrictively (...) in the jurisprudence of the ECJ’\textsuperscript{61}.

In the third approach, references are made to the judgments of the ECJ or the General Court when establishing particular elements of a restrictive practice. The judgment of the Supreme Court of 19 February 2009\textsuperscript{62} is a good

\textsuperscript{57} Judgment of SOKiK of 6 December 1995, XVII Amr 44/95, (1997) 1 \textit{Wokanda}, item 49.
\textsuperscript{60} Judgment of SOKiK of 29 May 2006, XVII Ama 9/05, UOKiK Official Journal 2006 No. 4, item 58.
\textsuperscript{61} Citing judgment of the ECJ in 48/69 \textit{Imperial Chemical Industries Ltd} [1972] ECR 619.
example of this approach when determining under what conditions can a dominant undertaking abuse its market position on a related market. It was declared there that such an abuse is possible in limited circumstances when the dominant undertaking is not present on the market affected by its practice. That is so particularly when it is preparing to enter this market and uses its market power held on the dominated market to control the competitive conditions in the related field. On the basis of that statement, the Supreme Court ruled that lacking presence on the related market or the intention to enter it, the dominant purchaser of clutches could not have restricted competition on the market for veterinary services. Another example of this approach is delivered by the judgment of SOKiK of 7 May 2009. The court ruled in this case that in order for a restrictive practice to be established (determining a single retail resale price for roofing slates), it is sufficient that a certain price was agreed upon among the undertakings concerned. There is no need to determine whether that price was actually applied by the undertakings concerned.

VI. Reception of legal institutions developed in EU law

The fact that EU competition law has been in force for over 50 years means that many of its legal concepts have already been developed and commented on by the doctrine. This extensive experience could be helpful in applying national law, particularly when it deals with issues unrelated to the goals of competition law and policy or do not involve provisions that have been worded differently by national legislators. The impact of EU law on the application of national competition laws can in such cases be not only more visible but also more systematic and consistent. One of the instances were EU law served as a reference for the development of Polish jurisprudence was the judgment of SOKiK of 29 March 2006 concerning a distribution agreement that restricted

63 The case concerned alleged abuse by the dominant purchaser of clutches for breeding chicks consisting of imposing upon the clutches farmers covered by purchasing agreements a requirement to have their clutches controlled by a veterinarian specified by the dominant purchase. The NCA claimed that this requirement restricted competition on the (general) market for veterinary services by foreclosing it to other veterinarians servicing the regional market where the breeders were located.


65 Judgment of SOKiK of 7 May 2009, XVII Ama 140/07, not reported.


67 Judgment of SOKiK of 29 March 2006, XVII Ama 86/04, not reported.
the agent’s price setting ability. EU standards concerning genuine agency agreements were directly invoked by the court which ultimately decided that ‘the failure of the national legislature to exempt such agreements from the prohibition of competition restraining agreements cannot lead to the conclusion that national law is more restrictive in that respect than European law’.

A similar example is delivered by the judgment of 29 May 200868. SOKiK referred in this case to C-204/00 Aalborg Portland et al.69 when deliberating whether the required standard of proof in respect of the existence of an agreement was met in the circumstances of the case. Following the lead provided by the Court of Justice, SOKiK ruled that the participation in the restrictive scheme can be established by ‘single facts’ such as ‘the participation in meetings’ or the ‘silent approval of an unlawful initiative, without objecting to the scheme or whistle-blowing to the responsible authorities’. The court added that ‘the fact that the undertaking concerned does not commit itself to abide by the outcomes of the meeting concerning policy alignment, does not exempt it from the liability for the participation in a cartel, unless it clearly protested against such an alignment’. Only then did SOKiK apply this standard to the facts of the case and ruled that since there was no such an objection, other cartel participants could have correctly assumed that the scrutinized entity would behave loyally to the agreed strategy. EU law was used by the court to determine whether, and when, can an undertaking concerned be held liable for having participated in a cartel when there is no evidence that it had actually approved the restrictive scheme.

VII. Summary

Polish courts ruling on competition appeals have used, and are still using EU law in various ways in cases falling outside the scope of Regulation 1/2003. There is no doubt that such references influence the development of national jurisprudence and hence the understanding of domestic competition rules. It can be argued therefore that Polish jurisprudence has been ‘unionized’ to a great extent when it comes to the interpretation and application of the substantive provisions of its competition law.

The impact of European law on the application of Polish competition rules is rather selective. It seems that references to EU law are made primarily where solutions and arguments are being sought that would support the judicial

69 Citing judgment of the ECJ in C-204/00 Aalborg Portland and others [2004] ECR I-123.
decision that has already been arrived to by the court. Therefore European law serves more as a practitioner’s handbook than an analytical guide.

Another, yet unwelcome result of the frequent referrals to EU law in national cases particularly when establishing anticompetitive effect, is that what determines the outcome of the assessments is often the legal name of the form of conduct under consideration, rather than the facts of the case. The fact can even be questioned, whether the impact of the established judicial acquis communitaire is nowadays that beneficial considering the time-lag occurring between the attempts of the Commission to introduce an effect based approach incorporating a consumer welfare standard and its acceptance by the European Courts, which are then binding on the national judiciary.

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Influence of the General Principles of Community Law on Polish Antitrust Procedure

by

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Abstract

This article presents the new legal problems related to the decentralization of the enforcement of Community competition law. The study shows that Regulation 1/2003 did not only give national antitrust authorities new rights and competences in that context but obliged them also to respect the general principles of Community law. This article contains an analysis of the first decisions issued by the UOKiK President on the basis of Community law and shows that the right of defence applicable to Polish proceedings differs from the standards developed by the European Commission and courts. The paper concludes with a number of suggestions concerning changes in Polish antitrust procedure regarding not only the application of Community law but also national provisions.

Résumé

Le présent article traite des problèmes liés à la décentralisation de l’application du droit communautaire de la concurrence. Une analyse démontre que le Règlement 1/2003 a attribué aux organismes nationaux de concurrence non seulement de nouveaux droits et de nouvelles compétences dans ce domaine, il les a également obligés à respecter les principes générales du droit communautaire. L’article comporte une analyse des premières décisions rendues par le Président de l’UOKiK sur le fondement du droit communautaire. Il démontre que le droit à la protection qui est appliqué dans les procédures polonaises diffère des standards développés par la Commission européenne et les juridictions. L’article se termine par des suggestions des modifications dans la procédure de concurrence polonaise portant non seulement sur l’application du droit communautaire mais aussi sur des dispositions légales nationales.

Classifications and key words: competition; general principles of Community law; Community proceedings; right of defence; right to a fair hearing; statement of objections; decentralisation.

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1 This article uses term ‘general principles of Community law’, ‘Community law’, ‘Community proceedings’ etc. as they are used in the majority of case law and publications issued to date cited in the text. However, texts prepared after the issue of TFEU also cited in this article, refer instead to the European Union, such as, for instance, ‘general principles of EU law’, ‘EU law’ etc.
I. Introduction – new competences of the Polish antitrust authority to apply Community competition law directly

By virtue of Regulation 1/2003, the full and direct application of Community competition law has been entrusted equally as of 1 May 2004 to the European Commission, EU courts, national antitrust authorities, such as the UOKiK President, and national courts.

According to Article 3(1) Regulation 1/2003, where national antitrust authorities or courts apply domestic competition law to agreements, decisions by associations of undertakings or concerted practices, within the meaning of Article 81(1) TEC, which may affect trade between Member States within the meaning of that provision, they shall also apply to them Article 81 TEC. Where they apply national competition law to any abuse prohibited by Article 82 TEC, they shall also apply Article 82 TEC. It is clear therefore that when a given practice can affect Community trade, national competition authorities are not only allowed but in fact obliged to apply relevant EU antitrust rules simultaneously with national law.

The competences in the field of Community competition law that used to be exclusive to the European Commission were thus simply delegated to Member States. The latter were given great autonomy in terms of the choice of institutions responsible for competition protection and the procedure of relevance to their activities. Under Article 35(1) Regulation 1/2003, Member States were obligated to designate their own competition authority or authorities responsible for the application of Articles 81 and 82 TEC so as to ensure their effective observance. That position has been given in Poland to the UOKiK President. According to Article 29(2) of the Act of 16 February 2007 on Competition and Consumer Protection (Competition Act 2007), the UOKiK President has the power to

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4 Because cases and publications are cited in this article, which refer to the previously binding EC Treaty (TEC), there are used old numbers of the Treaty provisions regarding anticompetitive practices (Article 81) and abuse of a dominant position (Article 82). New numbers of the above provisions are used in parts of the text referring to the Treaty on the Functioning of the European Union (TFEU), OJ [2008] C 1151, respectively Article 101 and Article 102 TFEU.
exercise in Poland the tasks imposed upon Member States’ authorities pursuant to Articles 84 and 85 TEC. In particular, the UOKiK President is the competent competition authority within the meaning of Article 35 Regulation 1/2003. Under Article 31(6) of the Competition Act 2007, the scope of the activities of the UOKiK President includes the performance of tasks and the exercise of competences of a competition protection authority of a Member State, as specified in Regulation 1/2003.

The number of Polish cases applying Community competition law directly is gradually increasing. The UOKiK President is thus becoming a ‘Community’ competition authority as part of the process of the decentralisation of Community competition law enforcement.7

Unfortunately, the provisions of Regulation 1/2003 do not resolve all the procedural problems which can arise from the delegation of powers from the Commission to national competition authorities. One of the first difficulties to arise in this context in Poland was the specification of what type of decisions may the UOKiK President issue when applying Community law. The Polish Supreme Court has submitted a prejudicial question concerning this problem to the European Court of Justice (ECJ) under Article 234 TEC (currently Article 267 TFEU)8. The Supreme Court stated that the provisions of the Act of 15 December 20009 on Competition and Consumer Protection (Competition Act 2000) designated the UOKiK President as the relevant competition authority within the meaning of Article 35 Regulation 1/2003 and conferred on it the competences and obligations described in Regulation 1/2003. However, the said act did not specify in what way was the authority to exercise its competences regarding the application of Community competition law. The Supreme Court repeated also that national competition authorities are obliged to apply Community competition law in all proceedings conducted under national law when the scrutinised practice can affect trade between Member States. While the material grounds for such an assessment are found in national and EU law simultaneously, procedural issues are solely determined by domestic legislation with a limited degree of restraints arising from EU law, in particular, from the provisions of Regulation 1/200310.

These limitations will be analysed later in this article.

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8 Resolution of the Supreme Court of 15 July 2009 (III SK 2/09), not reported.
II. Obligations of national administrative authorities related to the application of Community law

Regulation 1/2003 prepared the substantive law basis for national antitrust authorities to apply Community competition law. It failed however to set out their procedural grounds because, in general, Community competition law is not designed to alter national procedural rules.

Nevertheless, the EU does not have a general code of administrative procedure which would be common for all Member States and thus applied in antitrust proceedings under Regulation 1/2003. The concept of the decentralised application of Community competition law was thus based on the optimistic assumption that different national systems of administrative procedure would act in a consistent manner, using similar legal tools guaranteeing a level playing field for all participants. For that purpose, national competition authorities should refer to the jurisprudence of the ECJ concerning the application of Community law rather than the application of competition law by national administrative authorities.

The situation in which a Member State acts on behalf of the Community, performing certain legal duties in its stead, is described by legal doctrine as an agency relationship whereby the Member State acts as an agent or proxy of the Community. In their application of Community law, national antitrust authorities become thus administrative bodies of the Community. This peculiar ‘lease’ by the Community of the administrative structure of its members places an obligation on domestic authorities to apply Community law according to the principle of superiority. Clearly, the principle of superiority cannot be limited to the enforcement of the law only but must also, importantly, apply to the sphere of its implementation – public administration must safeguard the efficient application of its rules in line with the requirements of *acquis communautaire* at national level. By ratifying the Accession Treaty, Poland

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11 Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003, SEC(2009)574, para. 31: ‘Regulation 1/2003 does not formally regulate or harmonise the procedures of national competition authorities, meaning that they apply the same substantive rules according to divergent procedures and they may impose a variety of sanctions. Regulation 1/2003 accommodates this diversity’.


14 A. Nowak-Far, ‘Krajowa administracja rządowa a Unia Europejska. Strefy relacyjne i podstawowe aspekty ich funkcjonowania’ [in:] A. Nowak-Far (ed.), *Dostosowanie polskiej*
has simultaneously adopted the achievements of the Communities – *acquis communitaire* – that consists not only of EU legal rules but also e.g. the accepted methods of their interpretation and application as well as ECJ jurisprudence.\(^{15}\)

The activities of national administrative authorities applying *acquis communitaire* are characterized by the fact that Community law serves as direct legal grounds for the proceedings. Nonetheless, that law affects also Member States’ administrative laws.\(^{16}\) It is not easy to accept this fact. It requires a radical change in the understanding of the law and the way in which it is applied. Controversies in this matter are illustrated, perhaps somewhat ironically but also quite accurately, by the words of Lord Thomas Denning, an English judge who said that ‘Community law is a roller destroying our breakwaters and flooding our lands and houses’.\(^{17}\) Those destroyed breakwaters are, of course, the consolidated legal terms of national laws and their interpretation which frequently differ from those of EU law.

Although European jurisprudence regarding the obligations of domestic authorities applying Community law precedes Regulation 1/2003, the findings of the ECJ are fully applicable to situations in which national competition authorities apply Articles 101 or 102 TFEU. Because they act ‘on behalf of the European Commission’, they should obey the same rules and obligations deriving from the jurisprudence of the ECJ as a part of *acquis communitaire*. This obligation is binding regardless of whether it is clearly expressed in Community legislation or in national competition provisions.

The first experiences in the application of Community competition law by the UOKiK President under Regulation 1/2003 show that the need to obey general principles of Community law constitutes one of the main practical problems in this context, a fact analysed later in this article.


III. General principles of Community law

1. Origin and nature of the general principles of Community law

Although Community law was designed primarily to achieve purely economic objectives, it was bound to evolve into a much more comprehensive set of legal rules through, *inter alia*, the gradual recognition of its general principles. Greatly inspired by the legal traditions of EU Member States but tailored to the specific needs of Community law, general principles of Community law were developed and refined by the Court of Justice in order to secure its smooth operation. More specifically, the recognition of the general principles of Community law allowed the Court to recognize rights to the benefit of individuals that have not been foreseen by the Treaty\(^\text{18}\).

General principles of Community law can be traced back to the jurisprudence of the ECJ, which derives them from the European Convention on Human Rights and the legal orders of EU Member States (constitutional traditions)\(^\text{19}\). Although their interpretations were made by the ECJ with reference to national legal orders, their final version is a compromise not necessarily reflected in the legislation of all Member States. However, even those countries which do not have domestic principles similar to those defined by the ECJ must obey them when applying EU law. General principles bind both Community institutions and Member States which apply Community law\(^\text{20}\). According to the ECJ, the general principles of Community law reflect its most important principles contained in its primary legal acts. As such, they take precedence

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20 E.g. 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l’Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali* [1979] ECR 2749, para. 31 ‘(…) the general principles of community law (…) are binding on all authorities entrusted with the implementation of community provisions’; 5/88 *Wachauf v. Federal Republic of Germany* [1989] ECR 2609, para. 19: ‘Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements’.

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over Community secondary legislation and thus cannot be excluded or restricted by it\textsuperscript{21}.

The list of general principles of Community law is not closed but subject to dynamic interpretation by the ECJ. General principles can be categorised according to their features. This article is interested in those general principles which are applicable to administrative proceedings: (1) good administration; (2) duty of sound financial management; (3) precision and completeness of relevant facts and interests; (4) right of defence; and (5) duty to state the reasons and access to administrative documentation\textsuperscript{22}.

Competition policy is one of the most important areas of direct implementation of Community law. Competition proceedings constitute therefore the ‘Rolls Royce’ of administrative adjudication influencing the development of procedural rights in other areas of Community administration\textsuperscript{23}. Not surprisingly, the concept of general principles was first established in Community competition proceedings.

2. General principles of Community law identified in antitrust cases; right to a fair hearing (guaranteed by the statement of objections)

Competition law cases dealt with by the ECJ identified several general principles of Community law such as: the right to a fair hearing, the right to access case files, the right to legal representation and to a privileged nature of lawyer-client correspondence. Similarly to the principles identified in other areas of Community law, the aforementioned list remains open and subject to change. In light of this case law, the European Commission applies special procedural safeguards deriving from these general principles. As a result, the right of defence granted to the participants of antitrust proceedings ensures that the fight against competition-restricting activities takes place without prejudice to consolidated legal standards. Thus, the limitation of the right of defence cannot be justified by the argument that this is required by the battle against a ‘worse evil’, that is, anticompetitive practices.

Because of the limited size of this article, it is not possible to analyse in detail all the types of general principles of Community law identified by the ECJ in its antitrust cases. The right to a fair hearing is described below as

\textsuperscript{21} See. e.g. C-260/94 Air Inter SA v Commission [1997] ECR II-997, para. 60.
\textsuperscript{22} C. Franchini, ‘European principles governing national administrative proceedings’ (2004) 68(1) Law and Contemporary Problems 190.
one of their key examples. It is also used in the comparative analysis of its observance in Community proceedings conducted by the UOKiK President.

The right to a fair hearing is a general principle of Community law in all proceedings involving sanctions, especially fines – it must be obeyed even in administrative proceedings\(^{24}\). The ECJ specified that the right to a fair hearing is safeguarded by giving a party to the proceedings the right to present its own position with regard to the claims against it.

The first judgment to thoroughly analyse the right to a fair hearing was the 17/74 *Transocean Marine Paint Association*\(^{25}\) case. The ECJ stated that an individual whose interests are affected by a decision of a public authority must have the right to present his/her own views on the case. Relying on the argumentation presented by English Advocate General Warner, the ECJ introduced a new approach into its judicature, previously based only on the civil law doctrine, in which a party to proceedings may only challenge an administrative decision before a court. This new approach is typical of the common law system, giving a party the right to challenge a decision before an administrative authority only before this decision is issued. In order to guarantee the right of defence, the ECJ made its position even more clear in other judgments. It stated that before the Commission issues a decision, it should provide the parties not only with the details of the complaints but also other relevant information such as the facts and evidence on which it was relying. It was also obliged to give the parties the opportunity to present their views on the truthfulness and relevance of the facts and circumstances relied on by the Commission\(^{26}\). The required data is presented in practice in a special document called a *statement of objections* (notice of complaints in earlier cases), an act very similar to the form and content of a final decision. An entity is thus granted the right to a fair hearing because it is able to present

\(^{24}\) 85/76 Hoffmann-La Roche & Co. AG v Commission of the European Communities [1979] ECR 461 para. 9: ‘Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of community law which must be respected even if the proceedings in question are administrative proceedings’.


\(^{26}\) 85/76 Hoffmann-La Roche & Co. AG v Commission of the European Communities [1979] ECR 461, para. 9: ‘Article 19(1) of Council regulation No 17 obliges the Commission, before taking a decision in connexion with fines, to give the persons concerned the opportunity of putting forward their point of view with regard to the complaints made against them’; para. 11 ‘Thus it emerges from the provisions quoted above and also from the general principle to which they give effect that in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty’.
its views on specific circumstances of the case as well as its own arguments and position on them.

Importantly, in cases where the right to a fair hearing was not guaranteed because of mistakes in the statement of objections, the ECJ declared the decisions of the Commission void to the extent caused by the mistakes. In SA Musique Diffusion\textsuperscript{27} for instance, the statement of objections specified a shorter infringement period than the final decision (used to set the amount of the fines). The ECJ did not accept the extension and based its judgment on the shorter infringement period only as specified in the statement of objections\textsuperscript{28}.

IV. Right to a fair hearing in Polish antitrust proceedings based on Community law

1. Lack of legal provisions

Unfortunately, Polish antitrust procedure does not contain any rules that could provide the parties with safeguards similar to the statement of objections during national proceedings enforcing Article 101 or 102 TFEU under Regulation 1/2003. Before issuing a decision, the UOKiK President does not present the parties with any information on e.g. the assessment of the facts and evidence gathered in the case files, the length of the violation, the identity of those that participated in the infringement or of those against whom the authority plans to impose fines etc. The resolution regarding the initiation of antitrust proceedings merely informs the parties of the content of the claim. Case file access given before the issuance of a decision does not constitute a sufficient guarantee of the right to a fair hearing, as defined by the ECJ. Undertakings frequently review hundreds of pages of case files without being aware of the relevance of the specific facts or evidence included and how to identify the issues they should comment on. Therefore, their right of defence is limited. Stressed here must therefore be the different nature of the right to a general access to case files and the right to a fair hearing (where

\textsuperscript{27} Joined cases 100 to 103/80 SA Musique Diffusion francaise and others v Commission of the European Communities [1983] ECR 1825.

\textsuperscript{28} Joined cases 100 to 103/80 SA Musique Diffusion francaise and others v Commission of the European Communities, para. 16-17: ‘In the present case it is not disputed that the Commission did not indicate to the applicants its intention to establish the existence of infringements of a longer duration than was mentioned in the statement of objections and that the undertakings hand no opportunity of making known their views as regards periods which were not mentioned therein. In these circumstances, in assessing the duration of the infringements, found by the contested decision, regard must be had only to the period late January/Early February 1976’.
the statement of objections informs the parties of the relevant circumstances). Such differentiation is reflected in the jurisprudence of the ECJ that treats them as two separate rights.

2. Right to a fair hearing in the first decisions of the UOKiK President based on Community law

Between 2003 and 2010\(^{29}\), the UOKiK President issued 5 decisions on penalised practices restricting Articles 81 or 82 TEC (currently Articles 101 or 102 TFEU) including the imposition of fines (2 decisions regarding abuse and 3 decisions regarding anticompetitive agreements).

None of them suggests that the UOKiK President respected the parties’ right to a fair hearing by the application of a procedure similar to a *statement of objections*. As far as procedural requirements are concerned, these decision only have two features in common i.e. they see the right to access case files as a safeguard of the right of defence and emphasise their compatibility with procedural rules because they were consulted with and accepted by the European Commission.

The relevant extracts from the aforementioned decisions showing the way in which the UOKiK President refers to procedural issues in Community cases are presented below.

1) Decision of the UOKiK President, DOK–166/06\(^{30}\)

The decision stated that Telekomunikacja Polska S.A. breached Article 9 of the Competition Act 2000 and Article 82 TEC.

It was explained that ‘(...) The President of the Office informed the party and the participant of the proceedings about the closure of the evidentiary proceedings\(^{31}\)’ and ‘The President of the Office informed the European Commission no later than 30 days before issuing this decision, by sending it a summary and the envisaged decision’. Thus, the decision was issued in line with binding procedural norms\(^{32}\).

An appeal was filed against the decision with the Competition and Consumer Protection Court (SOKiK). The judgment suggests however that the appeal was not based on the claim of a breach of the general principles of Community


\(^{30}\) Decision of the UOKiK President 29 December 2006, DOK-166/06.

\(^{31}\) Ibidem, p. 6.

\(^{32}\) Ibidem, p. 64.
law. SOKiK’s judgment\textsuperscript{33} was subject to further judicial review by the Court of Appeals\textsuperscript{34} and ultimately the Supreme Court\textsuperscript{35}. Neither of them referred to a breach of the general principles of Community law.

2) Decision of the UOKiK President, DOK–98/07\textsuperscript{36}

This was another decision against Telekomunikacja Polska S.A. for an infringement of Article 9 of the Competition Act 2000 and Article 82 TEC.

The wording of the decision suggests that the procedure of a \textit{statement of objections} was not applied in this case. It was only indicated that ‘The case files may be reviewed by the party at all times with the possibility of presenting its views on the evidence contained therein’\textsuperscript{37}.

The decision explains that its draft was consulted with and accepted by the Commission. The UOKiK President concluded thus that ‘This decision was issued in line with binding procedural rules’\textsuperscript{38}.

An appeal was filed against it but the case is still pending before SOKiK. It is impossible to tell whether the appeal referred to a breach of general principles of Community law because the appeal documents are not available for viewing.

3) Decision of the UOKiK President, DAR–15/2006\textsuperscript{39}

The decision stated that Polish banks have concluded a set of anticompetitive agreements with Visa infringing the provisions of the Competition Act 2000 and Article 81(1) TEC. In this decision, the antitrust authority stated that ‘(...) the President of the Office informed the parties about the closure of the evidence gathering stage of the proceedings and simultaneously stated that they may review the files (...)’\textsuperscript{40}.

The claim of a breach of general principles of Community law was not made in the appeal. Neither SOKiK\textsuperscript{41} nor the Court of Appeals\textsuperscript{42} referred to this

\textsuperscript{33} Judgment of SOKiK of 28 February 2008, XVII AmA 52/07, LEX no. 402189.
\textsuperscript{34} Judgment of the Court of Appeal in Warsaw of 29 January 2009, VI Aca 1202/08, not reported.
\textsuperscript{35} Judgment of the Supreme Court of 17 March 2010, II SK 41/09, not reported.
\textsuperscript{36} Decision of the UOKiK President of 20 December 2007, DOK-98/07.
\textsuperscript{37} Ibidem, point 435, p. 75.
\textsuperscript{38} Ibidem, point 482, p. 83.
\textsuperscript{39} Decision of the UOKiK President of 29 December 2006, DAR-15/2006.
\textsuperscript{40} Ibidem, p. 17.
\textsuperscript{41} Judgment of SOKiK of 12 November 2008 r., XVII AmA 109/07, not reported.
\textsuperscript{42} Judgment of the Court of Appeal in Warsaw of 22 April 2010, VI ACa 607/09, not reported.
issue. Still, the latter dismissed the judgment of the former in its entirety and remanded the case to SOKiK for renewed consideration.

4) Decision of the UOKiK President, DOK–6/2008

The decision stated that the Association of Authors ZAiKS and the Association of Polish Film Producers concluded anticompetitive agreements infringing the provisions of the Competition Act 2000 and Article 81(1a) TEC.

There was said that ‘The President of UOKiK closed the evidentiary proceedings and informed the parties to the proceedings as well as other interested parties about it and gave them the possibility to review the evidence gathered in the files (...)’ and ‘(...) The President of UOKiK informed the European Commission on 3 July 2008 about the planned solution (applied in this decision) sending it its draft. The European Commission did not raise any objections to the adjudication in this decision’.

An appeal was filed against this decision to SOKiK; the case is pending.

5) Decision of the UOKiK President, DOK–7/09

The decision stated that Polish cement producers concluded anticompetitive agreements infringing the provisions of the Competition Act 2000 and Article 81(1a) TEC.

It was explained that ‘During the proceedings, the parties took advantage of the right to review the files (...). On 14 September 2009, the antitrust authority informed the parties about the closure of the evidentiary proceedings, about their ability to review the whole of the evidence and called them to present their final positions in the case’ and ‘(...) The President of the Office provided the draft decision to the Commission which did not raise any objections’.

An appeal was filed against this decision with SOKiK; it is pending.

The above quotes clearly show that the UOKiK President misunderstands the right to a fair hearing by believing that it equates to the right of the parties to present their views on the evidence gathered and the right to review the files without however knowing which of the data will be used as evidence in

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44 Ibidem, point 9, p. 7.
46 Decision of the UOKiK President of 8 December 2009, DOK–7/09.
47 Ibidem, point 9, p. 9.
48 Ibidem, point 10, p. 9.
the final decision. Moreover, even though the authority refers to the term ‘evidence’, it is confusing it with the documents gathered in the files. Those documents contain a variety of information and data which might not be ultimately used as evidence in antitrust decisions. Therefore, the right to access the files cannot be equated with the right to a fair hearing, as defined in ECJ case law.

Additionally, the fact that the Commission was each time consulted on the draft is presented as sufficient evidence that the decision was compatible with ‘binding procedural rules’, a clearly untrue conclusion. It would be very interesting to find out about what type of review did the Commission conduct under Article 11(4) Regulation 1/2003. It did indeed not object to any of the drafts even though they did not observe the right to a fair hearing because Poland lacks a procedure similar to the statement of objections. Nevertheless, its review was likely to have been limited to the substantive part of the decision without considering their procedural aspects. If this assumption is correct, it would mean that the Commission’s review process is missing a key part even though it was enacted in order to ensure that the decisional practice of national competition authorities is compatible with the findings of the Commission and the jurisprudence of EU courts. It is also possible however, that the Commission did analyse their procedural aspects but incorrectly understood some of the terms used in the drafts. Perhaps the expression that ‘the party reviewed the files and had the possibility to present its views on the gathered evidence’ was interpreted by the Commission in such a way that all requirements regarding the right to a fair hearing arising from the jurisprudence of the ECJ were satisfied? This problem should be clarified directly and as soon as possible by the UOKiK President and the Commission because this uncertainty undermines the consultation process under Article 11(4) Regulation 1/2003.

The last decision mentioned, DOK–7/09, is very important in the context of this article as it shows that the UOKiK President is aware of the concept of ‘the general principles of Community law’ and that the authority knows how to apply it in practice. When justifying the evidence gathered in the case, the UOKiK President referred to Point 5 of the Preamble to Regulation 1/2003, which reads as follows: ‘This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law’.

Stating that procedural rules in antitrust proceedings must be compatible with the general principles of Community law, the UOKiK President added ‘in particular, with the principle of effectiveness (effet utile)’. The authority later added that ‘This means that the standard of proof applied by national
authorities cannot be so high as to render the application of Article 81 TEC (currently: Article 101 TFEU) impossible or excessively difficult\textsuperscript{49}.

Nonetheless, why would the authority refer to some general principles of Community law in places suiting its views, but not obey others, i.e. the right to a fair hearing, where that would be favourable for the parties? This approach is all the more controversial in the light of the following declaration, expressed in a different part of the same decision: ‘Taking the above into account and because, in the present case, the parties were accused of breaching Article 81 TEC (currently: Article 101 TFEU) and because the Polish antimonopoly law on competition-restricting practices is directly based on Community law, when analysing the activities of the parties to the proceedings, the President of the Office relied on the consolidated case law of the Commission and Community courts, as well as the legal doctrine regarding Community competition law. The President of the Office has the obligation to apply \textit{acquis communitaire} in the case of parallel application of Article 5 of the above act [MK – the Competition Act 2000] and Article 81 TEC (currently: Article 101 TFEU)\textsuperscript{50}.

\textbf{V. Consequences of breaching general principles of Community law by the UOKiK President}

\section*{1. Judicial review}

All decisions issued by the UOKiK President are subject to judicial review by SOKiK. When assessing the competences and obligations of the latter, it is essential to stress that, from the functional point of view, the national judiciary plays the role of EU courts in their application of Community law\textsuperscript{51}.

The norms of Community law may be an independent source of rights and obligations for civil and legal persons – they may base their claims on these rights before courts and administrative authorities. Thus, the addressees of the decisions issued by the UOKiK President under Articles 81 or 82 TEC (currently Articles 101 or 102 TFEU) may appeal them claiming a breach of general principles of Community law. If proprietary rights of entities – citizens and entrepreneurs from a given Member States – arise from the

\begin{flushleft}
\textsuperscript{49} Ibidem, point 429, p. 76. \\
\textsuperscript{50} Ibidem, point 417, p. 74. \\
\end{flushleft}
provisions of Community law, national courts must ensure the protection of these rights52.

It should be said therefore that in their application of Articles 81 and 82 TEC [MK - currently Articles 101 or 102 TFEU], national courts are obliged to rely on the general principles of Community law (arising from primary law) and others which are included in the provisions of Regulation 1/200353. As indicated above, general principles of Community law are a consequence of ECJ’s interpretation of EU law which is, according to the Supreme Court, universally binding54.

If SOKiK does not obey the general principles of Community law, its judgments are in conflict with EU law. Provisions were established in the Polish legal order which ensure effective proprietary rights protection in cases of judgments that are in conflict with EU law (legally binding or not yet). The Supreme Court acknowledges that a breach of EU law may be used as grounds for an appeal (against a 1st instance judgment not yet binding), a cassation (against a binding 2nd instance judgment) and a complaint to find that a legally binding judgement is in conflict with the law (against binding 1st and 2nd instance judgments).

According to the Supreme Court, an appeal and a cassation lead to ‘the elimination of the invalid judgment and, in consequence, to an adjudication which is compatible with Community law’. A complaint, which leads to the finding that a legally binding judgement is in conflict with the law, ‘has the objective of obtaining a prejudication, allowing for a claim to be filed for damages caused by the illegal activities of the authorities in separate proceedings’. The Supreme Court clearly stated that a breach of Community law may act as the grounds for all of these legal actions55.

2. Impact of general principles of Community law on the case law of the Supreme Court

A very interesting legal issue arises from the fact that an appeal based on an objection regarding a breach by the UOKiK President of general principles of Community law does not apply to an appeal on its merits, but on procedural issues.

53 Ibidem, p. 15.
54 Resolution of the Supreme Court of 22 October 2009, IUZ 64/09, LEX no. 560531.
Consolidated case law suggests that SOKiK’s holds the position of a 1st instance court obliged to examine the case on its merits\textsuperscript{56}. Therefore, procedural breaches by the UOKiK President should be repaired by SOKiK. Thus, the Court of Appeals is not obliged to refer to procedural grounds in the appeal\textsuperscript{57}. The Supreme Court indicated recently that it is only possible to reverse the decision of the competition authority in cases of errors which cannot be repaired by an amendment of the decision by the court. Such failures include situations where the decision was issued without legal grounds or with a major infringement of substantive rules or if it was addressed to the wrong party or was in breach of the \textit{ne bis in idem} rule\textsuperscript{58}. Current jurisprudence gives the impression that procedural errors can be healed by the court. It seems however that a breach of general principles of Community law (in particular the right of defence) in administrative proceedings constitutes a type of fault which cannot be repaired after the decision is issued.

Although Member States enjoy procedural autonomy, commentators indicate that national procedural rules have a somewhat subsidiary nature – they should be applied only if no EU law is in effect\textsuperscript{59}. Therefore, if consolidated European jurisprudence provides guidelines regarding the exercise of general principles of Community law in antitrust proceedings, these norms are binding on the UOKiK President and national courts. It is also up to the courts to ensure effective legal protection of rights derived from EU law\textsuperscript{60}. Thus, the principle of effectiveness defines the duties of Member States’ courts examining cases with a European element. In this respect, the principle of effectiveness limits their procedural autonomy\textsuperscript{61}.

With decisions issued by the UOKiK President under Article 101 or 102 TFEU, overlooking the infringement of fundamental procedural rights would put the party in a far worse position than if the case was examined by the European Commission and courts.

\textsuperscript{56} Judgment of the Court of Appeal in Warsaw of 21 September 2006, VI ACa 142/06, LEX no. 272753; Judgment of the Supreme Court of 13 May 2004, III SK 44/04, LEX no. 137437.
\textsuperscript{57} Judgment of the Supreme Court of 19 August 2009 r., III SK 5/09, LEX no. 548862.
\textsuperscript{58} Ibidem.
As a result, if a party raises an objection regarding the infringement of general principles of Community law, SOKiK should apply a pro-European approach as well as the principle of effectiveness. In that light, it should remand the whole of the antitrust decision for a renewed assessment.

It does not matter that the Polish civil law procedure and case law based on it to date do not expressly allow for such a possibility. These regulations cannot provide for such a procedure for claiming the entity’s proprietary rights arising from Community law, which would make actually exercising these rights impossible or excessively difficult (the so-called principle of effectiveness of Community law \(^{62}\)). National courts have the right and duty to refuse to apply an inconsistent provision without the need to wait for a reaction by the legislator or other authorities such as the Constitutional Tribunal which was established in order to remove incorrect legal acts. These competences of national courts guarantee that the principle of priority of Community law is applied immediately and effectively \(^{63}\).

Polish courts are however likely to be reluctant to rule on the compatibility of Polish antitrust procedure with the general principles of Community law. They are far more likely to submit instead a prejudicial question to the ECJ. Although an answer given by the ECJ is only binding in the case at hand, it is likely to influence other rulings also, even though the legal system of the EU does not have a case law nature. Considering that EU jurisprudence on its general principles is uniform and consolidated, it can be assumed that it will have a significant impact on Polish antitrust procedure in the near future.

VI. Conclusions

1. Comments on changes needed in the procedure applied by the UOKiK President in cases based on Community law

Entrusting EU Member States with the competences to apply Articles 101 and 102 TFEU directly (previously Articles 81 and 82 TEC) has resulted in an improvement of Community competition law enforcement. The ability of direct referral to the extensive EU jurisprudence and the decisions of the European Commission contribute to the quality of domestic antitrust enforcement. However, while national competition authorities were given new rights and competencies, they were also obliged to observe the general principles of Community law.

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\(^{62}\) K. Kohutek, ‘Stosowanie ...’, p. 16.

These principles are binding on national authorities in Community proceedings regardless of whether or not they are part of domestic legal orders. Considering however the need to increase legal awareness concerning these specific EU rules, it would be advisable to create explicit legal grounds for their application in national legislation on antitrust procedure. For example, the Competition Act 2007 should include a separate section regarding **statements of objections** in EU proceedings.

These proposals are not limited to EU proceedings which end with sanctions, in particular, fines. Such a precondition was applicable to the right of defence in the form of a **statement of objections**. However, other aspects of the right of defence, such as the **legal professional privilege**, should also be observed in all Community proceedings. It is important to stress here however that what falls into the category of ‘Community cases’ covered by the scope of the application of EU law\(^\text{64}\) are also national proceedings where the claims that arose from directly applicable EU rules are not proven (e.g. Article 101 TFEU). As a result, even if a case conducted on the basis of Articles 101 or 102 TFEU ends without establishing an antitrust infringement but is, for instance, dismissed instead, the case itself is a ‘Community proceeding’ that must respect the general principles of Community law.

Finally, it would be advisable for the UOKiK President and national courts ruling on antitrust issues to draw on the experience of other Polish administrative bodies and courts that already started to refer to the general principles of Community law. Especially relevant in this context are the judgments of the Supreme Administrative Court (NSA) issued in tax matters based on the inconsistency of domestic administrative decisions with one of the main general principles of Community law – the principle of proportionality\(^\text{65}\).

### 2. Call for changes in the procedure applied in cases based on Polish competition law

While conducting proceedings based on Community law, the UOKiK President must apply procedural rules similar to those used by the European Commission. The authority is not obliged however to do so with respect to proceedings based on Polish competition law only.

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Similarly, legal doctrine emphasises that the obligation placed on national courts to apply Community law as part of their national legal order is limited to Community proceedings only\(^{66}\). Commentators refer here to the jurisprudence of the ECJ which clarifies that, when deciding on a case from outside the scope of Community law, a national court is not bound to interpret domestic legislation in line with Community law or to refrain from the application of national rules\(^{67}\).

It might be worth considering however whether the degree of protection granted to the right of defence should not also increase in proceedings based on domestic laws only conducted by administrative authorities and courts.

The jurisprudence of the Supreme Court is not-uniform on this matter. In some judgments, the view was expressed that the obligation to conduct a pro-Community interpretation of national legislation does not apply to cases based only on the polish Competition Act. According to the Supreme Court, Article 3 Regulation 1/2003 suggests that when a competition-restricting practice does not affect trade between Member States, national courts apply domestic antitrust rules only. The Supreme Court explained also that ECJ judgments and the decisions of the European Commission regarding Articles 81 and 82 TEC constitute only – in cases where Articles 81 and 82 TEC are not applied [MK – currently Articles 101 and 101 TFEU] – a source of intellectual inspiration, an example of legal reasoning and understanding of certain notions\(^{68}\). The Supreme Court mentioned also that the referral to Community law in national cases has a comparative and persuasive advantage only.

A different position was expressed however in the resolution of the Supreme Court III CZP 52/08\(^{69}\) where the problem of the prejudicial nature of antitrust decisions was analysed for judgments of common courts regarding competition law offences. In the said resolution, the Supreme Court supported the independence of common courts adjudicating on antitrust matters. It stated referring to Community law and Regulation 1/2003 in particular, that civil courts may independently assess whether the conditions required for the application of Community competition law in litigations between private entities are satisfied – in other words, courts do not have to wait for an antitrust decisions in the same case. Following this line of thought, the Supreme Court expressed the even further-reaching view that even if no effect on Community trade was established and thus the court was to apply domestic law only, a

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\(^{67}\) C-264/96 \textit{Imperial Chemical Industries} [1998] ECR I-4695, para. 34.


legal interpretation ‘which would eliminate substantial procedural divergences in the application of Community and national laws would be desirable’.

Legal doctrine calls also for the consideration of Community experiences regarding the increasing standard of proof expected from an antitrust authority.70

The requirement for Polish antitrust procedure concerning domestic cases to provide the same degree of protection of the right to defence as proceedings conducted in Community cases, is not only a matter of the law but simply a matter of honesty and objectivity of the UOKiK President. References to Community jurisprudence and doctrine are made in the majority of Polish antitrust decisions based only on national competition law where it supports the approach taken by UOKiK. Still, they contain no reference whatsoever to Community standards concerning the right of defence. The antitrust authority should be consistent in its approach. Reference should be made either to all *acquis communitaire* in domestic proceedings, including the general principles of Community law, or no reference should be made at all even when that would be favourable to the arguments of the authority.

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Right to Be Heard or Protection of Confidential Information? Competing Guarantees of Procedural Fairness in Proceedings Before the Polish Competition Authority

by

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Abstract

The concept of procedural fairness plays an important role in the enforcement of competition law, which must not only be effective but also fair. Thus, legal institutions should guarantee a proper level of protection of the values of procedural fairness. This paper is dedicated to the possible conflict between the guarantees of procedural fairness that find their expression in the right to be heard and in the protection of confidential information.

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Both guarantees, the right to be heard on the one side, and the protection of confidential information on the other, should be properly balanced. Unlike EU law, Polish legislation and jurisprudence proves to be inefficient in this respect. Article 69 of the Competition Act fails to show clearly what the limits of the protection of confidential information are in situations when the right to be heard of other parties of antitrust proceedings is at stake. Business secrets are predominantly protected over the right to be heard also in the jurisprudence of Polish courts. By contrast, the Competition Act does not seem to properly protect confidential information other than business secrets. Such situation poses a risk for the adequate level of protection of procedural fairness in Polish antitrust enforcement. Moreover, neither Polish legislation nor jurisprudence explains to companies what shall prevail in the case of a concrete conflict between the protection of business secrets and the right to be heard. An answer to this questions is needed seeing as proof of a competition law infringement which should be accessible to the parties, can at the same time constitute a business secret.

Résumé

Le concept de l’équité procédurale joue un rôle important dans le renforcement de la loi de la concurrence, qui, outre d’être efficace, doit aussi être équitable. Pour cela, les institutions légales devraient garantir le niveau de protection de l’équité procédurale nécessaire. L’objet de cet article est d’étudier les conflits possibles entre les garantis de l’équité procédurale qui trouvent leur expression dans le droit d’être entendu et dans la protection des données confidentielles.

Classifications and key words: procedural fairness; right to be heard; protection of business secrets; confidential information; right of defence; antimonopoly (antitrust) procedure.

I. Introduction

The protection of free competition must be effective. Thus, the public authority responsible for the protection of free competition should be equipped with proper tools to combat antitrust infringements. On the other hand, procedural fairness must be guaranteed during proceedings that might lead to the finding of an infringement and the imposition of a sanction (fine). Procedural rules need to protect the values of procedural fairness, process values1, especially by providing

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proper guarantees such as: the right to be heard, the right of defence, the right to protect confidential information and the right to judicial review.

The legal guarantees of the values of procedural fairness limit the power of a competition authority. They can also be in conflict with the pursuit of effective competition law protection. For example, in the case of an inspection carried out by the officials of an antitrust authority, the consideration for the right of defence and the privilege against self-incrimination can restrict the possibility of finding facts confirming an antitrust violation. Nonetheless, this approach is correct – the power of the state is balanced here with the rights and freedoms of private entities (including undertakings).

The problem intensifies when the pursuit of effective protection of free competition is confronted with procedural fairness values that are in conflict with each other. The competition authority, which acted before as if it was a prosecutor, must act in such situations as if it was a judge – it has to decide which value should prevail or the guarantees of which value can be limited to a greater extent in a given situation. This problem is well illustrated by the conflict of the right to be heard of one party to the proceedings with the protection of confidential information (such as business secrets) of another. Both parties have a legitimate expectation to have their interests protected by the competition authority. The realisation of the rights of one of the parties can lead to the limitation of the rights of the other - the protection of business secrets can result in the limitation of the right of access to evidence.

This article focuses on this possible conflict discussing the deficiencies of the current legal solutions in the context of Polish antitrust procedure. Proposals are also made meant to solve, or at least limit, the problems identified in this context by showing how to balance the right to be heard with the protection of confidential information. In this respect a comparison with EU competition law procedure is made.

II. Right to be heard and its limitations

1. Limitation of access to evidence contained in case files

Under Article 69(1) of the Act of 16 July 2007 on Competition and Consumers Protection2 (hereafter, the Competition Act), the President of the Office of Competition and Consumers Protection (hereafter, the President of UOKiK) is entitled to limit evidence access to an indispensable extent. This rule relates to evidence attached to the case file in situations where rendering such evidence

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2 Journal of Laws 2007 No. 50, item 337 as amended.
accessible would entail a risk that business secrets, or any other secrets protected by separate legal provisions\(^3\), might be revealed\(^4\). The UOKiK President may adopt an order on the limitation of the access to evidence on request submitted by an undertaking the business secrets of which might be revealed or *ex officio*. A decision in that matter can be appealed directly under Article 69(3) of the Competition Act to the Court of Competition and Consumers Protection\(^5\) (hereafter, SOKiK) by both the undertaking that has claimed the protection of its business secrets (or other secrets protected by the law) and by the undertaking, party to the proceedings, that has been subjected to the limitation\(^6\).

Article 69 of the Competition Act provides a clear basis under Polish competition law for the limitation of access to evidence contained in case files\(^7\). The only premise under this provision for such limitation is the risk for a business secret to be revealed, or indeed any other secret protected by the law. There is no mention here of the need to protect the right to be heard of those parties to the proceedings that were subjected to a limitation. However, the expression that the limitation is permissible only ‘to the extent indispensable’ suggests that there are values other than confidentiality that the UOKiK President should take into consideration while making the decision on the limitation of evidence access.

2. Protection of the right to be heard under Polish competition law

The right to be heard is one of the most important guarantees of procedural fairness. Polish law accepts that procedural fairness, a notion deriving directly from the principle of a democratic state of law\(^8\) (Article 2 of the Constitution

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\(^3\) On the notion of other secrets see point III.1.

\(^4\) Article 69(1) of the Competition Act replaced Article 62(1) of the Act of 15 December 2000 on Competition and Consumers Protection (Journal of Laws 2005 No. 244, item 2080 as amended) under which, the limitation on access to evidence could also take place when it was demanded by public interest. Such a possibility could have resulted in the arbitrary limitation of access to evidence by the UOKiK President – order of SOKiK of 31 August 2004, XVII Amz 35/04, not reported.

\(^5\) Order of SOKiK of 14 May 2003, XVII Amz 11/03, not reported.

\(^6\) See order of SOKiK of 30 May 2006, XVII Amz 21/06, not reported; order of SOKiK of 21 June 2006, XVII Amz 13/06, not reported; order of SOKiK of 13 August 2003, XVII Amz 17/03, not reported.

\(^7\) The limitation can only refer to the evidence of the case and never to the statements of the parties expressed during the proceedings (order of SOKiK of 16 December 2002, XVII Amz 17/02, not reported) or to the information about the collection of the evidence (order of SOKiK of 13 August 2003, XVII Amz 17/03).

\(^8\) See the judgments of the Constitutional Court of 15 December 2008, P 57/07 (2008) 10/A OTK ZU, item 178 and of 22 September 2009, P 46/07 (2009) 8/A OTK ZU, item 126 and
of the Republic of Poland), is applicable to proceedings before administrative bodies\(^9\). Thus, its guarantees are reflected in administrative procedure and especially in Article 10 of the Code of Administrative Procedure (hereafter, KPA) that establishes the principle of active participation in administrative proceedings. It includes the right of the parties to the proceedings to be heard with regards to evidence collected and objections raised during their course. An important guarantee of Article 10 is provided by Article 81 KPA whereby the facts of the case can be considered to be proven only if the parties have been given the opportunity to comment on the evidence on the basis of which the facts are being established. Article 10 KPA is wholly applicable to proceedings before the UOKiK President\(^10\) and so is Article 81 \(^11\). It is also reflected directly in the Competition Act and especially in its Article 74. In its light, the UOKiK President can base his/her decision only on those objections raised against a given undertaking to which that undertaking has been given the opportunity to comment on.

These arguments prove that the right to be heard must be wholly respected in the procedural practice of the UOKiK President. This is especially true considering the extensive powers of that body and its mixed function whereby it acts as the authority notifying the objections as well as the body deciding on their validity\(^12\). But this means also that Article 69 of the Competition Act must be interpreted in a way that does not exclude the right to be heard of parties whose access to evidence is being limited. In other words, the protection of business secrets must not disproportionally limit or completely exclude others’ right to be heard.

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10 See Article 83 of the Competition Act.

11 It can be said that Article 81 KPA is not applicable to the proceedings before the UOKiK President as the provisions of the Code of Civil Procedure (not the one of the Code of Administrative Procedure) regulate per analogiam the hearing of evidence before the UOKiK President (see Article 84 of the Competition Act). Such an approach is not correct because Article 10 KPA cannot be considered to be respected when the facts are established in the decision of the administrative body on the basis of evidence which the party has not been given the possibility to comment on. The Code of Civil Procedure does not provide the parties with proper guarantees in this respect because in civil procedure it is for the party (so the undertaking, not the UOKiK President) to prove the facts (see Article 232 of the Code of Civil Procedure).

III. Right to be heard v protection of business secret

1. Approach of Polish courts - is there a proper balance?

Courts should scrutinize whether the protection of business secrets was properly balanced with the right to be heard of the parties to the proceedings when dealing with appeals against the orders of the UOKiK President made on the basis of Article 69 of the Competition Act. They are correct to believe that the antitrust authority is not bound by the scope of a request for the limitation of evidence access. From the perspective of other parties, it is important that the UOKiK President is obliged to precisely specify in his/her decision to which pieces of evidence does the restriction of access refer to (especially to which documents contained in the case file). As to the documentary evidence (such as contracts), it should be possible for the parties to be recognised even if their content is considered by the UOKiK President to be confidential (containing business or other secrets protected by the law). With respect to a contract that is part of the case file, the authority is expected to specify if it is considered to be a business secret (or other secret) in its entirety, or only some of its parts.

The UOKiK President has surely the right to disagree with the opinion of an undertaking that a given piece of information deserves confidential treatment. Thus, the authority can decide to place a document outside the scope of the business secret category even in light of the opposition of the said undertaking. This very issue is what the UOKiK President (as well as SOKiK in appeal proceedings) is focusing on when preparing and justifying decisions issued according to Article 69 of the Competition Act.

In principle, the interpretation accepted by the Courts is that the limitation of evidence access can take place only to the extent indispensable. In one of its decisions, the Antimonopoly Court (the predecessor of SOKiK) stated that it is the openness of case files that constitutes the rule here and not its secrecy. In other words, limiting access to evidence contained in the case file should be considered the exception rather than the rule. Doctrine also stresses that the right of a party to have evidence access (the right to be

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13 Order of the Antimonopoly Court of 15 May 1996, XVII Amz 1/96, not reported.
14 Order of SOKiK of 13 August 2003, XVII Amz 17/03.
15 Ibidem.
16 Ibidem.
17 Order of the Antimonopoly Court of 15 May 1996, XVII Amz 1/96. Similarly, when it comes to the court proceedings, the Court of Appeals in Warsaw in the order of 16 April 2009, VI ACa 1577/07, not reported.
18 Order of SOKiK of 16 December 2002, XVII Amz 17/02.
heard in the broader sense of the term) can indeed be limited but never completely excluded\textsuperscript{19} and that the restriction of this right must not extend to information vital in the given case, provided they are not simultaneously important business secrets\textsuperscript{20}.

The analysis of SOKiK’s jurisprudence proves that the general principle of openness of case files to the parties of antitrust proceedings is very often not followed in its juridical practice. This realisation can raise doubts whether the right to be heard is respected to a satisfactory degree in Polish competition law cases.

In an order of 13 August 2003, SOKiK saw as irrelevant the fact that the limitation of evidence access was impeding, or indeed eliminating the possibility of a party to comment on the given evidence\textsuperscript{21}. According to SOKiK, the protection of the interests of the parties is realised by the UOKiK President acting in the public interest\textsuperscript{22}. These two statements should be considered as both wrong and impossible to maintain. They are incorrect because they deny the necessity of taking into consideration the right to be heard of the parties to antitrust proceedings when delivering a decision on the limitation of evidence access. They are inaccurate also because they misinterpret the role of the UOKiK President. As an institution, the authority is undeniably responsible for the protection of free competition in the public interest. But the fact that the UOKiK President is acting in the public interest is irrelevant to the parties accused of having breached competition law provisions – the UOKiK President, even if acting in the public interest, cannot substitute an undertaking in its own defence\textsuperscript{23}. When defending itself, the accused entity should posses a maximally broad access to evidence – referring clearly to the evidence upon which the facts proving an infringement are being established. It is not for the competition authority to decide if a given piece of evidence is useful or not for the defence of a particular undertaking\textsuperscript{24}. EU jurisprudence is known to have criticised a situation when a competition authority acts as both the entity notifying the objections as well as the body deciding the case, having at the same time a more detailed knowledge of the case file than the


\textsuperscript{21} Order of SOKiK of 13 August 2003, XVII Amz 17/03. These statement was made by the Court despite mentioning in the same order the principle of the openness of case file.

\textsuperscript{22} Ibidem.


\textsuperscript{24} See T-30/91 Solvay v Commission, para. 83.
defence. This is the reason why the right to be heard cannot be exercised by the UOKiK President instead of the undertaking concerned.

This is not to mean that the need for the protection of business secrets is being denied here but that it should be properly balanced with the right to be heard of other parties. Unfortunately, SOKiK is not seeking such balance. In an order adopted on 29 April 2003, the Court changed an UOKiK decision that was based on the assumption that the restriction of evidence access would exclude the right of the parties to consult documents upon which the authority was likely to base its final decision. So the decision of the UOKiK President was changed by SOKiK to the disadvantage of the right to be heard of the parties to the administrative proceedings.

SOKiK went even further in its order of 21 June 2006. The undertaking that lodged the appeal in this case was of the opinion that the decision of the UOKiK President on the limitation of evidence access had infringed the principle of active participation in administrative proceedings (Article 10 KPA). The company claimed also that this decision has made the defence of not participating in the competition restricting agreement impossible. SOKiK dismissed the appeal. The Court was of the opinion that for an undertaking, in order to duly exercise its right of defence, it is not indispensable to have access to information about the actions of others (the business secrets of whom were being protected) when it comes to the commercial relations with their business partners. Having said that, SOKiK noted that an undertaking’s claim to gain full evidence access can be considered ‘as a one-sided interpretation’ meant to evade that entity’s liability for an antitrust violation. Even if the information at stake was not crucial for the defence of the scrutinised undertaking, a fact that should be proven by UOKiK, the competition authority and the court that exercises juridical control over it, cannot justify the decision on the limitation of evidence access by denying that undertaking the possibility of exercising its right to be heard. With such an approach, the protection of business secrets will always prevail over the right to be heard. It seems that SOKiK is wrong to presume that a disagreement of an undertaking with a decision issued by the UOKiK President on the limitation of evidence access always proves that it wants to uncover the business secrets of others rather than simply exercise its own right to be heard.

The UOKiK President has made some suggestions concerning the correct understanding of the notion ‘to the extent indispensable’ – the concept that

26 Order of SOKiK of 29 April 2003, XVII Amz 34/02, not reported.
27 Order of SOKiK of 21 June 2006, XVII Amz 13/06.
28 See the order of SOKiK of 30 May 2006, XVII Amz 21/06 and the order of the Antimonopoly Court of 30 October 1996, XVII Amz 3/96, LEX No. 56452.
specifies the permissible scope of the restriction of evidence access. It was stressed that to answer the question whether a given limitation is indispensable, it is crucial to assess whether the party has the ability to access most of the evidence collected. SOKiK put it slightly differently when it found that the lack of importance of a given piece of evidence can justify (in itself) the limitation of access to the case file with respect to this particular piece of evidence.

This opinion opened a discussion whether the importance of a given piece of evidence is the premise of the limitations falling under Article 69(1) of the Competition Act. It is of relevance for the problem discussed in this article only when it comes to the conclusion that the limitation of access to evidence cannot refer to such data which is of key importance to the proceedings seeing as it constitutes the only proof of an infringement (and is a business secret or other secret protected by the law). From this perspective, the UOKiK President should, before delivering a decision under Article 69(1), also assess if the evidence the limitation of access to which is being requested (as a business secret or other secret protected by the law) is of such importance that it could be seen as the proof of the infringement of the Competition Act by the undertaking subjected to the limitation.

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29 See the opinion of the UOKiK President referred to in the order of the SOKiK of 29 April 2003, XVII Amz 34/02.
30 Order of SOKiK of 30 May 2006, XVII Amz 21/06; order of the Antimonopoly Court of 6 December 1995, XVII Amz 2/95, not reported.
31 Compare the negative opinion on that [in:] G. Materna, ‘Ograniczenie prawa wgląd u do materiału dowodowego w postępowaniu przed Prezesem UOKiK’ (2008) 4 Przegląd Prawa Handlowego 32-33. It was noted in jurisprudence that information that is not of importance to the proceedings cannot be considered to be evidence at all – order of SOKiK of 19 April 2004, XVII Amz 4/04, not reported; order of SOKiK of 22 June 2006 r., XVII Amz 67/05, not reported. It seems from this perspective, that the use in such a situation of Article 69(1) of the Competition Act would be irrelevant as it refers to the limitation of access to information that is considered to form part of the evidence of a given case – M. Bernatt, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), Ustawa o ochronie konkurencji i konsumentów. Komentarz, Warszawa 2009 (Art. 69, Nb 26).
32 See point III.3. below.
33 For this reason, the opinion of the UOKiK President should be supported that the decision on the limitation of access to evidence cannot be issued if this results in the violation of the Article 74 of the Competition Act, that is, in a situation when the restriction would make it impossible for the undertaking to comment on the evidence upon which the charges in the case are based. Unfortunately, SOKiK did not share this opinion of the UOKiK President - see the order of SOKiK of 29 April 2003, XVII Amz 34/02. Still, SOKiK has in one of its decisions accepted that the business secrets that are protected as a result of a decision under Article 69(1) of the Competition Act, cannot be of big importance to the case - SOKiK order of 10 March 2004, XVII Amz 2/04, not reported.
SOKiK rulings suggest that the right to be heard is not properly balanced under Article 69(1) of the Competition Act with the protection of business secrets. The Court accepts that it is the task of the UOKiK President to establish whether the information, the limitation of access to which is being requested, is actually a business secret or not. SOKiK does not pay enough attention to the fact that the restriction of evidence access can take place only to the extent indispensable.

It is possible that in the name of the protection of business secrets, parties will not have access to information used by the UOKiK President to establish relevant facts of the case concerning the proof of an infringement, unless the authority conducts a proper analysis of whether revealing a given piece of evidence excludes, or disproportionally limits, the right to be heard. Such a situation would violate not only Article 10 and Article 81 KPA, it would also diverge from the approach applied by EU courts.

2. Looking for good examples - practice in the EU

Before taking a decision under Articles 7, 8, 23 and Article 24(2) of Regulation 1/2003, the Commission must according to Article 27 of that act give the scrutinised undertakings the opportunity of being heard on the matters to which objections have been raised. Thus, parties are entitled to have access to the Commission’s case file subject to the legitimate interest of others as far as the protection of their business secrets is concerned.\(^\text{35}\)

At the same time however, the Commission is not allowed to use (to the detriment of an undertaking party to the proceedings) the facts, circumstances or documents which it cannot, in its view, disclose. That is so because a disclosure refusal would adversely affect that entity’s opportunity to effectively communicate its views on the truth or implications of those circumstances, on those documents or on the conclusions drawn from them by the Commission.\(^\text{36}\)

The right of access to the case file should be designed so as to ensure the effective exercise of the right of defence. Thus, the protection of confidential information (understood more broadly than business secrets in Polish antitrust


\(^{35}\) Article 27(2) of Regulation 1/2003.


procedure\(^{38}\) is better balanced with the right to be heard under EU law\(^{39}\). The preamble to Regulation 773/2004 explicitly states that where business secrets, or other confidential information, are necessary to prove an infringement, the Commission should assess whether the need to disclose each individual document is greater than the harm which might result from it\(^{40}\).

Under EU law, the decision on the limitation of access to the case file cannot be directly challenged before the court by the undertaking subjected to such restriction. From this perspective, Polish rules guarantee procedural fairness better than the EU solution seeing as juridical control over administrative proceedings is immediate\(^{41}\). In fact however, judicial control in the EU, even if it is triggered only after the final decision is issued, is cautious when it comes to the search for the proper balance between the protection of business secrets and the right to be heard – it can even result in the annulment of a decision adopted by the Commission.

The failure to communicate a document constitutes a breach of the right of defence (and the right to be heard) if the undertaking concerned shows, first, that the Commission relied on it to support its objections concerning the existence of an infringement\(^{42}\) and that these objections could be proven only by reference to that document\(^{43}\). However, in a case where an exculpatory document has not been communicated, the undertaking concerned must only show that its non-disclosure was able to influence (to its disadvantage) both the course of the proceedings and the decision reached by the Commission – it is sufficient for the undertaking to show that it would have been able to use the exculpatory document in its defence\(^{44}\).

\(^{38}\) For comment on this see point IV.
\(^{40}\) See point 14 of the preamble to the Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ [2004] L 123/18.
\(^{41}\) Polish procedure is more accurate than the so called *AKZO procedure* whereby only the undertaking that claimed the protection of its business secrets, or other confidential information, is entitled to appeal the Commission order in this respect – see J.M. Joshua, ‘Balancing the Public Interest: Confidentiality, Trade Secret and Disclosure of Evidence in EC Competition Procedures’ (1994) 15(2) *European Competition Law Review* 77 and the judgment of 24 June 1986 in case 53/85 *AKZO v Commission* [1986] ECR 1965.
\(^{44}\) T-30/91 *Solvay v Commission*, para. 68; C-51/92 *P Hercules Chemicals v Commission*, para. 81; judgement of the ECJ of 21.12.2002 in case C-238, 244-245, 247, 250, 251-251 and 254/99 *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para. 318; judgment
The fact that the Commission takes into consideration both the need for proper protection of confidential information as well as the right to be heard is well illustrated by the fact that under paragraph 47 of the Commission Notice on the rules for access to the Commission files\(^{45}\), after having obtained access to the file, the party is entitled to submit a reasoned request to the Commission if it requires knowledge of specific non-accessible information for its defence that are contained in the file\(^{46}\). Such a request cannot be general. It has to go into detail with respect to each document the undertaking considers as useful for its defence\(^{47}\).

The Notice considers that the qualification of a piece of information as confidential is not a barrier to its disclosure if such information is necessary to prove an alleged infringement (‘inculpatory document’) or could be necessary to exonerate a party (‘exculpatory document’)\(^{48}\). The Commission is correct to believe that the need to safeguard the rights of defence of the parties, through the provision of the widest possible access to the case file, may outweigh the concern for the protection of confidential information of others\(^{49}\). This can actually happen after an assessments by the Commission of such elements as: (1) the relevance of the information in determining whether or not an infringement has been committed, and its probative value; (2) whether the information is indispensable; (3) the degree of sensitivity involved (to what extent would the disclosure of the information harm the interests of the person or undertaking in question); (4) the preliminary view of the seriousness of the alleged infringement.

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\(^{46}\) If the services of the Directorate-General for Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers – para. 47 of the Commission Notice on the rules for access to the Commission file.

\(^{47}\) T-24/07 ThyssenKrupp Stainless AG v Commission, para. 267.

\(^{48}\) Para. 24 of the Commission Notice on the rules for access to the Commission file.

III. Distinction between business secrets and other confidential information as the solution?

1. Business secrets and other confidential information

Unfortunately, business secrets are not set apart from other confidential information in the Polish legal system. Under Polish law, a business secret is the entrepreneur’s technical, technological, organisational or other information having commercial value, which is not disclosed to the public and with respect to which, the entrepreneur has taken the necessary steps to maintain its confidentiality. Article 69 of the Competition Act protects other secrets but only those that are liable to protection under separate legal provisions. This notion includes, among other things, an official secret (such as state secrets or professional secrets), a bank secret or an insurance secret. Grounds for the restriction of access to evidence contained in the case file are therefore narrow and do not guarantee proper flexibility for the UOKiK President while deciding if a given piece of information can be revealed to the parties for the sake of the right to be heard. There is in particular no clear legal basis in Polish law for the protection of the anonymity of those submitting a written notification to UOKiK concerning a suspicion that competition-restricting practice has been used. The confidentiality of the information sources of the President UOKiK useful when it comes to proving the infringement are in a similar situation. It can be said that, on the one hand, Polish law excessively protects business secret but, on the other hand, it does not guarantee proper protection of other confidential information that cannot be considered to be a business secret or other secret protected by other laws.

There is a clear distinction in EU law between business secrets and other confidential information. A business secret is a piece of information the disclosure of which could result in serious harm to the undertaking concerned including: technical and/or financial information relating to its know-how, methods of cost assessment, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists,
marketing plans, cost and price structure as well as sales strategy\textsuperscript{54}. The category of ‘other confidential information’ includes information other than business secrets, which may be considered as confidential insofar as its disclosure would significantly harm a person or undertaking\textsuperscript{55}. This may apply to information provided by third parties about an undertaking that is able to place significant economic or commercial pressure on its competitors, trading partners, customers or suppliers\textsuperscript{56}. It is also legitimate to restrict the access of an undertaking to certain letters received from its customers since their disclosure might easily expose them to the risk of retaliation\textsuperscript{57}. Therefore, the notion of other confidential information may include information that would enable the parties to the proceedings to identify complainants or other third parties that have a justified wish to remain anonymous\textsuperscript{58}.

It can be observed that data considered to be protected under EU law as ‘other confidential information’ is not protected under Article 69 of the Polish Competition Act and is thus accessible to the parties (it is clearly part of the evidence contained in the case file). This can pose a serious risk not only from the perspective of procedural fairness (when it comes to the protection of interests of those not party to the proceedings) but also from the point of view of the effectiveness of the protection of free competition in Poland.

2. Other confidential information can be revealed, business secrets cannot?

The lack of a distinction between business secrets and other confidential information has significant consequences also for the safeguards of the right to be heard in the proceedings before the UOKiK President.

In proceedings before the Commission, the protection of ‘other confidential information’ is not seen as absolute and thus the need to safeguard the right to be heard may outweigh it\textsuperscript{59}. The threshold for disclosure is much higher

\textsuperscript{54} Para. 18 of the Commission Notice on the rules for access to the Commission file.
\textsuperscript{55} Para. 19 of the Commission Notice on the rules for access to the Commission file.
\textsuperscript{56} Ibidem.
\textsuperscript{58} Para. 19 of the Commission Notice on the rules for access to the Commission file.
for business secrets, although even here it does not go over reasonable limits. Hence, confidentiality could be lifted if a given piece of information, despite being a business secret, would be also decisive for the determination of whether or not an infringement has taken place. The Commission may also decide that even if given data falls in to the business secret category, the fact that it will be revealed will not greatly harm the interests of the undertaking in question. However, business secrets must never be disclosed to third parties. The protection in this respect is absolute.

The lack in Article 69 of the Competition Act of the notion of ‘other confidential information’ complicates the situation of the UOKiK President. Unlike the European Commission, the Polish antitrust authority may not simply classify a given piece of information as not being a business secret but as ‘other confidential information’ (where the harm resulting from its disclosure is smaller) and, in order to safeguard the right to be heard, to decide to disclose it to the parties.

3. Proposed solution

Not having the aforementioned possibility, the UOKiK President should properly apply the concept specifying the permissible scope of the limitation of access to evidence, that is, the notion of ‘to the extent indispensable’.

(1) First, the UOKiK President is supposed to check if the request for confidentiality at all refers to a business secret (or any other secret). (2) If yes, the authority should look for a reconciliatory solution that would make it possible to avoid revealing the business secret, for example, the confidential parts of the documents can be blacked out. (3) If, however, this would exclude or disproportionally limit the right of the parties to be heard, the

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60 For example, as a general rule, the Commission presumes that information pertaining to the parties’ turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential – para. 23 of the Commission Notice on the rules for access to the Commission file. In this respect see T-24/07 ThyssenKrupp Stainless AG v Commission, para. 258.


UOKiK President must consider if the disclosure of a given business secret will seriously harm the economic interest of the undertakings at stake. If not, such information must be disclosed. (4) When such harm is likely to happen, the UOKiK President should examine if it is possible to prove the infringement without the use of the business secret in question. (5) Finally, if that is not possible, the information that falls into the business secret category but constitutes the proof of the infringement must be revealed. Otherwise, a violation of Article 10 KPA would take place which, unless corrected by SOKiK on appeal (under Article 69(3) of the Competition Act), should result in the quashing of the final decision issued by the UOKiK President seeing as such a mistake could not be repaired during the appeal proceedings.

IV. Conclusions

Polish antitrust procedure needs to change in order to properly ensure the right to be heard of the parties to the proceedings before the UOKiK President when business secrets of other undertakings are at stake. Both the UOKiK President and SOKiK should always remember that limiting the access to evidence is permissible only to the extent indispensable. Thus, the limitation cannot extend to information that, even if it is a business secret, constitutes proof of the infringement of competition law. The question whether the limitation of evidence access under Article 69(1) of the Competition Act results in a disproportional restriction, or even exclusion of the right to be heard, must always be assessed before delivering a decision on that matter. Thus, the competition authority should follow the example of the approach used in the proceedings before the Commission, and not limit its analysis to the assessment whether a given piece of information is a business secret or not.

A change to the current solution can also be achieved by the introduction into the content of Article 69(1) of the Competition Act of the right to be heard as a

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63 Similarly, however, as in the UE business secrets can never be disclosed to third parties or to the public at large.
64 Some scholars claim that the essence of the practice restricting competition cannot be considered to be a business secret – C. Banasiński, E. Piontek (eds.), Ustawa o ochronie konkurencji i konsumentów. Komentarz, Warszawa 2009, p. 669.
65 See judgment of the Supreme Court of 19 August 2009, III SK 5/09, not reported, and M. Bernatt, ‘The control of Polish courts over the infringements of procedural rules by the competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 - Marquard Media Polska (No. III SK 5/09)’ (2010) 3(3) YARS strona do uzupełnienia po zakończeniu prac.
66 See point III.3.
premise to be taken into consideration when deciding about the indispensable extent of an access limitation. This is however a proposal of a *de lege ferenda* character. Such amendments could be avoided if the interpretation of Article 69(1) of the Competition Act changes in the suggested way both in the case of the enforcement practice of UOKiK and jurisprudence of SOKiK.

There is however a clear need for the introduction into Article 69 of the protection of confidential information other than business secrets that would cover a broader, more flexibly understood notion of information the disclosure of which would harm the undertaking’s interest to an extent smaller than business secrets. Included in this category should also be the information that needs to be protected to ensure the effectiveness of the protection of free competition (e.g. data relating to the identity of those notifying a suspicion of a competition law violation and information on the sources of the UOKiK President’s evidence).

The introduction of the notion of ‘other confidential information’ would be helpful also when it comes to the search for an appropriate overall balance between the right to be heard and the protection of confidential information. In the case of business secrets, refusal to limit the access to evidence of other parties could take place only exceptionally. In the case of other confidential information, access could be given more often considering their less important nature.

Changes of both interpretation and the content of Polish legal rules should be accompanied by broader reforms. Especially in the organisational framework of the UOKiK President’s office, an independent functionary could be created responsible for the realisation of the right to be heard and to guarantee a high level of protection of business secrets and other confidential information. Moreover, the authority’s intended practice concerning access to its case files and the way it classifies information could be published in a separate set of guidelines67. This would improve legal security for undertakings.

**Literature**


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67 Guidelines describing i.a. the UOKiK President’s leniency policy has already been published. There are no obstacles to continue this practice with regards to other issues connected with the proceedings before the UOKiK President.
Bernatt M., ‘The control of Polish courts over the infringements of procedural rules by the competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 - Marquard Media Polska (No. III SK 5/09)’ (2010) 3(3) YARS.


Commitment Decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives

by

Tomasz Kozieł*

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Abstract

The aim of this paper is to provide an analysis of the commitments procedure under the Polish competition law, including both legal and economic perspective. The outcome of this research is supposed to help in estimation whether novel negotiated instruments may be successfully employed in the field of antitrust enforcement. Hence, the paper first introduces the legal background of the commitments decisions, with focus on the specific features of the procedure. Being a tool of antitrust enforcement, commitment decisions should contribute to its goals. Therefore, the paper identifies such objectives drawing on the economic literature. It is in the light of these criteria that the decision practice of the Polish competition authority, still in the stage of development, is subsequently evaluated. This assessment reveals

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circumstances, under which the competition authority is particularly apt to engage into commitments procedure. It allows also for a conclusion that the application of this negotiated instrument is in principle commensurate with the exigencies following from economic theory. Nevertheless, where necessary, the paper provides suggestions as to the improvement of application of commitment decisions.

Résumé

Le but de cet article est de présenter une analyse de la procédure d’engagements en droit polonais de la concurrence, d’un point de vue juridique et économique. Le résultat de cette recherche permettra d’estimer l’efficacité de ces nouvelles procédures négociées dans le domaine du droit de la concurrence. Ainsi, l’article introduit le cadre juridique de la procédure d’engagements en Pologne, en se focalisant sur les éléments spécifiques d’un tel mécanisme. Instrument de mise en œuvre du droit de la concurrence, la procédure d’engagements devrait contribuer à accomplir les buts de cette politique. Par conséquent, l’article essaie d’identifier de tels objectifs, en s’appuyant sur la littérature économique. La pratique décisionnelle de l’autorité de la concurrence polonaise est par la suite analysée à la lumière de ces critères, tout en gardant à l’esprit qu’elle n’en est qu’à ses prémisses. Cette analyse révèle les circonstances dans lesquelles l’autorité de la concurrence est particulièrement susceptible de mettre en œuvre une procédure d’engagements. Elle nous permet aussi de constater que l’application des procédures négociées en Pologne est, en principe, conforme aux exigences relevant de la théorie économique. Néanmoins, quelques suggestions visant à l’amélioration de la procédure d’engagements sont proposées, au cas où cela soit nécessaire.

Classifications and key words: commitment decision; enforcement of competition law; legal certainty; restorative justice.

I. Preliminary remarks

Optimal antitrust enforcement is just as important in the area of competition policy as correct formulation of legal rules. Legal compliance can be achieved only by the use of enforcement mechanisms that align individual incentives with social objectives through the alleviation of the moral hazard of potential violators. A degree of compliance can be determined by several factors, all of which must be considered within the enforcement process. Most commentators

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agree that antitrust enforcement should above all prevent undertakings from violating competition rules\(^2\). To achieve this, the cost of an infringement need to increase making competition law violations unprofitable. However, deterrence is not in itself sufficient to ensure a high level of law compliance which is also dependent on the clarity of the content of the applicable legal rules. Hence, it is vital that enforcement increases legal certainty especially in the field of competition law that needs to respond swiftly to dynamic market changes\(^3\). Moreover, in cases where an infringement has already occurred, the appropriate enforcement agency needs to decide how to deal with its consequences. Literature notes in this context that finding a workable solutions to the problem at hand and restoring effective competition on a given market is much more important than actually punishing the offender\(^4\). It is in the light of such criteria that the effectiveness of particular antitrust enforcement tools should be assessed.

An infringement decision, often accompanied by a fine, is a legal instrument traditionally employed in the enforcement of behavioural competition law in Poland\(^5\). It establishes a breach of competition law (subject to judicial review) and thus sends a clear message to other market participants as to what behaviour is illegal in Polish antitrust. Moreover, since the amount of the fine reflects the profits gained by the infringer from the violation\(^6\), it implements the deterrence theory\(^7\). ‘Restorative justice’ is achieved mainly by prohibiting


the undertaking in question from the use of the contested practice in the future. Such ban constitutes an integral part of an infringement decision.  

Nonetheless, traditional enforcement of competition law has a major disadvantage – it is rather costly. Many legislators decided therefore to employ various negotiated enforcement instruments that make it possible for antitrust authorities to re-allocate their limited resources and increase their performance efficiency. Two such instruments were introduced into the Polish antitrust procedure: the leniency programme and commitment decisions. It is particularly interesting to see how the latter relates to the objectives of antitrust enforcement and what advantages can it bring for both the undertakings and the authority. This paper will analyse the legal background and principles underpinning commitment decisions under Polish competition law from this very angle. The practical reflection of these principles in the administrative practice of the UOKiK will also be noted. In that respect, comments will be made concerning possible improvements of the effectiveness of the commitments procedure. The purpose of this paper is thus to introduce the readers to the specific features of the Polish commitments procedure and to evaluate the practice of its application.

II. Commitment decisions under Polish law

1. The underlying idea

Commitment decisions are a reflection of the plea bargaining model. It allows litigation parties (for instance a prosecutor and a defendant) to enter into a bargain with the other side of the proceedings. Such a bargain is overall more beneficial for both parties than the estimated outcome of a trial, saving litigation costs and facilitating the arrival at a more socially desirable solution. In consequence, the defendant is handed down a lesser than expected sentence without prejudice however to social welfare. This trade-off between justice and procedural efficiency allows an enforcement agency, such as a competition
authority, to invest the time and resources normally spent on prosecution in the detection of other infringements.

Efficiency considerations concerning antitrust proceedings were also at the heart of the Polish legislator when commitment decisions were introduced into UOKiK’s toolkit in 2004. It was believed that accepting commitments from undertakings may in some cases be a more efficient way to restore effective competition than the imposition of a fine\(^{12}\). On the other hand, undertakings would benefit greatly from the inapplicability of Articles 10, 11 and 106 of the Competition Act, which entitle the UOKiK President to issue an infringement decision and impose a fine of up to 10% of the turnover achieved by the offender in the preceding year. Moreover, since commitments are proposed by the scrutinised undertakings themselves, they can take account of their own interests while formulating potential solutions to an established competition problem\(^{13}\).

2. Legal background

Commitment decisions were introduced into Polish competition law on the day of its EU accession with the entry into force of a modernization package concerning the Competition Act of 2000\(^{14}\). However, it would be incorrect to state that no form of settlement was available in Polish behavioural competition law before that moment. The aforementioned amendment repealed Article 89 of the Competition Act of 2000, which used to allow the UOKiK President to not levy a fine in cases of minor violations if an undertaking admitted to anticompetitive practice. In such cases, an infringement decision was issued prohibiting the exercise of the contested practice without however having to prove its adverse effect on competition. Although this mechanism constituted a form of a ‘settled solution’\(^{15}\), it left the decision on the remedies to UOKiK. The amendment shifted the initiative in that respect to the undertakings

\(^{12}\) Projekt ustawy o zmianie ustawy o ochronie konkurencji i konsumentów oraz o zmianie niektórych innych ustaw [Proposal for an amendment of the competition and consumer protection act and several other acts] of 20 February 2004 (Druk Sejmowy Nr 2561), para III.4 of the explanatory memorandum attached to the proposal.

\(^{13}\) According to Z. Kmieciak, this is the major advantage of applying negotiated instruments in the field of administrative law: Z. Kmieciak, Mediacja i koncyliacja w prawie administracyjnym, Kraków 2004, p. 18 and 23.


themselves following the model of Article 9 Regulation 1/2003. Indeed, even the *travaux préparatoires* admitted that the new procedure was analogous to the commitment decisions used in Community competition law enforcement.

Nevertheless, even if the reform was meant to align Polish competition law with the standards of the modernized EU antitrust rules, introducing a domestic commitment procedure was not necessary in order for Poland to participate in the European Competition Network. Despite this fact, the approach adopted by the Polish legislator should be welcomed because it made it possible to avoid procedural discrepancies in cases where both Polish and EU antitrust rules were applicable. In consequence, it assured similar enforcement possibilities irrespective of whether a case is pending before the Commission or the Polish authority. However, Article 12 of the current Competition Act does not implement the European Modernization Regulation nor does it expressly refer to its wording. As a result, its content and the principles of its interpretation remain completely autonomous. These have been developed in the administrative practice of UOKiK and the jurisprudence of Polish courts. They may thus be different from the way Article 9 Regulation 1/2003 is applied by the European Commission. The implications of these particularities can be well demonstrated on the example of the procedure for the adoption of a commitment decision by the Polish competition authority.

### 3. Procedural aspects

According to Article 12 of the 2007 Competition Act, the UOKiK President can impose an obligation upon an entrepreneur to exercise specified commitments at any time of the proceedings provided a violation of Polish or EU competition rules has been rendered plausible and the company in

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17 Projekt ustawy..., para III.4
18 *Ibidem*, para. I.
20 For instance, the first commitments decision under both Polish and EU competition law provisions prohibiting abuse of dominant position concerned unilateral practices engaged into by the authors’ association ZAiKS. Decision of the UOKiK President of 24 August 2010, DOK-7/2010.
21 This is confirmed by the structure of the explanatory memorandum, which groups new provisions in three separate sections, first of which refers to the necessity to align Polish provisions with the EU competition law and the remaining two concern the improvement of the effectiveness of Polish antitrust law.
question has agreed to take or discontinue certain actions in order to prevent the infringement\textsuperscript{22}. The procedure resembles therefore Article 9 Regulation 1/2003 in that a formal decision must be issued making the commitments binding upon its addressees. A commitment procedure is an ordinary antitrust proceeding under the Competition Act. Formally speaking, the decision does not constitute any form of settlement but rather, an act where the authority avails itself of the state powers vested in it and unilaterally defines obligations or rights of an individual\textsuperscript{23}. It should thus be differentiated from an administrative settlement foreseen by the Polish code of administrative procedure (KPA)\textsuperscript{24} that has been used in domestic antitrust proceedings on several occasions in the past\textsuperscript{25}. What makes commitment decisions a ‘negotiated instrument’ though is the fact that a party to the proceedings may propose the content of the commitments which may, or indeed may not, be accepted by UOKiK.

Despite the ambiguity of the wording of Article 12\textsuperscript{26}, there should be no doubt that the initiative in proposing commitments lies in the hands of undertakings\textsuperscript{27}. This seems to be confirmed by the application practice of Article 12 by UOKiK that awaits a reaction from the scrutinised undertaking to the notification that antitrust proceedings were initiated against it\textsuperscript{28}. In that regard, nothing should prevent the authority from indicating to the investigated company that the case may be solved by committing to refrain from adopting certain actions. However, the voluntary nature of commitments requires that the choice of measures should be left entirely up to the undertaking to avoid too much public influence. Thus, the competition authority can make suggestions as to possible modifications of the commitments offered only after they were submitted, if the initial proposal was unsatisfactory\textsuperscript{29}.

\textsuperscript{22} Article 12(3) of the Competition Act.
\textsuperscript{24} Article 114 and following of the Code of Administrative Procedure of 14 June 1960 (Journal of Laws 1960 No. 30, item 168, as amended).
\textsuperscript{26} This ambiguity and in particular the lack of specific procedural rules was pointed out by A. Gill, M. Swora, ‘Decyzja zobowiązująca…’, p. 125.
Furthermore, only after has an undertaking been officially notified about the fact that antitrust proceedings were initiated against it can commitments be first proposed. This follows inter alia from the requirement that the UOKiK President can accept an offer only if a violation ‘has been rendered plausible’ – a well-established standard of Polish administrative law and jurisprudence. The commitments procedure under Regulation 1/2003 is therefore less specific than the Polish requirement whereby an infringement does not have to be proven with certainty, its existence must nevertheless be seen as probable or credible. One can speak of rendering a violation of competition rules plausible if UOKiK considers it to be obviously more probable than any other alternative solution to the practice in question. Thus, an in-depth analysis of the circumstances of the case is not necessary because the authority’s conviction about the existence of a violation, inferred from the data collected or submitted by third parties, suffices to fulfil this standard. It is argued that initiating an antitrust procedure renders by itself the infringement plausible since the authority would not have proceeded otherwise into the formal stage of investigation. For that reason, the content of a commitment decision does not have to reflect the expected infringement decision. For instance, a relevant market established in a commitment decision may somewhat differ from what would have been established under an adversarial procedure requiring full evidentiary backing. Likewise, the authority may base its opinion in a commitment procedure on information gathered from a small fraction of the parties affected by the practice. However, should there be different elements constituting jointly an infringement of competition law, UOKiK must render the existence of each of them plausible. The adoption of a standard that is well-established in domestic jurisprudence is applauded; it makes it possible to avoid unnecessary controversies about the extent to which an infringement has to be demonstrated. It also facilitates the adoption of a benchmark for the assessment of the adequacy and proportionality of the accepted commitments.

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36 This was one of the main controversies that the EU Court of Justice had to deal with in its recent judgment of 29 June 2010 in the Alrosa case. See case C-441/07 Commission v Alrosa, not yet reported.
4. Consequences of a failure to comply with the commitments

Sanctions for the failure to comply with the content of commitment decisions constitute an important aspect of their enforcement. Unlike the provisions of Regulation 1/2003, the UOKiK President cannot impose in a commitments decision a fine analogous to that normally accompanying an infringement decision. To do so, the authority would have to re-open the proceedings and rule on the subject matter of the case after collecting compelling evidence.

In the Polish commitment procedure, fines can only be imposed for a delay in compliance (up to EUR 10 000 per day) or for the failure to provide UOKiK with information on the compliance with its content (up to EUR 50 000 000). Although the authority cannot immediately react to a breach of binding commitments, the approach adopted here seems to be appropriate since a fine of up to 10% of the scrutinised company’s yearly turnover is imposed only if an infringement has been proven. Moreover, imposing such fine for a breach of commitments, accepted by virtue of the discretionary powers of the authority, would be doubtful from the point of view of legal protection. If a fine is imposed, an undertaking should be allowed to contest fully the fact that an infringement was establishment, whilst that is not the case in the commitments procedure. Furthermore, issuing a formal infringement decision is important with respect to other legal consequences that can be drawn from the violation of antitrust rules such as contract nullity and follow-on claims. In order to persuade the offender to comply with the commitments, the authority can impose the aforementioned periodic penalty payments as well as a fine for the failure to provide the required data. The solution adopted

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37 See Article 23(2)(c) Regulation 1/2003.
38 Article 107 of the Competition Act.
39 Article 106(2)(2) of the Competition Act.
40 For instance, the argument that the Commission may impose a fine for the breach of commitments equal to that which would have been imposed under the adversarial procedure was used by the claimants in Alrosa to support the view that the discretionary powers of the Commission in the commitments procedure should be limited. Supra note 36.
41 In numerous cases commitments are offered immediately after an undertaking is notified about the fact that proceedings were initiated against it (Decisions RWA-27/2007 and DOK-3/2008) even though on occasion, the undertaken comportment is adopted even prior to that (Decision of the UOKiK President of 13 September 2007, RWA-30/2007). The fact of the infringement is thus neither contested nor discussed.
42 Although these can also be established independently by a civil court. See A. Jurkowska-Gomułka, ‘W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję – głos do uchwały SN z 23.0.2008 r. (III CZP 52/08)’ (2010) 5 Europejski Przegląd Sądowy 46 et seq.
in the Polish Competition Act seems both effective and coherent with the system of antitrust enforcement.

III. Commitment decisions and optimal enforcement of competition law

1. Commitments and deterrence

In order to achieve optimal law enforcement, it is necessary to properly employ the available enforcement tools. The instrument used has to respond to the needs of the situation without incurring unnecessary costs to the society as well as the offender. Due to the great variety of infringement types (differing in their gravity, aim and mode of operation), an enforcement agency has to be able to make use of various instruments. This need was addressed by the Polish legislator with the introduction of commitment decisions into Polish antitrust procedure in 2004. Its aim was to better target those forms of violations where the issuance of a formal infringement decision under the adversarial procedure was not necessary. The following part of this article will analyse under what conditions should commitment decisions be adopted and whether this standard is satisfied by UOKiK’s decisional practice. This assessment will be based on the typology of roles that law enforcement, competition law in particular, has to fulfil, mentioned in the introduction to the article.

Optimal deterrence is crucial in the enforcement of competition law in order to preserve vital competition. Serious infringements should be punished with adequate sanctions otherwise there is no credible threat of prosecution, failing in turn to prevent undertakings from further violations (under-deterrence). Fines have to be sufficiently high in comparison to the illegal gains associated with antitrust violations to stop anticompetitive behaviours. On the other hand, the imposition of excessive sanctions on those that have committed minor infringements is also less than optimal. First, over-deterrence may lead to the prevention of not only illegal conduct but also actions that are socially desirable such as innovation. Excessive sanctions might therefore

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43 Explanatory memorandum, supra note 12.
44 This somewhat follows the typology introduced by Wouter Wils in: ‘The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles’ (2008) 31(3) World Competition 335–352.
have a chilling effect on competition. Second, it is necessary to maintain ‘marginal deterrence’ whereby the level of punishment reflects the gravity of the offence. If an equally harsh fine is imposed on a minor infringement and on a hard-core price fixing cartel for instance, then committing the latter is deterred far less effectively than committing the former. It seems therefore that commitment decisions are desirable in cases where no major harm was inflicted on society as a result of the scrutinised restriction.

This interpretation is commensurate with Article 89 of the former Polish Competition Act applicable before the commitments procedure was introduced. On its basis, UOKiK could issue a decision banning further exercise of the contested practice without imposing a fine – that possibility was limited however to cases of minor violations only. In case of most severe infringement adequate deterrence is more important than investigation cost-savings, and ought to be sanctioned by a fine. On the other hand, the cost of an intervention against minor infringements in an adversarial procedure is relatively high compared to associated societal gains, that is, the fine and the degree of compliance achieved. What really matters is to restore competition on a particular market as quickly as possible. Voluntary commitments seem to be an appropriate means of achieving such an objective.

The latter idea underpinned the introduction of the commitment procedure into Polish antitrust procedure. Nevertheless, unlike Regulation 1/2003, the Competition Act does not preclude its application in cases where a fine could be imposed. To the contrary, the fact that an undertaking can cease committing an anticompetitive practice without being fined for its exercise is noted as one of its advantages in the explanatory memorandum to the

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48 See generally I. Forrester, ‘Creating New Rules? Or Closing Easy Cases? Policy Consequences for Public Enforcement of Settlements under Article 9 of Regulation 1/2003’ [in:] C.-D. Ehlermann, M. Marquis (eds.), European Competition Law Annual 2008... p. 637-661. It is also commensurate with Article 89 of the former Competition Act which explicitly foresaw that only minor infringements could be dealt with by a decision prohibiting the exercise of a practice in place of a fine.

49 See subsection 2, above. As a result, it was not suitable to encompass horizontal agreements restricting competition. R. Molski, ‘Programy łagodnego traktowania – panaceum na praktyki kartelowe?’ (2004) 1 Kwartałnik Prawa Publicznego 217.


51 Supra note 12 (Projekt ustawy...).

52 Cf. recital 13 of the Preamble to Regulation 1/2003. Although the enforcement practice of the Commission casts some doubt as to whether it effectively holds to this condition.
amending act\textsuperscript{53}. Literature confirms in this respect that Article 12 of the Competition Act allows the application of the commitments procedure to all kinds of competition restrictions, including hard-core violations\textsuperscript{54}.

Such an approach might lead to under-deterrence if commitments were to be accepted in place of a fine – undertakings might not be sufficiently prevented from violating competition rules. It might also interfere with the fine immunity programme in cartel cases, since entrepreneurs can try to substitute leniency for commitment decisions and thus avoid stigmatization and the risk of follow-on claims. The solution to this problem seems to reside in the discretion to adopt commitment decisions that the legislator vested in the UOKiK President. Since grave competition law restrictions are not excluded from the Polish commitments procedure \textit{a priori}, it will be up to the authority to decide which cases can be solved with the help of this enforcement tool\textsuperscript{55}.

For instance, a commitment was accepted in the past where an undertaking active in the market for construction products has removed from its contracts a minimum resale price clause\textsuperscript{56}, despite the fact that such practice amounts to a hard-core price fixing cartel\textsuperscript{57}. However, the authority justified its decision by reference to the particular circumstances of the case. It was observed that the contested clause obliged retailers to refrain from the sale of the products in question below their wholesale price. Since it is economically unreasonable to offer products with a retail price inferior to their wholesale cost, the authority concluded that the anticompetitive effect of the said agreement was limited and could only concern promotional activities by retailers\textsuperscript{58}. Moreover, the authority stressed that it is normally unwilling to accept commitments in cases of such grave violations suggesting therefore that the aforementioned case was to be seen as an exception rather than a rule to its enforcement practice\textsuperscript{59}. It would be desirable for UOKiK to hold to that statement.

The Polish competition authority was so far consistent in its choices issuing commitments decisions in cases concerning restrictions of access to an essential facility\textsuperscript{60} or unfair contractual conditions\textsuperscript{61} where a rapid remedy was crucial.

\textsuperscript{53} \textit{Supra} note 12 (Projekt ustawy...).
\textsuperscript{56} Decision DOK-3/2008.
\textsuperscript{58} Decision DOK-3/2008, at 24.
\textsuperscript{59} \textit{Ibid}.
\textsuperscript{61} Decision No. 7/2009 (obliging waste-collecting firms to deliver it to a particular site), and Decisions of the UOKiK President of 16 March 2009, RKT-06/2009, of 11 June 2008,
However, a more recent decision relating to an abuse of dominance on the market for television transmission of sporting events deviates slightly from this path. In that case, Polsat TV used the exclusive rights it obtained to transmit the Euro 2008 football championship to tie the sale of television decoders and a special maintenance service. As a result, many of its customers had to sign disadvantageous agreements to the benefit of Polsat. A fine seemed an appropriate measure to punish the firm. The UOKiK found however that it was sufficient for the broadcaster to commit itself cumulatively to refrain from including such conditions into future contracts, to buy back the contested decoders and to return the maintenance costs. It is likely that the authority’s prime concern was here on restorative justice and thus it decided to accept commitments to restore the situation from before the infringement. It will be interesting to see the future application practice of commitment decisions. However, similar cases should be treated by UOKiK with caution for reasons of optimal competition law enforcement.

2. Improving legal certainty

Over-enforcement can on the other hand also result from legal uncertainty. Firms may be reluctant to introduce new products or services (developed through costly R&D) if they have doubts about the assessment of their practices by UOKiK. This is particularly relevant for new types of infringements, such as margin squeeze, and for the most sophisticated forms of antitrust violations. It is thus essential to clarify the law and establish under what conditions will particular market behaviour be regarded as anticompetitive. This is even more true in the wake of the ‘economization’ of competition law both in the EU and Poland with its effects focus. These would have to be clearly identified in order to clarify the content of the prohibition.

The use of commitment decisions by UOKiK should therefore not interfere with legal certainty that must be provided by competition law. Legal certainty can be assured best if, after having collected compelling evidence, the authority

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62 See more on that in the section III.3 below.
issues a formal decision establishing an infringement in cases of complex, novel and sophisticated violations. UOKiK findings are subsequently subject to judicial review contributing further to the clarification of the content of the prohibition\textsuperscript{65}. The same result cannot be achieved by commitment decisions. Their lower standard of proof makes it impossible for courts to review them fully from the perspective of the alleged infringement and its effects on competition. The need for legal certainty in competition law supports thus an argument that the UOKiK President should enjoy wide discretion in accepting commitments allowing the authority to independently formulate its competition policy\textsuperscript{66}.

It seems that UOKiK’s use of the commitments procedure is commensurate with the requirements of legal certainty. The cases picked so far were not posing difficulties in relation to the establishment of an infringement and were not particularly novel. Moreover, the standard of proof in commitment decisions, even though limited, may give some indications as to the content of the prohibition embodied in the Polish Competition Act\textsuperscript{67}. UOKiK goes even further in its concerns about legal certainty in adopting negotiated instruments by stating that:

‘decisions issued by the President of the Office play a two-fold role. Firstly, they constitute a finding of a breach in a particular case, in relation to a given practice

\textsuperscript{65} The appellate court is entitled not only to annul a UOKiK decision but also to substitute it and rule on the matter at hand. M. Sieradzka, ‘Sądowa weryfikacja decyzji i postanowień wydawanych przez Prezesa Urzędu Ochrony Konkurencji i Konsumentów’ (2007) 10 Rejent 90–113.

\textsuperscript{66} See M. Stafaniuk, ‘Decyzje wydawane w oparciu o zobowiązania składane przez przedsiębiorców jako przykład działań organów administracji w prawie antymonopolowym, opartych na idei zastosowania środków alternatywnego rozstrzygania sporów (Zarys Problematyki)’ [in:] J. Olszewski (ed.), Arbitraż i mediacja: Praktyczne aspekty stosowania przepisów. Materiały konferencyjne (Iwonicz Zdrój 18-20.10.2007 r.), Rzeszów 2007, p. 274. In that respect, the proposal of the Working Group of the Polish Competition Law Association, requiring the UOKiK President to respond to the commitments offered within 14 days does not seem to be an appropriate solution. It would, of course, improve the effectiveness of the procedure by putting pressure on the authority and thus incline it to accept commitments more often. However, it might also interfere with independent formulation of the competition policy since the rejection of commitments (which have to be reasoned) may constitute a ground for appeal. Stowarzyszenie Prawa Konkurencji, Stanowisko Grupy Roboczej Stowarzyszenia Prawa Konkurencji w sprawie propozycji zmian przepisów ustawy z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Position of the Working Group of the Competition Law Association on the proposal for an amendment of the provisions of the Act on Competition and Consumer Protection of 16 February 2007], available at: http://www.spk.com.pl/funkcje/pobierz.php?plik=download|2008-10-06|spk_postulaty_grupy_roboczej.pdf.

\textsuperscript{67} Since the infringement has to be rendered plausible, it tells which behaviour is likely to constitute a violation of competition law. There can be, however, no certainty about that. See section II.3 above.
employed by particular undertaking, but simultaneously they are an important information for other market participants with respect to what potential comportment may be seen (or not) as a manifestation of an anticompetitive practice. The decisions of the President of the Office influence thus the process of attitude shaping of market participants, and by doing so fulfilling the public objective indicated by the act 68.

The UOKiK President may have gone a little too far by attaching so much importance to commitment decisions. It is questionable whether market attitudes should in fact be shaped on the basis of negotiated instruments, which are subject to a limited degree of juridical review 69. It has to be borne in mind here that despite the effort undertaken by UOKiK to demonstrate a high probability of an antitrust violation, a decision issued under Article 12 does not lead to the establishment of an infringement. The undertaking concerned merely commits not to adopt certain practice in the future, a fact which – contrary to the opinion of UOKiK70 – should not assure legal certainty for third parties. Furthermore, the UOKiK President admitted in the Polsat decision that ‘the commitment in question should be regarded in a broader sense as an attempt to create positive market behaviours for the transmission of major sporting events’71. This reveals ‘regulatory-like’ ambitions on the part of the competition authority created by the opportunities inherent in the commitment procedure. Competition law may be used to support regulation on the market72; the UOKiK President should resist however the temptation to use commitments as a mean of market regulation 73. Therefore, taking into account the individual and voluntary nature of commitment decisions. In any case, their role should not be exaggerated and go beyond mere information about the remedies adopted in a particular case in order to restore competition on a given market74.

69 It would be difficult for the undertaking in question to contest the adequacy or proportionality of commitments which it proposed itself voluntarily. D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), Ustawa…, p. 751.
70 Ibid.
71 Ibid., p. 40.
74 This conclusion is also supported by the resolution of the Supreme Court of 23 July 2008 (III CZP 52/08, (2009) 2 Monitor Prawny, item 90), where it held that ‘decision foreseen in
3. Restorative justice

Despite a commitment by an undertaking to stop an allegedly anticompetitive practice, its negative effects may persist on the market and impede competition. This is the case, for instance, where business partners are bound by obligations unduly imposed on them by a dominant firm. These negative consequences affect mainly the customers of the offender and their removal is in the best interest of the victims. However, contrary to the finding of an infringement, a commitment decision does not affect contract validity, nor does it constitute a basis for follow-on claims. As a result, accepting commitments might hinder the pursuit of due rights by those harmed by the practice, since an infringement decision could not be invoked in a litigation before a civil court. Should thus UOKiK take into account individual interests of third parties when contemplating the acceptance of commitments? The authority has repeatedly stressed the public nature of Polish competition law which excludes the pursuit of individual interests through its enforcement. Nonetheless, in one of its recent decisions the UOKiK President accepted, among others, a commitment to buy back products that were unlawfully tied to the principal service offered. In another case, the authority required all agreements for water supply containing the contested clauses to be modified with an ex-tunc Article 11a of the act, which does not decide in a definitive way on the violation of the prohibition inferred from Article 8 (1) of the act, since it is based merely on rendering violation of that prohibition plausible.

75 Such additional services and products tied to the sale of rights to display a sporting event (Decision DOK-1/2010), fees not reflecting effectively rendered services (Decision RKT-06/2009) or liabilities towards a dominant undertakings tied to the sale of lumber (Decision RBG-12/2006).


77 In several cases some NCAs and the European Commission took into account the fact that the effects of infringements were mitigated through compensating victims by undertakings responsible for a breach of competition rules. W. Wils, ‘The Relation between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32(1) World Competition 19-21.

78 See for instance judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, where it held inter alia that the objective of the Competition Act is not to protect an individual player on the market, who can avail itself of claims available before a civil court. This situation is contrary to the private enforcement of competition law, which presumes ‘enforcement of competition law for the sake of competition and not merely for the sake of one’s own interests’, W. van Gerven, ‘Crehan and the Way Ahead’ (2006) 17(2) European Business Law Review, at 269. On the protection of public and private interest under Polish competition law see also P. Podrecki, Porozumienia monopolistyczne i ich cywilnoprawne skutki, Kraków 2000, p. 221 et seq., and D. Miąśik, ‘Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law’ (2008) 1(1) YARS 33-58.

effect\textsuperscript{80}. Still, in other decisions, a commitment not to continue a tying practice was found to be satisfactory despite the fact that the liabilities tied to sale of products, bearing no market value, were not assigned back to the dominant undertaking\textsuperscript{81}. Overall, the competition authority should not be overly concerned with corrective justice. The resulting benefits for the victims of an infringement, such as returning the price of unduly tied service, constitute an indirect consequence of an effort to restore effective competition\textsuperscript{82}.

In the absence of a formal infringement decision in an adversarial procedure, civil courts are still empowered to establish a violation of competition law and draw from that fact any necessary consequences\textsuperscript{83}. Moreover, the commitments procedure does not require proof of an infringement taking place but merely the probability of its existence. This should generally exclude the possibility of requiring the company subject to a commitment decision to compensate its alleged victims or to hand over the benefits arising from a void contract. However, such a proposal may indeed increase the chances of an offender to have its commitments accepted and avoid a fine\textsuperscript{84}.

When proposing commitments, an undertaking should thus be primarily concerned with the situation on the affected markets. Its offer should focus on eliminating the remains of the questionable practice. Private interests of individuals affected by the comportment should be left out of the scope of the commitment procedure. In a case where considerable harm has been inflicted to numerous entities, the authority should contemplate an infringement decision in order to discourage the offender, as well as others, from adopting similar practices. The official establishment of an infringement would open the way for private follow-on actions based on that decision, which would be binding on civil courts.

\textsuperscript{80} Decision RKT-06/2009.
\textsuperscript{81} Decision RBG-12/2006.
\textsuperscript{82} This follows from a recent decision of the UOKiK President accepting a commitment to reduce termination period of agreements for copyrights management by ZAiKS (Authors’ Association). The President considered proposed measure to be appropriate to alleviate the deficiency of competition on the market for managing of copyrights. Decision DOK-7/2010.
\textsuperscript{83} Resolution of the Supreme Court, see \textit{supra} note 74. More specifically on the civil law remedies following a decision of the President of the UOKiK see R. Poździk, ‘Glosa do uchwaly SN – Izba Cywilna – z dnia 23 lipca 2008 r. (III CZP 52/08)’ (2009) 7-8 OSP 605 et seq. and E. Rumak, P. Sitarek, ‘Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law’ (2009) 2(2) \textit{YARS} 115.
\textsuperscript{84} Decision DOK-1/2010. It should be assessed in the lights of other objectives referred to in this paper, whether that would be a desirable solution from the viewpoint of optimal antitrust enforcement.
IV. Conclusion

The introduction of a commitments procedure into Polish antitrust law responded to the needs of economic reality. Familiar concepts of national competition law were incorporated into the framework of the European Competition Network. It is remarkable though that the legislator gave such a considerable degree of discretion to the competition authority in determining the conditions of its practical use. In that respect, ‘effectiveness’ is the only explicit criterion for adopting a commitment decision by the UOKiK President85.

However, other above-mentioned factors that follow from the general goals of the Competition Act, as defined in its Article 1, should also be taken into account. Compliance with these aims can be taken into account in the course of appeal proceedings before the court competent in competition matters. In that regard, it is formally feasible for the appellate court to substitute commitments for an infringement decision86, even though the practical possibility of such ruling is limited87. Therefore, it is essential for the UOKiK President to apply the commitments procedure in accordance with these goals rather than focus exclusively on procedural efficiency88. So far, UOKiK’s enforcement practice confirmed that the Polish competition authority understands well the role of commitments. By applying this instrument to minor infringements, the enforcement of domestic competition law benefited from cost-savings (mainly by avoiding appeal proceedings) without prejudice to the deterrence of potential violations89. Moreover, the study of UOKiK decisions shows that the authority uses commitments mainly in cases where they can restore competition more effectively than an infringement decision. It is also aware of the clarifying role of antitrust enforcement. Nevertheless, it should not overestimate the content of commitments decisions as they cannot serve as a benchmark for third party self-assessment. Otherwise, they would have to

85 This follows from the preparatory acts, where improving effectiveness of the antitrust proceeding was main concern. See supra note 12 (Projekt ustawy...).
86 M. Sieradzka, ‘Sądowa weryfikacja...’, p. 106.
89 This is clearly demonstrated by accepting commitments in the price-fixing cartel case, what the UOKiK President justified with little harm inflicted to the society.
stand up to a much higher standard of proof decreasing in turn the efficiency
of the commitments procedure.

What is striking though is the low number of commitment decisions issued
by the UOKiK President in the six years since the procedure was introduced.
Certainly, the authority was initially cautious in using the new instrument
in order to correctly develop its application practice. Commitments were
indeed contemplated in numerous cases. However, where the existence of an
infringement was clear and the acceptance of commitments would not have
facilitated major benefits for the market (e.g. immediate restoration of the
competition), the authority issued infringement decisions instead. Although, its
reluctance to accept commitments is criticized by the industry\textsuperscript{90}, it is essential
to make it possible for the authority to use its full discretion in accepting
commitments and thus to independently formulate its competition policy\textsuperscript{91}. It
is also possible that the UOKiK President wants to avoid any adverse effect of
the commitment procedure on the leniency programme, making sure that the
latter is not substituted by the former. The application practice of the Polish
commitments procedure does not seem to be fully established yet but its past
success should catalyse its developments in the years to come.

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Banasiński C., Piontek E. (eds.), \textit{Ustawa o ochronie konkurencji i konsumentów. Komentarz

99 The Economic Journal.

\textsuperscript{90} In order to incline the UOKiK to accept commitments more regularly the Working
Group of the Polish Competition Law Association tabled a proposal, requiring the President
of the UOKiK to respond to the proposal of commitments within 14 days. Stowarzyszenie
Prawa Konkurencji, Stanowisko Grupy Roboczej Stowarzyszenia Prawa Konkurencji
w sprawie propozycji zmian przepisów ustawy z dnia 16 lutego 2007 r. o ochronie konkurencji
i konsumentów [Position of the Working Group of the Competition Law Association on the
proposal for amendment of provisions of the Act on Competition and Consumer Protection of 16
10-06|spk_postulaty_grupy_roboce.pdf.

\textsuperscript{91} Imposing on the UOKiK an obligation to respond to a proposal of commitments, might
be used as a ground to challenge decision if such obligation was not observed, what would
impede the effectiveness of the procedure and thus should generally be inadmissible. D. Miąsik,


Kmieciak Z., Mediaция и концiliation в праве административном [Mediation and Conciliation in the administrative law], Kraków 2004.


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Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse

by

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Abstract

This paper will analyze the impact of the modernized approach to Article 102 TFEU on the application of the prohibition of dominant position abuse contained in Polish competition law. For that purpose, several questions will be answered. Has the consumer-welfare standard already become, or will it become (in particular under the influence of the effects-based approach), the decisive criteria for the finding of a violation of Article 9 of the Polish Competition Act as well as its past

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equivalents? Will EU’s new approach to the abuse of dominance lead to a re-orientation of the goals pursued by Polish competition law on unilateral conduct? Has Polish enforcement practice attached as much emphasis to the protection of market structures as some EU cases that might have justified the accusation of over-enforcement? Has the recent reform introduced any new requirements, standards or tests in the procedural dimension of the application of the ban on the abuse of dominance and if so, to what an extent will they influence the traditional approach employed by Polish antitrust and judiciary institutions?

In order to answer these questions, relevant Polish legislation and case-law will be analyzed. The article will try to establish the actual scope of the change relating to substantive as well as procedural rules which will (or should) affect the enforcement of Article 9 of the Polish Competition Act under the impact of the new EU approach.

Résumé

Cet article a pour but d’analyser l’impact de l’interprétation modernisée de l’article 102 TFUE sur l’application de l’interdiction de l’abus de position dominante dans la loi polonaise. Dans ce but, nombreuses questions seront adressées. Par exemple, le bien être des consommateurs, est-il déjà, ou sera-t-il dans le future (en particulier, sous l’influence de l’approche fondée sur les effets), le critère décisif pour constater une violation de l’article 9 du Droit de la concurrence polonais, aussi que leurs équivalents?

La législation polonaise et la jurisprudence seront analysées. Cet article tente d’établir l’étendue actuel des changements relatifs aux règles substantives et procédurales, qui affectent (ou devraient affecter) le renforcement de l’article 9 du Droit de la concurrence polonais sous l’influence de la nouvelle approche de l’UE.

Classifications and key words: abuse of a dominant position; effects-based approach; consumer harm; exclusionary conduct; anticompetitive foreclosure; rule of reason; efficiency-defense; over-enforcement; ‘as efficient competitor’ test; standard of proof.

I. Introduction

A new Guidance on exclusionary abuses by dominant undertakings was published by the European Commission on 9 February 2009 in all languages of the EU Member States¹. The Guidance specified the Commission’s modernized approach to the application of the prohibition of dominant position abuse

contained in Article 102 TFEU; particular issues\textsuperscript{2} concerning this reform will be discussed further in this paper.

The principles of the application of the Polish prohibition of dominant position abuse laid down in Article 9 of the Competition Act\textsuperscript{3} cannot remain unaffected by this reform. First, this provision is designed to fulfil a very similar (if not identical, see below) ultimate goal to Article 102 TFEU. Second, there are only a few substantially insignificant differences in the wording of those two legal rules\textsuperscript{4}. Third, what speaks in favour of the interpretation of the Polish prohibition in line with the new Guidance is not only Poland’s membership in the EU but also, potentially even more importantly, the ‘membership’ of the UOKiK President in the European Competition Network. Finally, Article 102 TFEU is directly applicable in all Member States and so the Polish antitrust authority, national courts\textsuperscript{5} and private entities are entitled to apply this provision directly in relation to dominant firms in Poland.

II. ‘Consumer harm’ as the ultimate objective of the modernised approach to the ban on the abuse of dominance: the lack of reorientation?

According to the underlying concept of the reform, the prohibition of the abuse of a dominant position is designed to protect consumers. More


\textsuperscript{3} Act of 16 February 2007 on competition and consumer protection (Journal of Laws 2007 No. 50, item 337, as amended; hereafter, Competition Act).

\textsuperscript{4} T. Skoczny, ‘W sprawie modernizacji stosowania zakazu nadużycia pozycji dominującej’ [in:] C. Banasiński (ed.) \textit{Ochrona konkurencji i konsumentów Polsce i Unii Europejskiej}, Bydgoszcz 2005, p. 107. The Author rightly notes that the prohibitions (emerging from the aforementioned provisions) should not be applied on the basis of different rules and concludes that also the ‘Polish’ ban on the abuse of dominance should be the subject of modernisation.

significantly, consumer harm has become a decisive factor for an intervention by the Commission in unilateral conduct\(^6\) (see below, point III) – it relates to harm of economic nature that takes the form of higher prices, lower quality of goods and the limitation of offer and innovation\(^7\). In this context, the notion of ‘consumers’ is interpreted in economic terms reflected by all market participants operating on the demand-side\(^8\) (i.e. not only final consumers, but also intermediate producers, distributors and other users of the products or services\(^9\)).

The legal instruments (including the ban on the abuse of dominance) contained in all three modern Polish competition laws\(^10\), were aimed at the protection of consumer interests or, at the very least, their protection constituted one of their main goals. Article 1 of the current Competition Act (similarly to the Act of 2000 and the preamble of the Act of 1990) explicitly speaks of the ‘protection of consumer interests’. It is worth noting however, that public protection of consumers was not necessarily commonly attributed to the prohibition of the abuse of dominance\(^11\), in particular after rules on collective consumer interests were added to the Act of 2000 (see Article 24 – 28 of Competition Act). In order to determine whether that ban has indeed been applied as a means of preventing consumer harm, it is thus necessary to analyze Polish jurisprudence and, to a certain extent, also the administrative practice of the UOKiK President. Such an assessment leads to the conclusion that even before the formal endorsement of the recent reform, Polish courts have quite often passed judgments in which consumer harm constituted at least one of the criteria, if not even one of the decisive factors considered.

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\(^6\) See point 5- 6 of the Guidance.

\(^7\) See point 6 of the Guidance.

\(^8\) The notion of consumer is broadly (economically) interpreted also under Polish antitrust rules; see D. Miąsik, T. Skoczny [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 56, 57, 935.

\(^9\) See note No. 15 of te Guidance.


\(^11\) Still, the explicit statement in the very wording of the act that its provisions are aimed at the public protection of the interests of consumers justifies the finding that the Competition Act is already (i.e. without necessity of amending its regulations) ‘formally prepared’ to pursue the ultimate aim of the modernized EU approach.
within the antitrust assessment of unilateral conduct. This fact is confirmed by both older and more recent rulings.

However, other rulings lack the assessment of the impact of the scrutinized conduct on the economic situation of consumers. At the same time, they presented both conclusions: one, that despite the lack of such an analysis did not raise meaningful or substantial objections (because of no false positives or no false negatives) and another that could be seen as, at least, debatable. Finally, it is possible to identify some Polish judgments where the protection of consumer interests was deemed to be of secondary importance, realized

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13 See for example the judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343, where the court required the consideration of the consumer interests (participants of the insurance market) by examining whether, and if so, how they benefited from sending them to car repairers that cooperated with the dominant insurer; judgment of the Antimonopoly Court of 17 June 2002, XVII Ama 98/01, UOKiK Official Journal 2002 No. 3-4, item 173, where the court ordered the consideration (also) of the interests of passengers representing the demand-side of the market and their harm in the form of depriving them from the right to choose a contracting party.
14 See for example judgment of the Court of Competition and Consumer Protection of 29 June 2007, XVII Ama 14/06, UOKiK Official Journal 2007 No. 4, item 45 (imposition of limitations in access to ski-slopes/lifts operated by the dominant firm on those who rented ski equipment from its competitors by requiring them to pay an additional fee); see also judgement of the Supreme Court of 19 October 2006, III SK 15/06, (2007) 21-22 OSNP, item 337 (infringing consumer interests by making it impossible to undertake the activity at stake by practically all potential competitors); judgement of the Supreme Court of 14 January 2009, III SK 24/08, not yet reported (excluding or limiting the possibility of offering more attractive conditions of rendering of liquid rubbish collection services).
16 For example the correct acquittal of the use of uniform prices in the wholesale petrol market (judgment of the Supreme Court of 21 February 2002, I CKN 1041/99, (2002) 9 Wokanda) or rightful acquittal of the refusal to appoint the profession location of lawyer at place, which that lawyer had indicated in his motion (judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 OSNC, item 13).
17 See for example judgment of the Supreme Court of 19 August 2009, III SK 5/09 (not yet reported) where selective above-cost price cutting in the market of sport newspapers has been found to be anticompetitive (risk of false positive). Fortunately that risk was here only theoretical, as the Supreme Court quashed the condemning ruling of the Court of Appeals on other grounds; see K. Kohutek, ‘Shall selective, above-cost price cutting in the newspaper market be qualified as anticompetitive exclusion? Case comment to the judgement of the Supreme Court of 19 August 2009 - Marquard Media Polska (Ref. No. III SK 5/09)’ (2010) 3(3) strona (do wstawienia na końcu prac).
merely ‘by the way’ of the protection of the main aim of the Competition Act – ‘an atmosphere in which economic activity is conducted’\(^{18}\).

The protection of consumers from economic harm was thus one of the main goals (sometimes even the ultimate aim) realized by the Polish prohibition of the abuse of dominance. This realization is confirmed by doctrine which, while characterized by a certain ‘chaos’ in relation to the identification of the goals of Polish competition law, has nevertheless reached the conclusion that consumer-welfare is to be treated as its ultimate aim\(^{19}\). The implementation of the paradigms of the EU reform is unlikely therefore to lead to a functional re-orientation of the enforcement of Article 9 of the Competition Act as far as the determination of the goals of the Polish ban is concerned. Indeed, the Supreme Court stressed nearly a decade ago, during an investigation of a potential breach of that prohibition, that the Antimonopoly Act is not aimed at the protection of an individual undertaking but rather, that it protects competition as an institutional phenomenon\(^{20}\). Such statement\(^{21}\) is fully in line with the Commission’s declaration concerning its new enforcement priorities for Article 102 TFEU in relation to exclusionary abuses. The Commission found that ‘what really matters is protecting an effective competitive process and not simply protecting competitors’\(^{22}\). The spirit of recent UOKiK decisions is based on a similar approach\(^{23}\).

Aside from some recent rulings\(^{24}\), it would be difficult to find any Polish judgments that would resemble some of the well-known but controversial rulings based on the former Article 82 TEC, which have raised criticism because of their protectionism of competitors rather than the process of

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20 Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 OSNC, item 13 where the court found that since the scrutinised practice of the dominant firm concerns an individual interest of the undertaking (here: a lawyer), than the provisions of the Antimonopoly Act are not applicable. Individual rights can be protected before civil or administrative courts.
21 The courts and the UOKiK President have subsequently often refered to the quoted statements of the Supreme Court as an appopriate interpretation of the aims of the Antimonopoly Act and the values protected by its rules.
22 See point 6 of the Guidance.
23 See decision of the UOKiK President of 24 August 2009, RBG-9/2009 stating that the rules laid down in the Antimonopoly Act (including the ban on abuse) are aimed at the protection of the mechanism of competition safeguarding the highest possible level of consumer welfare.
24 See in particular the judgment of the Supreme Court of 19 August 2009, III SK 5/09, not yet reported; see K. Kohutek, ‘Shall selective…’ strona do wstawienia na końcu prac.
competition\textsuperscript{25}. Unlike EU law however, Polish antitrust was never concerned with the so-called ‘integration’ goal realized in Europe primarily by the elimination of trade barriers between Member States. The pursuance of this objective, including the ‘active’ enforcement of the abuse prohibition, has contributed greatly to the creation of a very structure/form-based approach to its application\textsuperscript{26} facilitating an elevation of the ‘integration’ aim over that of ‘competition’. In light of the recent reform, the former has already given way, or at least will do so in the near future, to the fundamental aim of community competition rules\textsuperscript{27}, that is, enhancing consumer welfare.

III. General approach to exclusionary conduct: between the ‘old’ and ‘new’ definition

The protection of consumers is thus meant to be a major aim of the modernized approach to Article 102 TFEU. The ‘essence’ of that reform manifests itself in establishing the ‘consumer harm’ criteria as a direct pre-requisite of an intervention by the Commission against unilateral conduct (see, below). The prevention of consumer harm has been the ultimate, general aim of the ban on the abuse of dominance also under the traditional ‘forms-based’ approach. It finds its support in a famous statement of the Court of Justice in \textit{Continental Can}\textsuperscript{28}, the first judgment examining a suspected infringement of that prohibition. The court stated there that this provision (originally Article 86) is not only aimed at practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on effective competition\textsuperscript{29}.

It seems legitimate to conclude therefore that the key change introduced by the recent reform is not reflected in the establishment of new paradigms for Article 102 TFEU\textsuperscript{30}. Instead, it manifests itself primarily in the modification of the methods of examining whether a dominant firm’s conduct is harmful

\textsuperscript{25} See in particular: T-203/01: \textit{Michelin v Commission}, ECR [2003] II-5917; C-95/04 P \textit{British Airways plc. v Commission} ECR [2007] I-2331; C-202/07 \textit{France Télécom S.A. v Commission} (not yet reported); see also E. Fox, ‘We Protect Competition, You Protect Competitors’ (2003) 26(2) \textit{World Competition} 149–165.

\textsuperscript{26} And thus to increase, at least potentially, the number of decisions that could constitute false positives.

\textsuperscript{27} A fact noticed by Polish doctrine; see T. Skoczny, ‘W sprawie modernizacji...’, p. 112–114.


\textsuperscript{29} Para. 26 of the \textit{Continental Can}.

\textsuperscript{30} Literature contains opposite findings also; see for example T. Eilmansberger, ‘Neue Paradigmen im Europäischen Recht?’ (2009) 4 \textit{Zeitschrift für Wettbewerbsrecht} 438.
to consumers and thus prohibited whereby the term ‘methods’ is understood as procedural measures as well as modifications in substantial soft-law. The latter refers in particular to changes in the general concept of exclusionary abuse. In light of the Guidance, exclusionary abuse should be associated with anticompetitive foreclosure leading to consumer harm. The reformed approach to exclusionary conduct has thus a narrower scope than the ‘definition’ developed in *Continental Can* and *Hoffman La-Roche*. A negative impact on the structure of competition and a presumed only harm to consumers (‘indirect’) are no longer sufficient. Under the new effects-based approach, not only is it necessary to demonstrate harm to the structure of competition (foreclosure) but also that such foreclosure is the cause of consumer harm.

The analysis of relevant jurisprudence (see, point II) clearly suggests that the Polish prohibition of the abuse of dominance is already being used as a means of protection against (at least) indirect consumer harm. The key question here is whether the ban on exclusionary abuse has also in Poland already become (or will do so in the future) a legislative instrument designed to prevent only direct (actual or likely) consumer harm or, in other words, will consumer harm act as a direct operational criteria of differentiating anticompetitive practices from legal conduct of dominant entities.

It would be difficult to answer that question in the affirmative and even more so, to deliver an unambiguously positive answer. First, even though Polish jurisprudence has quite often treated consumer interests as an important factor in antitrust assessments of unilateral conduct, consumer harm itself was usually ‘only’ inferred. Moreover, general substantial framework of exclusionary conduct constructed in recent case law does not relate to...

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31 Exploitative practices of dominant companies have not been encompassed by the reform (see, point V).

32 According to the Commission (point 19 of the Guidance) ‘anticompetitive foreclosure describes a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of a dominant undertaking whereby the latter is likely to be in a position to profitably increase prices to the detriment of consumers’; whereby the notion of ‘price increase’ is also used for other (than price) ways in which the parameters of competition (such as output, innovation, the variety or quality of goods/services) can be influenced (point 11 of the Guidance).

33 See also e.g. N. Petit, ‘From Formalism...’, p. 486.

34 What relatively often meant in EU case-law the presumed/alleged harm only or simply harm that is just potentially possible (see in particular cases: *Michelin II*, *British Airways*, *Wanadoo*).

35 And thus becoming similar to ‘indirect consumer harm’ within the meaning of the *Continental Can*.

36 The Polish Competition Act, similarly to ‘hard’ Community law, does not provide for the definition of abuse determining only the notion of a dominant position (see Article 4 point 10 of the Competition Act).
consumer harm. In the opinion of the Supreme Court: ‘anticompetitive abuse of a dominant position constitutes such a conduct of a dominant undertaking that while being objectively contrary to normal competition, may influence the structure developed by community courts’ (see *Hoffmann La-Roche* case\(^{37}\)). That concept was strongly influenced by ordo-liberal thoughts, based on the so-called ‘formal/structured-based approach’ to the abuse of dominance. It over relies on such values and goals as: striving for the integrity of the common market, economic freedom and fairness\(^{38}\). Many of those postulates have been revised under the effects-based approach, a fact reflected at least to some extend by the new Guidance. The Polish concept of exclusionary conduct, even though presenting some intellectual progress in comparison to the *Hoffman La-Roche* formula (see below), is neither close to the wording nor even to the essence of anticompetitive foreclosure (within the meaning presented by the Commission). Its content makes no reference to consumer harm, it also ignores the fact that the basic intervention condition in exclusionary conduct can give raise to the risk of condemning practices that in fact do not/are not likely to harm consumers, being harmful only to the competitor’s of the dominant firm at most\(^{39}\) (risk of false positives). Downplaying the consumer-harm-condition can be all the more meaningful considering that the Supreme Court created that concept in a judgment passed more than half a year after the EU reform\(^{40}\). As far as the scope of the general approach to exclusionary conduct is concerned, it can be assumed therefore that Polish judiciary has not yet fully accepted its substantial, modernized framework. Taking into account

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\(^{37}\) 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461; see para. 91 of that judgment where the Court ruled that: ‘the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’.


\(^{39}\) What also occurred in that case (see judgment of the Supreme Court of 19 August 2009, III SK 5/09). It can be inferred from its content that ‘harming a competitor’ of the defendant constituted in fact the main criterion of considering his price-based conduct as anticompetitive (see also K. Kohutek, ‘Shall selective...’ nr strony do wstawienia).

\(^{40}\) The Guidance was issued in December 2008 (in English); its translations were published on 9 February 2009.
the non-binding character of the Guidance, this in itself does not constitute a violation of EU law. The approach of the Supreme Court proves that it has taken a reserved stance towards EU trends and remained, at least to some extent, ‘loyal’ to more traditional concepts (shaped by community courts and not by the Commission). For the time being however, it would be unjustified to conclude on the basis of a single judgment only that the general concept of exclusionary conduct has already been fully developed and commonly accepted in Poland. Such a finding is strongly dependant on the ‘will’ and ‘frequency’ of recalling that concept in future judgments and decisions of the UOKiK President.

IV. Procedural requirements and mechanisms under the ‘effects-based’ approach

1. Tendency to increase the standard of proof

It is likely that the most ‘practically appreciable’ change caused by the EU reform will be reflected by an increase of procedural requirements for demonstrating whether a dominant firm’s conduct is anticompetitive. The Commission, national authorities and any others claiming that a violation of the ban on abusive conduct took place will have to prove not just an inferred

41 ‘Formalised’ primarily by the executive authority of the Commission in the form of appropriate soft law documents.
42 The presented concept departs somewhat from Hoffman La Roche. For example, it rightfully does not speak of weakening of competition (allegedly caused by the mere fact of the very presence of the dominant undertaking on the given market). There is no direct relation between market concentration and the restriction of competition on that market; see also W. Kolasky, ‘What is competition? A comparison of U.S. and European perspectives’ (2004) Spring-Summer The Antitrust Bulletin 32, 33.
43 The Commission itself explicitly declares that the Guidance is not intended to constitute a legal statement and is without prejudice to the interpretation of Article 82 by the ECJ or CFI (point 2 of the Guidance).
44 The judgment of 19 August 2009, III SK 5/09, contains however the first as extensive declaration on the Supreme Court’s general approach to exclusionary conduct.
45 However in one of its latest rulings, the Supreme Court referred to the presented judgment (see footnote above) and especially to the ‘disproportionality condition’, i.e. an element of the general concept of exclusionary abuse (developed in the latter); see judgment of the Supreme Court of 18 February 2010, SK 28/09 (not yet reported) where the reduction of prices (for international calls) has not been qualified as disproportionate (on the market affected by the conduct of a dominant undertaking).
46 See also N. Petit, ‘From Formalism...’, p. 497.
but an actual\textsuperscript{47} or likely\textsuperscript{48} consumer harm – it will thus not be sufficient to demonstrate an indirect\textsuperscript{49} or potentially possible harm only. So far, Polish abuse cases did not normally include a detailed assessment of the influence of the conduct on the economic situation of consumers\textsuperscript{50} (indicating\textsuperscript{51} that the practice under scrutiny actually harmed or will likely harm consumers). Establishing a violation of the said prohibition was limited to the evaluation of the legal conditions of a given practice (usually listed in the Competition Act\textsuperscript{52}), without analyzing its market effects (a fact noted by doctrine\textsuperscript{53}).

It appears that the need to meet an increased standards of proof will, or at least should constitute a significant change in the enforcement of Article 9 of the Polish Competition Act. The fact should be stressed however that at least in some Polish cases both the likelihood and the form of consumer harm have been reliably inferred from ‘mere life experience’\textsuperscript{54} (i.e. without reference to a complex economic assessment or even any at all). With respect to other cases, and in particular ‘complicated’ ones, the assumption of such a presumed harm (or lack thereof) would be doubtful under the reformed methodology concerning the establishment of abuse. In such cases, proving or disproving consumer harm will often require the conduct of an analysis of the actual and future (long-term) market conditions on the scrutinized markets, including some hypothetical evaluations\textsuperscript{55}.

\textsuperscript{47} See points 21, 37, 52 of the Guidance.

\textsuperscript{48} See points 20-22, 30, 31, 36, 50, 52, 63, 70, 71 of the Guidance.

\textsuperscript{49} I.e. the harm, inferred from the infringement of the market structure (competitors’ harm).

\textsuperscript{50} Leading to the creation of a coherent and reliable theory of consumer harm; see P. Lowe, ‘The Design of Competition Policy Institutions for the 21th Century – The Experience of the European Commission and DG Competition’ (2008) 3 Competition Policy Newsletter.

\textsuperscript{51} On the basis of particular evidence (like: higher prices, limited output or choice, etc.).

\textsuperscript{52} The list of statutory abuses is longer in the Polish Competition Act than in Article 102 TFEU, including seven (however also only exemplary) forms of conduct that may constitute an abuse of dominance.


\textsuperscript{54} See e.g. decision of the UOKiK President of 24 August 2009, RBG-9/2009. UOKiK Official Journal 2009 No. 4, item 31 where a violation of Article 9 of Competition Act was found by reference to ‘mere life experience’. The President indicated that the market entry of the dominant firm’s competitor would without a doubt lead to measurable benefits for customers (in particular in the form of cost reductions).

\textsuperscript{55} I.e. establishing the likely way in which the relevant market will development and in particular whether consumers would be better or worse off in the absence of the conduct in question (so called ‘an appropriate counterfactual’; see point 21 of the Guidance). Some elements of ‘counterfactual methodology’ can be found in an ‘older’ Polish rulings; see judgment of the Antimonopoly Court of 15 March 1995, XVII Amr 66/94 (1996) 3 Wokanda where the court indicated that the proof that monopolistic practices satisfy the consumers’ needs better
Nonetheless, some recent judgments of the Supreme Court have placed greater emphasis on the performance of a more detailed market assessment in order to deliver economically reliable grounds speaking for, or against, the occurrence of consumer harm caused by the conduct under consideration. The court ruled in one of its judgments that the mere limitation of another company’s freedom to act (usually concerning the competitor of the dominant entity) is not sufficient to establish a violation of Article 9 of the Competition Act; such limitation must be capable of having actual or likely (but logically explained) impact on the level of competition on the market. Proof that the imposition of a contractual clause has raised the costs of the contracting parties of a dominant undertaking (compared to their costs borne in the absence of such clause) has also been recognized by the Court as a necessary condition to qualify such clause as anticompetitive. In a subsequent case, the Supreme Court reversed a ruling of the Court of Appeals due to, among other things, the inability to demonstrate an allegedly negative impact of the dominant undertaking’s conduct on the economic conditions of a given market and thus also (i.a.) on prices of services rendered on that market. Finally, the Supreme Court has treated a decision of the UOKiK President as defective because it did not present the operational conditions of the Polish gas market in the relevant period of time (a crucial factor for the evaluation of the effects on competition and consequently also consumers of the practices of market participants). The aforementioned judgments suggest that Polish jurisprudence is considering following the trend to increase the standard of proof required to establish a breach of the prohibition of dominant position abuse.

One of the objectives of the reformed approach to the application of Article 102 TFUE is increasing the transparency and predictability of its enforcement.

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57 Judgment of the Supreme Court of 3 March 2010, III SK 37/09 (not yet reported), where the court explicitly stated that the UOKiK President, obliged to demonstrate a violation of competition rules, has not met the required standard of proof.
59 Judgment of the Supreme Court of 15 July 2009, III SK 34/08 (not yet reported).
60 Both repealing the verdicts of the Court of Appeals and sharing (at least partially) the arguments put forward by the defendant.
61 Literature has treated the first of the judgment of 19 February 2009, III SK 31/08 as an example of the use of the economic approach by Polish judiciary, i.e. concentrating the assessment on the effects of the conduct in question; T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąśik (eds.), Ustawa..., p. 614.
The fulfilment of this goal is better to be seen in the procedural dimension as well. It is because of creating legal instruments, tests, presumptions and defences which are designed to facilitate self assessment by dominant firms (ex ante) as well as assessment by those charging them with a violation of competition law to construct the presumption of the abuse. It pertains especially to solutions such as: dominance screen, the lack of per se abuses, ‘as efficient’ competitor test or efficiency defence.

2. The lack of per se abuse?

Under the new approach to Article 102 TFEU there shall be no per se abuses (the correct standpoint in particular in the dimension of substantial law). In other words, no practices will be condemned solely on the basis of their form or intrinsic features. As opposed to hard-core cartels, unilateral practices quite frequently are of ‘dual nature’ – capable of having simultaneously anti- and pro-competitive effects.

Polish jurisprudence has generally not applied a formula of per se illegality to any specific forms of unilateral conduct, a fact not disproved by the realization that abuse charges were often evaluated by the examination of the fulfilment of statutory conditions of a given ‘named’ example of abuse (see above). Indeed, judgments can be identified where the courts ruled explicitly that some forms of conduct (potentially exclusionary or discriminatory) are not in themselves anti-competitive (e.g.: exclusive dealing, non-linear pricing for the rent of premises).

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63 The Commission reserved the right not to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm and thus is likely to be abusive (anticompetitive). Such ‘simplified methodology’ of finding abuse (or at least of adopting of the presumption of abuse) shall be limited to such conduct only that apparently can solely raise obstacles to competition and create no efficiencies (see point 22 of the Guidance); so called ‘opt-out clause’.
64 The majority of those cases pertained to exploitative practices (see Article 9 (2) point 1 and 6 of Competition Act) which do not usually have exclusionary/anticompetitive effects; also those practices shall be ‘formally’ classified as anticompetitive; see K. Kohutek, ‘Naruszenie interesu publicznego a naruszenie konkurencji – rozważania na tle praktyk rynkowych dominanntów’ 2010 (7) Państwo i Prawo.
66 Judgment of the Antimonopoly Court of 13 March 2002, XVII Ama 23/01, Lex 56377.
applying regressive rents for the lease of land or standings on the local fair\textsuperscript{67}, network access refusal\textsuperscript{68}, price discrimination\textsuperscript{69}).

3. ‘As efficient competitor’ test: conceptually already applied

One of the key rules associated with the effects-based approach assumes that in principle only competitors that are at least as efficient as dominant firms deserve (‘indirect’\textsuperscript{70}) antitrust protection\textsuperscript{71}. The so called ‘as efficient competitor’ test is an instrument designed to facilitate the legal qualification of a dominant firm’s price-based exclusionary conduct.

Even before the formal introduction of the EU reform, some Polish judgments already referred at least to the very concept underlying this standard. In one of such verdicts, the Supreme Court stressed the competitive advantage enjoyed by the dominant undertaking due to earlier economic expansion and concluded that the ineffectiveness of its competitors was caused by that very advantage\textsuperscript{72}. In other cases, inefficient competitors did not gain antitrust protection\textsuperscript{73}.

The approach adopted in these judgments was conceptually based on the assumptions underlying the ‘as efficient competitor’ standard. They did not however apply the methodology of that test which requires the comparison

\textsuperscript{67} Judgment of the Antimonopoly Court of 21 January 1998, XVII Ama 59/97, Lex 56167.

\textsuperscript{68} Judgment of the Supreme Court of 15 July, 2009 III SK 34/08 (not yet reported), where the court found as incorrect the treatment as abusive of each refusal of the rendering of transmission services of imported gas (that took place before 1 May 2004).

\textsuperscript{69} Judgement of the Supreme Court of 19 August 2009, III SK 5/09 (not yet reported), in which the court indicated that price-differentiating is \textit{per se} not anticompetitive even when carried out by a dominant undertaking.

\textsuperscript{70} Under the reform, the prohibition is not ‘in itself’ designed to protect competitors of dominant undertakings (see point 5 and 6 of the Guidance). The ultimate goal of its enforcement is to prevent consumer harm whereby its pursuance can ‘by the way/indirectly’ also protect some categories of competitors of dominant companies.

\textsuperscript{71} See point 23 of the Guidance.


\textsuperscript{73} See for example judgment of the Supreme Court of 28 January 2002, I CKN 112/99, (2002) 4 \textit{Biuletyn Sądowy} where the court associated competition with an instrument of improving efficiencies pointing out that the elimination of ineffective undertaking constitutes the essence of (market) rivalry; see also Judgment of the Antimonopoly Court of 17 June 2002, XVII Ama 98/01, UOKiK Official Journal 2002 No, 3-4, item 173, where the court indicated that the essence of competition equals a situation where those who as the result of market rivalry lost their contracting parties, will be forced out of the market, frequently experiencing financial losses.
of prices of goods/services offered by the dominant entity with the costs of their production74 (whereby, as a matter of principle75, a conduct shall not be condemned if the prices are above a certain level of costs76). However, some recent decisions of the UOKiK President concerning price-based practices of a dominant undertaking77 already include a price-cost analysis78 based on appropriate evidence79. Reference to the price-cost methodology has also been made in the latest judgments of the Supreme Court which stated that as long as price-cutting does not result in a reduction of prices below the costs incurred by the defendant, than such practice cannot be seen as anticompetitive80.

4. Efficiency defence: the application of the rule of reason to the abuse of dominance

The Commission has explicitly permitted the invocation of the objective justification defence or efficiency defence by dominant firms under the reformed approach to Article 102 TFEU 81. It is the ‘efficiency-institution’ that matters most in the light of the basic assumptions underlying the reform. A dominant entity is entitled to rebut the presumption of anticompetitive foreclosure by demonstrating that in the affected markets the likely efficiencies brought about by its conduct outweigh any likely negative effects on competition and consumer welfare82.

Polish antitrust provisions (in line with Article 102 TFEU) do not stipulate any formal exceptions (‘exemptions’) from the prohibition of abuse. Still, some both recent and past judgments can be identified where the practices of

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74 Point 25 of the Guidance.
75 In certain circumstances the Commission has however reserved the possibility of interfering in the pricing policy of dominant companies also where a less efficient competitor exerts competitive pressure (see point 24 Guidance).
76 See points 26 – 27 of the Guidance.
77 Predatory pricing in particular.
78 Probably under the influence of the reform and its methodology of price-based exclusionary conduct evaluation.
79 See e.g. decision of the UOKiK President of 26 August 2009, RBG-411-10/06/BD; decision of the UOKiK President of 30 April 2009, RLU-411-02/06/MW, decision of the UOKiK President of 31 March 2009, RKR-4/2009.
80 Judgment of the Supreme Court of 18 February 2010, III SK 28/09 (not yet reported). The Supreme Court ruled however in an earlier judgment that prices can be treated as unfair also when they are set above costs; see judgment of the Supreme Court of 19 August 2009, III SK 5/09 (not yet reported).
81 See points 28-30 of the Guidance.
82 See point 30 of the Guidance where the Commission determined the conditions of the use of the efficiency-defense; they are similar to the pre-requisites laid down in Article 101(3) TFUE.
dominant firm that ‘looked abusive’ *prima facie* were not condemned because of circumstances constituting their objective justification (*sensu largo*). Moreover, the first modern Polish Antimonopoly Act of 1990 contained an explicit legal basis to ‘legalize’ the conduct of a dominant undertaking that would otherwise be seen as a monopolistic practice (Article 6 of the Act of 199083). This provision became the basis for the establishment of the rule of reason84 in Polish antitrust. Among market practices of dominant companies that have escaped condemnation are: the conclusion of agreements with specific car repairers only85; rendering an exclusive right to sell or buy goods on a specified territory86; collecting fees for telecoms services that were not included in the price list and were subsequently counted among telephone fees87.

The formal framework established in the Act of 1990 has thus, paradoxically, corresponded better to the new EU standards than the provisions contained in later Polish legislation. Article 6 of the Act of 1990 effectively provided a legal basis for an ‘exemption’ from the ban on the abuse of dominance in cases where such an exemption was economically justified88. The court had rightly stressed in that context that ‘the indispensability of the monopolistic practice’ (within the meaning of that provision) shall be examined not only from the perspective of certain facts but also from the point of view of economic insights89.

Subsequent legislation did not contain an ‘equivalent’ rule. Its absence should explain the lack of cases in the last decade where the practices of a dominant firm

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83 The wording of that provision has been cited in footnote no. 89.
85 Judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343. In this judgment the court ruled that the Antimonopoly Office should have examined whether likely benefits resulting from the practice (*prima facie* abusive) outweigh the expected restrictions of competition.
86 Judgment of the Antimonopoly Court of 8 January 1997, XVII Amr 65/96, (1998) 1 Wokanda, where it was said that the scrutinized practices can be legalized (on the basis of Article 6 of the Act), if they (i.a.) safeguard proper benefits to consumers.
87 Judgment of the Antimonopoly Court of 25 January 1995, XVII Amr 51/94, (1995) 12 Wokanda. The examined practice had not been qualified as abusive because it contributed to development of national telecoms which in turn helps satisfy the social needs of the society in a more efficient way.
88 That provision provided, that the abuse of dominance prohibition shall not apply, when the practices of the dominant undertaking were technically or economically indispensable for conducting an economic activity and did not lead to a significant restriction of competition. The burden of demonstrating such circumstances lies with the person who invoked them. It is thus not only the concept but also the procedure and the conditions that are similar to those established by the Commission in points 28-30 of the recent Guidance.
that had some anticompetitive effects were not qualified as abusive on the basis of a ‘pure’ efficiency defence or, in other words, because of the use of the rule of reason under Article 9 of the Competition Act. Such a legislative environment does not of course hinder, or indeed eliminate, the permissibility of the use of an efficiency defence also under current provisions. The conditions sets out in the recent Guidance could serve here as a point of reference for the UOKiK President, Polish courts and dominant undertakings. Existing case-law (see above) and the interpretation of the pre-requisites of Article 6 of the Act of 1990 could also be helpful, at least to some extent, to the implementation of the efficiency defence under the effects-based approach associated with the application of the prohibition laid down in Article 9 of the current Competition Act.

V. Exploitative practices: of no antitrust concern under the new approach?

The recent reform is relevant to only one category of unilateral conduct – exclusionary practices. The Commission stressed that the number of future interventions against such conduct will decrease significantly (‘last resort intervention’). However, exploitative practices (primarily the imposition of excessive prices or other onerous contractual conditions) constituted the subject matter of the majority of Polish abuse cases due to the specific structure of many Polish markets (most often local) affected by the conduct of dominant undertakings. In many cases, dominant undertakings were natural/network or legal monopolies, which used to be the case in relation to territorial self-government units or other entities that by order of those units organized or rendered.

90 The most frequently investigated by the Commission type of unilateral practices.
91 See point 7 Guidance where the Commission declares that it will intervene rather exceptionally in such cases, i.e. in particular where the protection of consumers and the proper functioning of the internal market could be otherwise not adequately ensured. The Commissioner for Competition Policy N. Kroes noted also that ‘fairness played a prominent role in the enforcement of Section 2 of the Sherman Act in a way that is no longer the case’, concluded that a similar development could take place in Europe; N. Kroes, ‘Preliminary Thoughts on Policy Review of Article 82’, speech delivered at the Fordham Corporate Law Institute, New York, 23rd September 2005 http://ec.europa.eu/competition/speeches/index_2005.html.
92 It concerns mainly the period of time between 1990-2005.
93 A significant part of the cases concerning exploitative abuses referred just to undertakings of such category.
94 Under the Competition Act, the status of ‘an undertaking’ is attributed also to those organising or rendering public utility services which are not business activity (see Article 4 point 1a of the Competition Act); see also G. Materna, Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji, Warszawa 2009, p. 90-103.
public utility services\textsuperscript{95}. Still, some ideas underlying the reform are already reflected\textsuperscript{96} in a number of recent Polish judgments concerning the interpretation of the provisions on exploitative practices.

A reduction in interventions directed at exploitative practices\textsuperscript{97} is to be expected in the future also in relation to the activities of the UOKiK President. Not only is such trend already practically underway\textsuperscript{98} finding support in the latest rulings of the Supreme Court\textsuperscript{99}, it is confirmed by the official motto placed on the UOKiK’s website\textsuperscript{100} which indicates that the authority’s focus on exclusionary conduct. The words ‘You have a choice’ suggest that the President of UOKiK is intending to concentrate primarily on preventing and combating exclusionary practices that result in the limitation of choice\textsuperscript{101}.

\section*{VI. Final remarks}

The following conclusions can be reached on the basis of an analysis concerning the question to what an extent has the EU reform already affected or is likely to affect the substantial framework and enforcement procedure of Article 9 of the Polish Competition Act in the future.

\textsuperscript{95} The statute gives the commune the exclusive right to render, and in particular to organise such services; see Article 7 of the Act of 8 March 1990 on the self-government of communes (consolidated text: Journal of Laws 2001 No. 142, item 1591, as amended).

\textsuperscript{96} See for example judgement of the Supreme Court of 19 February 2009, III SK 31/08 (not yet reported) where the court ruled that the onerosity of the terms and conditions of an agreement (see Article 9(2)(6) of the Competition Act) shall be evaluated from both legal and economic perspective.

\textsuperscript{97} Perhaps under the influence of the new approach of the Commission.

\textsuperscript{98} See in particular the decisions of the UOKiK President issued in 2009 and 2010. Their majority refers to exclusionary practices. In the opinion of the UOKiK President, dominant undertakings have usually violated Article 9(2)(5) of the Competition Act (‘counteracting the formation of conditions necessary for the emergence or development of competition’).

\textsuperscript{99} See the judgement of the Supreme Court of 18 February 2010, III SK 24/09 (not yet reported). In the opinion of the court, the imposition of excessive prices should in free market economy be found only exceptionally, and in particular, in relation to practices of those operating as network monopolists.

\textsuperscript{100} According to this slogan: ‘You have a choice. We’ve been taken care of that for 20 years’. These words have been placed on the UOKiK’s website on the occasion of the 20th anniversary of its creation (see: www.uokk.gov.pl and www.20lat.uokik.gov.pl).

\textsuperscript{101} It should be assumed that the notion of ‘choice’ is to be interpreted broadly implying also a rather broad scope of what practices restrict choice. It thus shall concern not only those that result in limiting market options or hampering innovation but also those that lead to higher prices (such prices – at least indirectly – limit the actual choice for consumers).
First, the reform should not lead to any revolutionary changes in the interpretation of Article 9 of the Competition Act in its axiological dimension, i.e., as far as the establishment of the ultimate purpose of the prohibition of the abuse of dominance. The economic interests of consumers are already frequently treated as the ultimate aim of this legal provision. Quite a number of Polish judgments have referred to the main ideas underlying the new effects-based approach to Article 102 TFEU. In the future however, an even stronger emphasis on the protection of consumer interests is to be anticipated, in particular, by attributing to it a sort of ‘exclusivity’ among all the other values protected by Article 9 of the Competition Act.

Second, in relation to the scope of the general substantial concept of exclusionary abuse, it is doubtful whether the basic change (the establishment of an explicit reference to consumer harm) has been deeply considered in the Polish jurisprudence. For the time being, it seems too early to make such far-reaching conclusions. The UOKiK President, or others claiming that a violation of Article 9 of the Competition Act took place, shall be required to conduct an appropriate market analysis of the contested anticompetitive practice whereby a credible consumer harm (not only potentially possible) acts as a decisive condition of finding at least the presumption of the violation of that provision.

Third, it cannot be assumed that some of the specific instruments encompassed by the EU reform (e.g. the lack of *per se* abuse; the permissibility of a ‘legalization’ of *prima facie* anticompetitive practices by reference to objective/economic justification; the application of the ‘as efficient competitor’ test) constitute a complete novelty for the application of the Polish equivalents to Article 102 TFEU. Referring to the latter operational rule, even though the methodology underlying that test has not been used in former Polish cases, a price-cost analysis of the dominant firm’s goods and services has been already incorporated into some recent decisions of the UOKiK President.

Finally, it is worth mentioning that as opposed to the wording of Article 102 TFEU, the Polish Competition Act contains a legal rule designed to reduce the scope of the interventions by the competition authority – the general condition that the act applies only to situations where the scrutinized conduct goes against the public interest\(^\text{102}\) (see Article 1(1) of the Competition Act). A correct interpretation of the ‘public interest-clause’ provides a formal basis of selecting only those practices of a dominant firm that truly justify the intervention by the UOKiK President\(^\text{103}\) (reducing the risk of false positives).

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\(^{102}\) Literature defines the requirement of public interest violation as an ‘intervention pre-requisite’; see D. Miąśik, T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąśik (eds.), *Ustawa...*, p. 60.

\(^{103}\) See also D. Miąśik, ‘Controlled Chaos ...’, p. 42-43.
This clause prevents also the misuse of the Competition Act (including its ban on abuse) by preventing its enforcement merely to protect the interests of those entities ‘jeopardized’ by the intense competition from a dominant company\textsuperscript{104}. Such competition is generally favourable to consumers, both in the short- and the long-run.

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The Permissibility of Exclusive Transactions: Few Remarks in the Context of Exercising Media Rights

by

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Abstract

This article discusses issues associated with exclusive rights to broadcast television coverage of sports events, in light of a decision of the President of the Office of Competition and Consumer Protection (hereafter, the UOKiK President) relating to a long-term licence agreement between the Polish Football Association and Canal+. It describes the special features of a sports event as the subject of licensing rights and discusses the impact of intellectual property issues on assessing whether agreements comply with the law on competition and consumer protection. Emphasis is put on

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the special role of analysing each case of exclusivity economically, particularly with regard to its long-term market effects and the significance of additional restrictions accompanying exclusivity. Attention is also drawn to the precedential nature of the position of the UOKiK President that media licences can, in justified cases, cover periods of several years.

Résumé

L'article traite de questions liées à l'exclusivité en matière de retransmission télévisée d'évènements sportifs, à la lumière de la décision du Président de l'OCCP (Office polonais de la protection de la concurrence et des consommateurs) portant sur le contrat d'exploitation pluriannuel conclu entre la Fédération polonaise de football et Canal+. L'auteur y présente les caractéristiques particulières des manifestations sportives faisant l'objet de droits d'exploitation. L'article aborde également la question de l'impact de la propriété intellectuelle sur l'appréciation de la conformité des contrats conclus avec le droit de la protection de la concurrence et des consommateurs. L'auteur souligne par ailleurs le rôle particulier de l'analyse économique de chaque cas d'exclusivité, notamment de l'impact exercé sur le marché sur une période plus longue et de la portée des restrictions supplémentaires accompagnant l'exclusivité. Enfin, l'article évoque la position d'un précédent du Président de l'OCCP, en vertu de laquelle les droits d'exploitation peuvent, dans des cas justifiés, être cédés pour plusieurs années.

Classification and key words: exclusivity agreements; exclusivity; intellectual property; audiovisual work; sports event; media rights; UOKiK; the Polish Football Association; PZPN; Canal+.

I. Introduction

Exclusive transactions concluded between companies with substantial market shares are one of the more complex issues of competition law, particularly where exclusivity is granted by an entity with a monopolistic position to an entity which subsequently exploits the rights it acquires in specific areas of intellectual property. Such a situation occurs when exclusive rights to broadcast sports events in the media are licensed to television broadcasters by their organisers, which are usually sports associations. The basic problem which the anti-monopoly regulator should settle in such a case is the acceptability of exclusivity itself as a form of commercial cooperation between the parties to the transaction. Another issue is the acceptable duration of exclusivity, provided of course that the anti-monopoly authority has not decided to prohibit it. Thirdly, it must analyse possible monopolistic consequences of such aspects of
transactions as the scope of the exclusivity granted, the possibility of it being
extended, the impact on the market situation of third parties, particularly
competitors, etc.

This article discusses the above issues in the context of a specific case which
was dealt with by the Polish anti-monopoly authorities in connection with an
exclusive licence to exercise media rights to league matches granted to Canal+
by the Polish Football Association (hereafter, the ‘PZPN’).

II. Background – the case of Canal+/PZPN

1. Exclusivity agreements

The issues outlined in the introduction to this article relate to a licensing
agreement concluded in 2000 between the television company Canal+ and the
PZPN, by virtue of which Canal+ obtained the exclusive right to broadcast
coverage of football league matches, i.e. Polish Cup and Polish League Cup
matches. The agreement was concluded for the league seasons from 2001/2002
to 2004/2005, and provided for the possibility of an extending, as well as

The way in which that agreement was performed was challenged by the
UOKiK President who, having carried out explanatory and anti-monopoly
proceedings, issued a decision finding that the actions of the PZPN and Canal+
were an agreement restricting access to the market or eliminating companies not
covered by the agreement from the market.1 Fines2 were imposed on the parties
for breaching the statutory prohibition on concluding such agreements3. The
parties filed appeals against the decision of the UOKiK President to the Court
for Competition and Consumer Protection, which were dismissed by that court4,
as were the appeal5 and cassation appeal6 subsequently filed by Canal+.

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1 Decision of the UOKiK President of 29 May 2006, DOK-49/06.
2 Article 5(1)(6) of the Act on Competition and Consumer Protection of 15 December
   2000 (consolidated text: Journal of Laws of 2005 No. 244, item 2080, as amended), which was
   replaced by the current Act on Competition and Consumer Protection of 16 February 2007
   (Journal of Laws 2007 No. 50, item 331, as amended). The substantive provisions of the two
   laws relating to the case in question are identical.
3 A= fine of approximately PLN 7.4 million was imposed on Canal+ and ultimately, a fine
   of approximately PLN 225,000 was imposed on the PZPN.
4 Judgement of the Court for Competition and Consumer Protection of 14 February 2007,
   XVII Ama 98/06, UOKiK Official Journal 2007 No. 2, item 22.
5 Judgment of the Court of Appeals of 4 December 2007, VI ACa 848/07.
6 Judgment of the Supreme Court of 7 January 2009, III SK 16/08.
2. The challenged practice

The practice challenged by the UOKiK President essentially consisted of Canal+ guaranteeing itself a priority right to obtain an exclusive licence to exercise media rights after a period of four years from the conclusion of the agreement. The subject of the licence were the rights to make available to any audience all or a part of any league football match, as well as exclusive access to information in all fields of exploitation (e.g. highlights and film clips).

With regard to the seasons from 2005/2006 to 2008/2009, the priority right was to be exercised as follows: if the PZPN received an offer during the term of the agreement relating to purchasing or obtaining a licence for the rights subject to the agreement, it would be obliged to notify Canal+ of that offer in writing, specifying its conditions. Canal+ could inform the PZPN that it was exercising its priority right, and the PZPN would then be obliged to conclude a new agreement with Canal+ on granting an exclusive licence for the period covered by that right, on terms similar to those specified in the most favourable offer submitted by another entity.

In 2004, the PZPN invited television and internet broadcasters to participate in a tender procedure for audiovisual rights to league matches for the seasons from 2005/2006 to 2007/2008. The licences offered by the PZPN were divided into ‘blocks of rights’, the most attractive of which for television broadcasters was the ‘Main Broadcaster’s Block’. The participants in the tender procedure were informed that Canal+ had the right to submit an offer for that block, i.e. a unilateral option to acquire the rights to it on the same terms as the most favourable terms for PZPN offered by any of the other bidders. The UOKiK President found that this understanding had a negative impact on the relevant market by a deliberate restriction of competition, which was confirmed in the course of the proceedings by the television stations Polsat and TVP, among others.

3. Key conclusions of the President of the Office of Competition and Consumer Protection

The position of the UOKiK President on the issue of exclusivity set out in Decision No. DOK-49/06 is of key significance. It is worth quoting it in full: ‘Both Polish and Community competition law has approached and approaches the conclusion of exclusivity agreements very carefully. If the commercial context indicates that concluding such agreements is commercially rational

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7 See the justification for the decision, p. 28.
and brings appropriate benefits to the economy and consumers, exclusivity can be used. However, the period for which it is granted should not be longer than is absolutely necessary for the correct performance of the agreement, in view of the harmful effect of exclusivity on the competitiveness of the market. In these proceedings, the anti-monopoly authority does not challenge the granting of an exclusive licence, and finds that exclusivity as such is essentially an element of the functioning of the markets for trading in media rights. Nor does the President of the Office challenge the period for which the licence for exercising the rights in question was granted, but finds that it was long enough to, on the one hand, provide the licensor and licensee with appropriate commercial benefits on account of granting/purchasing the licence and, on the other, short enough not to have a lasting adverse effect on the competitiveness of the market in question. However, the conclusion in 2000 of an agreement for an exclusive licence for a period of more than four years could result in that period being challenged as being too long and in violation of the rules of competition law'.

In the context of the above position of the UOKiK President, we should consider the definition of the relevant market applied in the case in question, i.e. the market for trading in rights to broadcast Polish league football matches. The PZPN holds a 100 per cent share of that market, which means it is a monopoly holder with regard to licensing media rights. In view of the above, the case was not subject to the exemption relating to agreements of minor importance (the ‘de minimis’ rule) or the regulation on group exemptions with regard to vertical agreements. When defining the relevant market, the UOKiK President made use of specialist knowledge on consumer choices. For that purpose, an analysis was carried out by a research institute, which showed that on the demand side a narrow definition of the market is appropriate, because television broadcasts of Polish league matches are not substitutable with regard to broadcasts of other football matches or other sports events, even those considered ‘premium’ events8.

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8 For example, the football world championships, Formula 1 races, a ski-jumping final, etc. An analysis of the definitions of media markets applied in EU countries is set out in an extensive report prepared for the European Commission by the law firm Bird & Bird: Market Definition in the Media Sector – A Comparative Analysis, DG Competition, December 2002.
III. Assessment of exclusive media rights transactions

1. A sports event as a subject of rights

The legal nature of rights to broadcast media coverage of sports events has been the subject of several studies in Polish legal literature. To briefly summarise the arguments they contain relating to the scope of protection in question, we must consider three basic areas: direct broadcasts of sports events, recordings of those events, and the accompanying information layer including commentaries, sports interviews and reviews of reports on ongoing sports events. The basic means of protection is the protection under the Law on Copyright and Neighbouring Rights afforded to ‘works’ in the meaning of that act. Whether ‘live’ or in the form of a recorded videogram, a television broadcast is eligible for the protection due to audiovisual works. Usually, information elements of sports events, e.g., commentaries, will also be works under copyright law (please note that many of them will in any case be a constituent part of an audiovisual work, which a sports broadcast is). Despite the doubts that arise when analysing the possibility of providing legal protection for a sports event ‘as such’, i.e. protection that takes into account the interests of ‘players/actors’ and the organiser of the event, there is therefore no question that a wide range of exclusive rights of television organisations exist relating to virtually any form of broadcast of a sports event.

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11 With regard to this issue, see the *de lege ferenda* proposal to introduce a ‘stadium right’ into Polish copyright law as a new neighbouring right, J. Barta, R. Markiewicz, ‘Widowisko sportowe...’, p. 30. See also M. Burnett, ‘Thirty-four years on: high time for filling the gaps in broadcasters’ protection’ (1995) 6(2) Ent. L. R. 39-41.
There are also interesting deliberations on entity-related issues associated with the acquisition of rights to broadcast league matches. It appears that the originally entitled entity is the PZPN as the main organiser of the league matches, although it can be argued that exclusive rights first arise to the benefit of football clubs as the organisers of individual matches. Further, with regard to any match, joint rights can be attributed to the two teams playing a football match. In any case, the acquisition of exclusive rights to create a broadcast of Polish league matches by a television broadcaster should be classified as an acquisition by transfer, as they are acquired from the originally entitled party PZPN, which is entitled, as the organiser of the matches, to a kind of ‘commercial exclusivity’ with regard to the exploitation of a sports event. With regard to created audiovisual works, i.e. recordings of league matches, the original creator’s right is held by the television company. These seemingly theoretical deliberations may have practical value, as, in the case being analysed, the PZPN transferred to Canal+ a different right than the one subsequently exploited by Canal+. We should therefore consider the possibility of concluding that PZPN’s actions involving the one-off disposal (assignment) of its rights to another entity are permissible. It appears that such reasoning would be justified from the standpoint of the needs of trading, according to which a sports association should be flexible in selecting a single contract partner instead of engaging energy and funds in negotiations with multiple television broadcasters. In this way, the focus of the legal assessment would shift from the issue of a prohibited agreement restricting competition to the issue of the consequences of a long-term unilateral restriction. An assessment of a possible refusal by the originally entitled party to grant other television broadcasters a licence to broadcast audiovisual works, i.e. broadcasts of league matches, could also be relevant. Such a refusal would then be subject to

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12 Joint rights are regulated in Article 14 par. 2 item 1 the Statute of the PZPN, which provides that ‘PZPN and clubs participating in the two highest match classes are the co-owners […] of the proprietary and non-proprietary rights to the matches, in particular television, advertising and marketing rights exercised with regard to the above-mentioned events and matches via available audiovisual, radio and audio means and the Internet and any other technical means existing now or in the future’. However, one may note that this provision can be classified as a formalisation of contractual relationships.


14 According to the assessment of the German Supreme Court in a case relating to central trading in rights to broadcasts of domestic league matches by the GFA (the equivalent of the
assessment in light of Article 9 of the Competition Act, i.e. relating to an abuse of a dominant position involving exclusion from the market or being, in the case of an inflated licence fee being charged, of an exploitive nature. It is worth referring here to the well-known case of Microsoft, in which the European Commission issued a decision on an obligation to grant competitors licences for exclusive rights relating to intellectual property. The matter is obviously not clear-cut, because it would require that the practice whereby a live sports event is broadcast exclusively by a single television broadcaster be broken. On the other hand, an encoded and paid television channel is less accessible than free-to-air channels, and the PZPN’s offer includes different types of broadcast packages. This could be an argument in support of an obligation to ‘share’ licences or ‘split’ them up among other broadcasters.

2. The issue of intellectual property

If television broadcasts of sports events constitute an intellectual asset, does that fact justify agreements providing for long-term exclusivity granted by the entitled party to a single broadcaster selected by it being afforded special treatment? The antimonopoly law does not affect rights under the laws relating to the protection of intellectual and industrial property, particularly those on the protection of inventions, utility and industrial designs, integrated circuit topography, trademarks, geographical markings and copyrights and neighbouring rights (Article 2(1) of the Competition Act). This means that, in principle, competition law does not challenge a monopoly stemming from intellectual property rights resulting from individual creative activities. This principle applies in all major legal systems, both in Europe and the rest of the world. The rule of the non-interference of antimonopoly law in the substance of a monopoly, e.g. a patent or copyright law monopoly, is the basic ‘demarcation line’ between those areas of law, and its ratio is expressed in the need to strike a balance between the public/legal need to regulate the sphere of commercial relations to protect the socially positive phenomenon.

Polish PZPN), the GFA cannot be deemed to have committed a monopolistic violation if it was the entity duly authorised to conclude such ‘central’ transactions (judgement of 11 December 1997, WuW 160, Fernsehübertragungsrechte I). This is related to the definition of two levels of the relevant market in cases involving sports licences, i.e. the market for purchasing rights to programme content (materials) and the market for disseminating them to viewers. With regard to this issue see K. Wojciechowski, Widowisko sportowe..., p. 302; R. Subiotto, T. Graf, ‘Analysis of the Principles Applicable to the Review of Exclusive Broadcasting Licenses Under EC Competition law’ (2003) 26(4) World Competition 591.

15 Judgement of CFI in the case T-201/04 Microsoft Corp. v. the Commission [2007] ECR II-03601. See also decision of the UOKiK President of 12 February 2010, DOK–1/2010, in the case of Cyfrowy Polsat S.A., in which it was found that that company abused its dominant position on the domestic market for the sale of rights to publicly reproduce coverage of EURO 2008, which involved applying practices involving tie-in transactions.
of competition and the need to allow creators freedom in shaping those relationships, which is inevitably related both to the commercialisation of creative products and the more general issue of the protection of unrestricted intellectual progress (technical and creative), which of course remains also in the public interest\textsuperscript{16}.

3. Analysis of the economic impact on the market

Let us again consider the assessment set out in decision of the UOKiK President No. DOK-49/06, according to which exclusive agreements are an element of the functioning of the markets for trading in media rights, and that concluding such agreements can be assessed as commercially rational in view of the benefits that can stem from them for both the economy and consumers. It should be stressed that functional (primarily economic) criteria are used in that assessment, as the key issue is the commercial rationality of exclusive agreements, which constitutes a reference to the ‘rule of reason’ set out in Article 8(1) of the Competition Act. That principle can also apply to exclusive contracts concluded between enterprises having a significant market share, or even a monopolistic position. It is necessary for the condition of commercial benefits to be satisfied, i.e. an improvement in the production or distribution of goods or of technical or commercial progress. An appropriate portion of those benefits must be transferred to buyers or users, and any restrictions related to an exclusivity clause (above all restrictions that block access to the market, i.e. foreclosure) must be essential to achieve the intended business objectives and not lead to the elimination of competition on the relevant market to a significant degree\textsuperscript{17}. On the other hand, the ‘rule of reason’ provided in


\textsuperscript{17} T. Skoczny, A. Jurkowska, D. Miąsik (eds.), \textit{Ustawa o ochronie konkurencji i konsumentów. Komentarz}, Warszawa 2009, p. 449; C. Banasiński, E. Piontek (eds.), \textit{Ustawa o ochronie...
Article 2(2) of the Competition Act with regard to agreements on licensing exclusive rights sets a different standard, providing that the antimonopoly law only applies to those agreements if they result in unjustified restriction of the parties’ freedom of business activity or a significant restriction of competition on the market. The difference between an anti-monopoly assessment of licence agreements and an assessment of other agreements of a vertical nature subject to the provisions of Article 6 of the Competition Act, which provides for a prohibition on concluding understandings which violate competition, therefore includes the fact that while a monopolistic objective of those understandings is alone sufficient for them to be prohibited (i.e. there need not necessarily be a monopolistic consequence), agreements on licensing intellectual and industrial property rights can only be prohibited after their monopolistic market consequences have been demonstrated. The strictness of the prohibition envisaged in the Competition Act is therefore reduced in the case of licence agreements, which is related to their special nature, involving trading in exclusive rights. Similarly, if we hypothetically classify the actions of the television broadcaster as an abuse of a dominant position involving refusing to grant a licence for exclusive rights to competing television broadcasters, such action could be justified on the basis of the ‘reasonableness clause’ under Article 2(2), while the clause under Article 8(1) would no longer be applicable to it.

One should note that the criteria set out in Article 8(1) and Article 2(2) of the Competition Act cannot be treated only generally, despite the fact that their wording may appear imprecise. The functional/economic approach to competition law, which has been particularly apparent since Poland’s accession to the European Union, means that in the circumstances of a specific case it will be essential to present arguments showing that a concluded understanding is beneficial. The arguments must be provided by the interested parties themselves, i.e. the parties which concluded the agreement, and will usually be


18 The specific nature of licence agreements and resulting modifications of the anti-monopoly assessment applied in the case of ‘ordinary’ agreements were the subject of analyses carried out by the European Court of Justice in the judgment of 25 February 1986 193/83 Windsurfing International Inc. v. the Commission [1986] ECR 611. With regard to this issue, see also the judgment of 8 June 1971, 78/70 Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG [1971] ECR 00487. See also R. Poźdźik, Dystrybucja produktów na zasadzie wyłączności w Polsce i Unii Europejskiej, Lublin 2006, p. 162.

19 Pursuant to Article 8(2) of the Competition Act, the burden of proof with regard to a ‘reasonableness clause’ rests on the company which derives favourable legal consequences from it. Because the scopes of both ‘reasonableness clauses’, i.e. that under Article 2(2) and that under Article 8(1) are to a large extent identical, and the objective of applying those clauses is also the same, it should be noted that although there is no equivalent of Article 8(2) with regard
economic market analyses demonstrating the market power of the key players on the relevant market, research into or extrapolations of market development trends, analyses of the impact of the transactions concluded on the situation of consumers, analyses of barriers to entry into the market, analyses of ‘economies of scale’, cumulative effects, etc. A helpful methodology could be the ‘significant impediment of effective competition’ test (SIEC), which the anti-monopoly authority uses when assessing the effects of market concentrations.

4. Acceptable exclusivity period

An analysis of economic effects will be essential when establishing the acceptable duration of restrictions resulting from exclusivity granted under a licence agreement. As pointed out above, the UOKiK President found that, in the case of media rights licences, a period of more than four years should be considered as having a significant and lasting negative impact on competition on the relevant market, while a period not exceeding four years was approved by the UOKiK President. The question therefore arises as to whether there are circumstances which justify concluding agreements on media exclusivity to assessing licence agreements, in this case too the parties to the agreement should be able to demonstrate that the positive effects of the agreement outweigh the negative consequences for competition. See D. Miąsik, Reguła rozsądku w prawie antymonopolowym, Zakamycze 2004, p. 383; I. Wiszniewska, Reguły konkurencji a transakcje wyłączne, Warszawa 1995, p. 80–83.

for a longer period. Let us remember that the agreement between PZPN and Canal+ envisaged exclusive relations between the parties that could continue in various forms until 2009, i.e. for nine years. There was a case where the European Commission granted a permit, albeit on special conditions, for even a fifteen-year period for exclusive exploitation of rights to disseminate film works\(^\text{21}\). On the other hand, with regard to some long-term agreements relating to the dissemination of broadcasts of sports events, the Commission challenged the excessively long exclusivity periods, for example an eleven\(^\text{22}\) or seven-year period\(^\text{23}\). Shorter periods lasting from three to five years therefore predominate\(^\text{24}\). Establishing a consistent rule is thought to be virtually impossible, because the circumstances of each case will always be significantly different\(^\text{25}\). There will also be differences in the nature of the transaction being concluded, i.e. whether it will involve only contractual relations (a licence agreement) or also relate to structural changes in the market (concentrations of undertakings\(^\text{26}\)). When analysing exclusivity clauses on the market for trading in sports broadcast rights with regard to concentrations, we can also consult the general principles provided in Commission Notice on restrictions directly related and necessary to concentrations\(^\text{27}\). The permissibility of such restrictions results from the fact that,


\(^{22}\) The case of Sogecable/Telefonica (Press Release IP/00/372).


\(^{26}\) The European Commission considered the duration of exclusivity clauses with regard to the objectives of a concentration being carried out in the case of Newscorp/Telepia, European Commission decision of 2 April 2003 COMP/M.2876, L.110/73, in which an exclusivity period in relations with football clubs amounting to two years was found to be acceptable.

for a purchaser to obtain the full value of the assets being transferred, the seller should provide it with an appropriate level of protection against competition to enable it to secure customer loyalty and assimilate and utilise the know-how being acquired. It is therefore essentially permissible when a concentration is being carried out to use clauses prohibiting the seller from competing with the purchaser with regard to the activities of the business undertaking or part thereof being sold. The effect of non-compete clauses is therefore similar to the full exclusivity that occurs in the case of a licence to use specific subjects of intellectual property rights. According to the Commission’s position set out in the Notice, non-compete clauses are justified for periods of up to three years, when the transfer of a business undertaking includes the transfer of customer loyalty both in the form of goodwill and know-how, and where only goodwill is involved they are justified for periods of up to two years. Although the Commission finds that non-compete clauses cannot be deemed to be necessary when a transfer is limited to exclusive rights to industrial and commercial property, whose holders can promptly take action against any violations by the party selling those rights, we are dealing here primarily with rights which are subject to registration by the relevant state authorities (i.e. patent rights, rights stemming from the registration of trademarks, new plant varieties, etc.). By analogy, it can therefore be concluded that a two or three-year period for which a television broadcaster would have guaranteed exclusivity with regard to broadcasting sports events would be justified ‘in advance’, so to speak. A longer period must be directly associated with the transaction and essential for the proper achievement of its objectives. For example, the European Commission approved a period of five years relating to the automobile market28, from eight to 10 years for chemical products markets29, and seven years for the market for processing pictures used in medicine30.

5. Other market restrictions

It is worth considering the issue of the preferential extension of the exclusivity granted to Canal+ through the above-mentioned ‘priority option’. That mechanism could have guaranteed broadcasting exclusivity for further league seasons, even until 2009, which the UOKiK President was critical about. The essence of the option and the contractual provisions relating to the manner in which Canal+ exercised it show that it is similar to the ‘English

30 Case IV/M.1298 – Kodak/Imation.
clause’, which is sometimes used in commercial agreements as an indirect exclusivity mechanism. Such a clause involves granting a purchaser a right to choose (option), according to which it can decide to continue the agreement beyond the initial term provided in it, which in turn will depend on the prices that may be offered by competing purchasers for the good or service which is the subject of the agreement. The seller therefore gathers competing offers and then informs the buyer of the prices offered, whereupon the buyer decides whether it will continue the agreement or not. There are different variations of English clauses and they are sometimes similar in form to a ‘most favoured nation clause’. They also vary in terms of the scope of the decision-making rights on both the seller’s and the buyer’s side. In specific circumstances, such clauses have an identical effect as an agreement which provides for exclusive purchasing or exclusive supply. If the parties (or a party) to the agreement have a dominant position on the relevant market, English clauses can be challenged by the anti-monopoly authority31.

In the broader context of the use of English clauses, the issue arises of the monopolistic effects of informing bidders of the content of bids submitted to organisers of sports events, as disclosing ‘sensitive commercial information’ to competitors could disrupt competition during tender procedures for media rights and also lead to anti-competitive coordination of market behaviour, above all through the possibility of independent pricing policy being distorted32.

IV. Summary

The judgements issued in connection with the PZPN/Canal+ case are precedential for the market for the exploitation of media rights to sports events. They confirm that the anti-monopoly authorities accept the exclusivity of licence agreements concluded on that market, indicating that an exclusivity period of several years is acceptable. The arguments presented by the UOKiK President are also general enough that they can act as a starting point for assessing exclusive transactions on other media markets, or on other relevant markets in general, particularly if the transactions concluded contain elements of intellectual property. Examination of the circumstances of each case should take into account the economic purpose of the transaction and the actual need for a particular exclusivity period. However, various restrictions accompanying

31 The case of PKP CARGO, the decision of the UOKiK President of 17 June 2004, DOK–50/2004.
 exclusivity should be approached with great care, particularly disclosure obligations leading to the dissemination of sensitive commercial information on the terms and conditions of offers submitted by third parties, which results in horizontal disruption of competition.

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Who Controls Polish Transmission Masts?
At the Intersection of Antitrust and Regulation

by

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Abstract

This paper will be devoted to the most acute point of intersection between sector specific regulation and the enforcement of competition law – a parallel scrutiny of the market position and behaviour of EMITEL TP, an incumbent infrastructure holder in the Polish broadcasting transmission field, by the national telecoms regulator and the antitrust authority. After presenting the relevant EU background, the discussion will focus on four basic factors that have influenced the relationship between antitrust and regulation in this case. The peculiarities of national legislation transposing the EU liberalisation package will be considered first, followed by the state of competition in Polish telecoms and the potential existence of prohibited market practices. Emphasis will be placed here on the use of the antitrust concept of relevant market definition in the framework

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of sector-specific regulation. The analysis will continue with an assessment of the differences between the two types of market intervention noted by the authorities in the context of a potential competence dispute. In conclusion, the need will be presented to shift the current focus placed on the separation of antitrust enforcement and regulation, which has made them both ineffective in achieving their purpose, towards that of their combination in order to facilitate the emergence of competition in the Polish broadcasting transmission services field.

Résumé

L’article concerne le point le plus aigu d’intersection entre la réglementation sectorielle et le renforcement de la loi de concurrence – le contrôle parallèle de la position sur le marché et le comportement de EMITEL TP, le propriétaire d’infrastructure dans le domaine de la radiodiffusion en Pologne, par le régulateur national des télécommunications et l’autorité chargée de la politique de concurrence. Après avoir présenté le contexte de l’UE, la discussion se concentrera sur quatre facteurs clés qui ont influencé les relations entre les politiques de concurrence et la réglementation sectorielle dans ce cas-là. Les particularités de la législation nationale transposant le train de mesures de libéralisation de l’UE seront considérées d’abord, suivies par l’état de concurrence dans les télécommunications en Pologne et l’existence potentielle des pratiques du marché interdites. L’emphase sera mise ici sur l’usage de la définition du marché en cause aux fins du droit de la concurrence, dans le cadre de la réglementation sectorielle. Dans la partie suivante, l’analyse sera centrée sur l’évaluation de la différence entre les deux types d’intervention sur le marché notés par les autorités dans le contexte d’un conflit possible en matière de compétence. Dans la conclusion, le besoin de tourner l’attention mise actuellement sur la séparation du renforcement de la loi de concurrence et la réglementation sectorielle, qui les avait faits inefficaces en atteignant leurs objectifs, vers la combinaison de les deux, afin de faciliter l’émergence de la concurrence dans le domaine des services de radiodiffusion.

Classifications and key words: antitrust enforcement; sector specific regulation; telecoms; market 18; transmission infrastructure; ‘relevant’ market; access to infrastructure; co-operation procedures; procedural intertwining.
I. Background – behind the scenes

1. Introduction

Few topics fit as well into the thematic framework of YARS as the interaction between a parallel public intervention by an antitrust body and a national regulatory authority (NRA)\(^1\). The level of interest is of course the greatest if the corresponding proceedings coincide not only in time but also in their general subject matter – when two separate public bodies assess market power and practices on a potentially identical ‘relevant’ market. Among the segments of Polish telecoms that have been subject to both types of intervention\(^2\) lies the so-called ‘market 18’ concerning transmission services to deliver broadcast content to end users. Even with the emergence of some new competition, the Polish broadcasting transmission services field remains dominated by Emitel Telekomunikacja Polska (EMITEL), the incumbent infrastructure holder that continues to control many aspects of the domestic broadcasting transmission field. Most importantly, the incumbent is still the only entity capable of providing country-wide broadcasting transmission services that are essential for public services broadcasters (PSBs).

EMITEL found itself subject to a regulatory decision adopted in 2003 by the Polish telecoms regulator, the UKE President (in Polish: \Urz\ad Komunikacji Elektronicznej; hereafter, UKE) and a separate antitrust decision issued in 2004 by the national antitrust authority, the UOKiK President (in Polish: \Urz\ad Ochrony Konkurencji i Konsumentów, hereafter, UOKiK). The analysis of these two parallel proceedings shows that their conduct was far from optimal. They also managed to achieve very little to improve the competitive structure on

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\(^2\) For a detailed assessment of the results of telecoms market regulation in Poland see S. Piątek (ed.), Regulacja rynków telekomunikacyjnych, Warszawa 2007.
the Polish broadcasting transmission services market. Among the key reasons identified for this failure are:

- A significant degree of confusion concerning the relationship between the 18 markets pre-determined in the Commission Recommendation of 2003 and the obligation placed on NRA to define relevant markets according to the principles of competition law;
- Clear legislative weaknesses of the Polish Telecommunications Law Act (in Polish: Prawo Telekomunikacyjne; hereafter, PT);
- The persistence of the incumbent’s market power and entry barriers;
- The complexity of the distribution chain with its dependence on diversified and largely, but not entirely un-replicable infrastructure which greatly complicates the delineation of relevant markets and thus also the establishment of potentially abusive market behaviour, and finally;
- An overall arguable lack of skill or at least, lack of will of the public authorities to use the available procedures to arrive at a balanced, coordinated solution to the commonly established competition problem.

Indeed, agreeing with J. Black that ‘the significance of the decision makers’ “world view”’ cannot be underestimated – the parallel proceedings regarding EMITEL show that while the two interventions could have complemented each other, the authorities have instead focused on stressing their distinctiveness. Noted in the closing remarks will also be the recent legislative amendments to the PT which are likely to eliminate at least some of the earlier uncertainties and the somewhat revised approach of the NRA shown in its new decision concerning EMITEL which was adopted in October 2010.

2. Relevant variables

The origin of the direct intersection between antitrust and regulatory intervention in telecoms are European rather than national in nature. They can be traced back to the implementation of the Electronic Communication Framework of 2002 and the general applicability of competition law. Indeed,

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seeing as incumbent telecom operators are far from immune to antitrust scrutiny, it is the prohibition of a dominant position abuse that is of particular relevance in this context. The Liberalisation Package’s reliance on the antitrust concept of relevant market definition has nevertheless proven in Poland to be the source of an inherent uncertainty concerning the practical rapport of competition law enforcement and regulatory interventions.

On the one hand, competition law and its enforcement practice precedes telecoms regulation both in time as well as experience and can thus be perceived as somewhat of an older brother in this relationship. This realisation seems to be reflected by the fact that Article 15(1) of the Framework Directive explicitly requires the use of competition law principles for the definition of relevant markets in the electronic communications field. This fact alone effectively introduces one of the most fundamental concepts of competition law, the notion of a relevant market, as the basic comparative framework for telecoms regulation. It represents the formalisation of the growing and increasingly acknowledged entwining of sector-specific regulation and antitrust enforcement. The EU liberalisation process is in fact directly based on the assumption that regulation can be imposed only on those markets, defined as relevant on the basis of antitrust rules, which are void of effective competition. As a result, the Framework Directive effectively established an obligation to directly respect some basic principles of competition law in the framework of regulatory proceedings.

However, the unquestionably case-specific nature of relevant market definition in antitrust enforcement has been notably blurred here by the pre-determination of markets in the Commission Recommendation 2003/311/EC regarding relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive 2002/21/EC. Crucially, the Recommendation contained a list of markets that the Commission considered at the time of its issue to suffer from the lack of effective competition and thus, which it believed to be susceptible to ex ante regulation. Broadcasting transmission services used to

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6 This entwining was noted by literature already before the liberalisation package see e.g. P. Larouche, Competition law...; A. Bavasso, Communications in the EU Antitrust Law: Market power and Public Interest, Hague 2003; W. Kip Viscusi, J. E. Harrington, J. M. Vernon, Economics of Regulation and Antitrust, MIT Press, Cambridge Mass 2000.


8 Issued on the basis of Article 15(1) of the Framework Directive.
deliver broadcast content to end users (market 18) were among the 7 retail and 11 wholesale electronic communication markets originally identified by the Commission. However, no list of that kind has ever been used in the realm of competition law. The rapport between the individualistic nature of relevant markets in antitrust enforcement and the generalist nature of the list created for the purpose of telecoms regulation has thus become subject to controversy between the involved national authorities. As such, regulation can be perceived as the younger sibling in this relationship that is expected to use the experiences accumulated over the years by its competition law counterpart but within the special borders pre-determined by their parent, in other words, the European Commission.

In practice, the uncertainty about the state of the relationship between antitrust and regulatory intervention can be reinforced by the peculiarities of national legislation implementing the EU package as well as its domestic enforcement practice. This consideration derives from the inherent feature of EU directives – the fact that they must be transposed into the legal systems of all EU Member States. Eventual divergences, not only between the pro-competitive results achieved in different Member States but also between the aspirations of the EU liberalisation package and the outcomes of its practical application are thus inevitable.

The second factor affecting the distance in the relationship between antitrust and regulatory intervention is the actual state of competition found on particular national telecoms markets. While the Commission has identified what criteria a market must fulfil to be subject to ex ante regulation, the NRAs are obliged to individually assess which of their own relevant markets fulfils the specified conditions of ex ante regulation. Moreover, the ECJ confirmed recently that this obligation, placed on NRAs by the Framework Directive, cannot be limited by national legislation. The three criteria to be considered are: high and non-transitory barriers to entry enforced by the fact that the structure of the market does not independently evolve towards effective competition within the relevant time horizon coupled with the realisation that the application of antitrust alone is not able to adequately address the arising issues. As a

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9 The Recommendation is not binding on national competition authorities in their analysis of the electronic communication field. It does however constitute an essential constraint of regulatory intervention.


11 Particularly relevant here is the fact that because antitrust enforcement relies on individual cases, its principles, and thus also market impact, develops 'sporadically (...) and may leave key issues untouched' see R. Baldwin, M. Cave, Understanding Regulation. Theory, Strategy and Practice, Oxford 1999, p. 45.
result, while competition law enforcement and regulation would by design have no point of direct intersection on competitive markets (since they would not become subject to *ex ante* regulation), that relationship was predestined to be close on markets struggling with market power.

While it is the state of competition in domestic telecoms that is decisive for the application of *ex ante* regulation, it is the identification of prohibited market practices that conditions the involvement of antitrust authorities. Thus, while both bodies must start their intervention by defining their relevant markets, the conclusions they reach can, but by no means have to coincide. Leaving aside for the moment the issue of the correctness and accuracy of market definition in any given case, the two bodies see the relevant market from an entirely different perspective. NRAs look first to the list published by the Commission. In truth, the list has neither a definite, biding or indeed closed character – national regulators are meant to define actual relevant markets in their own territory and in particular, to segment them further subject to notification and approval of the Commission. By contrast, it is the alleged existence of prohibited market practices (such as discrimination) that triggers an antitrust intervention. In other words, competition authorities will not get involved if market power exists but is not abused. In such circumstances, there will be no point of direct impact between antitrust enforcement and regulation. Still, if a dominant undertaking actually abuses its position on an interconnected, or indeed potentially identical relevant market to that defined by the NRA, then the two types of intervention will surely intersect.

Finally, the closeness of the bond between regulation and antitrust enforcement can also be greatly affected by their diverging nature (primarily reactive vs. proactive), character (*ex ante* vs. *ex post*), instruments of intervention (type of sanctions) and direct aims assuming that the improvement of consumer welfare constitutes their common ultimate goal. On highly concentrated markets both types of interventions are likely to coincide with

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12 The immediate aim of sector-specific regulation is to facilitation competition while antitrust is used to minimise its distortion; on the specifically pro-competitive function of telecoms regulation in Poland see M. Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki*, Warszawa 2005 pp. 93-94.

13 The ultimate goals of competition law are still being debated both on the international as well as national level see D. Miąśik, ‘Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goal of Polish Antitrust Law’ (2008) 1(1) *YARS*; on the other hand, regulators have been well known to pursue other, socio-political goals that are sometime in stark opposition to consumer welfare cf ‘Although maximising economic efficiency (…) may be touted by economists as our goal, in practice (…) regulators (…) respond to a variety of political constituencies’ in W. Kip Viscusi, J. E. Harrington, J. M. Vernon, *Economics of Regulation …*, pp. 9-10; see also M. Król, ‘Liberalization without a Regulator. The Rail Freight Transport Market in Poland in the years 1996-2009’ (2010) 3(3) *YARS*.
respect to the same entities and potentially, consider the very same market practices. However, while the comparative framework applicable to both is meant to coincide (relevant markets defined on the basis of competition law rules) their diverging characteristics might affect their outcome. Considering instruments of intervention for instance, while regulation is by definition meant to prescribe future actions (pro-active), the traditional approach the enforcement of the unconditional prohibition placed by antitrust rules on the abuse of dominance puts a stop to an existing infringement and penalises past misconduct (reactive & repressive\textsuperscript{14}). Thus, the divide between regulatory and abuse decisions would not be as great where the latter can contain remedies (positive obligations referring to the means of ceasing the infringement), as is the case on the basis of Article 7 Regulation 1/2003 in the EU\textsuperscript{15}. The difference would be much more pronounced if the traditional approach was followed, as is the case in Poland\textsuperscript{16}.

2. What is the business of an incumbent?

EMITEL was established in 2001 as part of the Polish Telecoms Capital Group (in Polish: Telekomunikacja Polska; hereafter, TP) to take control over the terrestrial broadcasting transmission infrastructure that TP has amassed over the long duration of its legal monopoly. TP has managed to create a network of transmission masts, transmitters and associated facilities, capable of reaching the entire Polish territory both with relation to receiving and transport of television and radio signals as well as their broadcast. Even in light of its relatively recent ‘creation’, EMITEL must thus be perceived as an incumbent that used to be privy to monopoly rights before the liberalisation process begun. This realisation carries with it important legal, structural and financial consequences. The Polish terrestrial broadcasting transmission field is characterised by significant legal barriers associated with the need to obtain permission to build new infrastructure. Structural problems are primarily reflected by the fact that the best places, or indeed the only usable locations

\textsuperscript{14} See in particular T. Skoczny, ‘Competition protection and pro-competitive sector-specific regulation’ [in:] A. Z. Nowak, P. Hensel (eds.), Business Administration..., p. 192 (point 2.3.3).
\textsuperscript{15} G. Monti, ‘Art 82 EC and New Economy Markets’ [in:] C. Graham, F. Smith, Competition law, regulation and the New Economy, Oxford 2003, p. 18; of course, European competition law enforcement is at its most prescriptive in cases of multilateral practices where conditional approvals can be issued; see the criticism of the use of antitrust in a quasi ex-ante manner in G. Monti ‘Managing the Intersection of Utilities Regulation and EC Competition Law’ (2008) 4(2) Competition Law Review.
for the construction of transmission masts are already used by the former monopolist. Finally, the creation of a comprehensive transmission network carries with it huge sunk costs which are in most cases impossible to overcome by new market entrants.

It is not surprising therefore that EMITEL had from the start the power to control its economic field. Indeed, even now it remains the only operator to control a country-wide terrestrial broadcasting transmission network comprising masts carrying low, medium and high strength transmitters. While certain local and regional infrastructure elements have been replicated by others, both competing telecoms operators as well as directly by broadcasters, EMITEL remains the only one capable to provide broadcasting coverage of the entire population. It is not surprising therefore that it has become subject to a comprehensive regulatory scrutiny by the relevant NRA\textsuperscript{17} commencing on 20 December 2004 followed by the adoption of a regulatory decision by the UKE President on 9 November 2006\textsuperscript{18}.

It is worth noting at this point that the European Commission has in the meantime completed a second consultation procedure and issued new a Recommendation\textsuperscript{19} that no longer lists the broadcasting transmission field as a market that is in its opinion susceptible to \textit{ex ante} regulation in Europe. Nevertheless, the competitiveness of the Polish terrestrial transmission market remains largely unchanged. Considering in particular the practical effects of the regulatory decision of 2006\textsuperscript{20}, the Polish NRA has conducted a renewed assessment of broadcasting transmission field. The analysis has made it arrive at the conclusion that little progress has been made since its original decision and that the three conditions of \textit{ex ante} regulation generally applicable to European telecoms are still fulfilled in the Polish case. Thus, after having gained the approval of the Commission, a new regulatory decision has been adopted by the UKE President on 12 October 2010\textsuperscript{21}.

On the basis of its infrastructure, EMITEL started in 2002 to provide broadcasting transmission services offered up to that point directly by the

\textsuperscript{17} The proceedings were initiated by the Regulatory Office for Telecommunication and Post (in Polish: Urząd Regulacji Telekomunikacji i Poczty; hereafter, URTiP), the institutional ‘predecessor’ of UKE created in 2005.

\textsuperscript{18} Decision of the UKE President of 9 November 2006.


former monopolist. According to company information, EMITEL offers ‘TV services including emission of TV programs and terrestrial transmission of modulation signals in various configurations (to broadcasting stations, TV studios, etc.)’ as well as ‘nation-wide radio services, including signal transmission and radio broadcasting, based on the newest technologies.’ It is also directly involved in the progressing digitalisation of broadcasting transmission. Indeed, from the moment of its creation, EMITEL has become party to numerous transmission services contracts with commercial broadcasters. At the time of the antitrust proceedings, EMITEL was said to provide broadcasting services on the basis of nearly 100 separate agreements. Among them, EMITEL became party to long term transmission services contracts concluded as early as 1996 with Polish public television (in Polish: Telewizja Polska; hereafter, TVP S.A.) and radio (in Polish: Radio Polskie; hereafter, RP S.A.). These agreements became the direct basis of an antitrust investigation opened in 29 December 2005 and a decision issued by the UOKiK President on 25 October 2007. Incidentally, the antitrust decision under consideration in this paper was annulled on 19 October 2009 by the first instance court for antitrust matters SOKiK (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK) fundamentally because of an incorrect relevant market definition. Still, the ruling was appealed by the Court of Appeals on 13 May 2010 which remanded the case to SOKiK for a renewed assessment. In line with existing Polish jurisprudence, the Court of Appeals stressed that SOKiK was competent to decide on the merits of the case rather than merely annul the original decision. Thus, the first instance court should have performed its own market analysis to accurately determine the relevant market and on this basis decide whether the charges brought against EMITEL were justified.

3. Markets relevant to whom?

Considering the position of an incumbent from the point of view of the infrastructure it holds on the one hand, and the services it provides on its basis on the other, is essential to a clear delineation of markets and their respective positioning within the distribution chain. As an incumbent that does not interact with consumers (does not act on down-stream retail markets), EMITEL has taken over TP’s wholesale provision of transmission services to...
broadcasters as its customers. It is this very market that has been identified
both by the Commission and UKE as lacking in effective competition and
thus in need of \textit{ex ante} regulation. However, not unlike in many other areas of
telecoms, it is often necessary to address the lack of competition on a market
placed lower in the distribution chain (transmission services) by the imposition
of regulatory obligations on a market placed higher in the chain (access to non-
replicable infrastructure elements necessary to provide transmission services\textsuperscript{27}).
Indeed, while it is less common now to find a telecom incumbent in complete
control of retail, generally subject to lesser entry barriers, the wholesale level
continues to suffer from more prevalent and persistent monopolisation\textsuperscript{28}.
Opening access to the infrastructure necessary for the provision of wholesale
services is thus not only a common, but arguably the most important means
of regulatory intervention\textsuperscript{29}.

Alongside the traditional transmission services provided by EMITEL on
the wholesale level, the incumbent was thus ‘regulated’ so as to provide access
services to its infrastructure to other telecom operators in order for them to be
able to compete with EMITEL’s primary offer. As such, the 2004 UKE decision
has effectively created a top-tier terrestrial network access market resulting in
a further segmentation of the Polish broadcasting transmission value chain into
broadcasting (multiple down-stream retail markets\textsuperscript{30}), transmission services
market/s (mid-level wholesale markets\textsuperscript{31}) and the transmission infrastructure
access market (up-stream wholesale market). The liberalisation process has
thus caused a significant shift in telecom customer relations – a move away
from a dual (monopolist v. broadcasters) towards a three-fold division of the

\textsuperscript{27} E.g. imposition of WLR to improve the competitiveness of call termination.
\textsuperscript{28} The new 2007 Commission Recommendation on relevant markets in the electronic
communication sector list only 1 retail market that it believes to be in need of \textit{ex ante} regulation
but still 6 wholesale markets.
\textsuperscript{29} S. Piątek, ‘Polityka komunikacji elektronicznej Unii Europejskiej’ \textit{[in:]} A. Jurkowska,
prawne”}, Warszawa 2010, p. 177.
\textsuperscript{30} Over the years many separate relevant markets have been identified on retail level of
broadcasting on the basis of European competition law starting with: \textit{free-access tv} in \textit{Dow
Jones/NBC-CNBC Europe} (Case IV/M1081), OJ [1998] C 83/4, para. 7; \textit{Tv-advertising} in \textit{Kirch/
Mediased} (Case IV/M 1574), OJ [1999] OJ C 255/3, para. 12; \textit{pay-tv} in \textit{MSG} (Case IV/M469), OJ
[1994] L364/1 para. 32 which directly concerned \textit{technical and administrative services for pay-tv}
as a mid-level wholesale market; see also the discussion on substitutability of broadcasting
transmission services from an antitrust perspective in A. Bravasso, \textit{Communications in EU
\textsuperscript{31} Potentially multiple markets segmented according to the type of transmission services
provided into e.g. transport of signal v. signal diffusion, or the type of programming transmitted
e.g. television v. radio transmission services; or according to the signal type e.g. analogue
v. digital transmission services.
value chain (incumbent vs. other operators & incumbent/other operators vs. broadcasters). For that very reason, customers of the transmission services markets, in other words, its demand side (broadcasters) must be clearly differentiated from EMITEL's new/potential customers on the up-stream access market (telecom operators).

Among the most striking realisations coming to mind after the analysis of the regulatory decision of 2004 is that the Polish NRA has failed to fully realise and act on this fundamental difference. This fact is especially regrettable because the comments submitted by the UOKiK President concerning the draft regulatory decision have not only noticed but actually stressed the incorrectness of considering both telecom operators and broadcasters as the buying side of the market defined as relevant in these proceedings.

The incorrectness of the approach applied by the UKE President is clearly reflected in the position of OFCOM, the British NRA, which explicitly identified 3 levels in the broadcasting transmission value chain: wholesale access market (up-stream), intermediate (mid-level) managed transmission services market and retail broadcasting markets (down-stream). Importantly, the British antitrust authority, the Competition Commission, follows a similar approach where it differentiated the wholesale access level from the intermediate wholesale transmission services level and finally from retail broadcasting.

II. The law and the market

1. Procedural intertwining

After the opening of the regulatory proceedings, the UKE President notified the proposed decision to the European Commission stating in particular the reasons for the narrowing down of the market listed in the Recommendation. The NRA also fulfilled its legal obligation based on Article 16 of the Polish

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32 In either case, retail broadcasting markets remain outside of the telecoms domain.

33 Rather than differentiating three distinct levels which intertwines telecoms with the broadcasting sector, some commentators speak of the wholesale level (infrastructure markets) as opposed to retail (infrastructure services) only see M. Szydło, Regulacja sektorów..., p. 99.

34 Alternative telecoms operators should have been placed on the same side of market 18 as Emitel as its competitors. The imposition of access obligations on Emitel would have taken place on a, so to speak ‘newly created’, access market.


Telecommunications Law of 16 July 2004 (in Polish: Prawo Telekomunikacyjne; hereafter, PT) to submit the draft decision to the UOKiK President for consultation. Unfortunately, since the PT did not specify at what stage of the proceedings the notification should take place, UKE did so only after the draft was fully formulated. That fact was unsuccessfully contested by EMITEL because formally no breach of PT took place. The incumbent was right however to note that the primary purpose of a consultation process between the NRA and the antitrust authority was for the former to be able to use the expertise of the latter as far as market definition is concerned, a concept which constitutes the basic framework of the entire regulatory proceeding. However, the authorities agreed that not only did the PT not specify the moment of the necessary consultation it also did not oblige the UKE President to actually incorporate the comments of the UOKiK President in the decision. As J. Black put it a ‘rule (…) is only as good as its interpretation [as] rules cannot apply themselves [to] be applied rules have to be interpreted’ – regrettably, the NRA followed here a formalistic interpretation of the existing law rather than fulfilling what would have been its intended purpose.

The involvement of the antitrust authority in the regulatory proceedings was further limited by the provision that the UOKiK President was meant to assess the correctness of the proposed decision only on the basis of the legal and factual circumstances presented by the NRA. The design of Polish legislation has therefore effectively eliminated the UOKiK President’s ability to actually influence the content of the regulatory decision unless of course, the NRA would admit to its mistakes in the formulation of the draft and voluntarily change it. If the regulator was however willing to do so, it would have most likely consulted the antitrust body at a much earlier stage of the investigation so as to increase the likelihood of its analysis taking place within the framework of an accurately defined relevant market. Incidentally, unlike the comments submitted by the UOKiK President, those received by the NRA from the European Commission were incorporated into the final decision. The fundamental difference in the treatment of two sets of comments can be attributed to the fact that Article 19(1) PT imposes an obligation on the UKE President to consider the comments received from the Commission to

37 Comments of the UOKiK President to the draft decision.
39 Agreeing with the view that sees the Commission as a party in the regulatory decision-making chain, rather than a policing instance, the UOKiK President should have a similar position see P. Larouche, M.C.B.F. de Visser, ‘The triangular relationship between the commission, NRAs and national courts revisited’ (2006) 64 Communications & Strategies 130.
the greatest extent possible\textsuperscript{40} while there is no such duty with respect to the observations submitted by the UOKiK President\textsuperscript{41}.

Under the Act on Competition and Consumer Protection of 15 December 2000\textsuperscript{42}, antitrust proceedings could be initiated \textit{ex officio} as well as on request of those entities, or their associations, that had a legal interest in the case. On 12 December 2005, the Association of the Employees of Public Broadcasters (in Polish: \textit{Związek Pracowników Mediów Publicznych}; hereafter, ZPMP) took advantage of the possibility provided by Article 84 of the Competition Act 2000 and submitted a formal complaint to the competition protection body alleging that EMITEL has committed a violation of the prohibition of a dominant position abuse with respect to its treatment of public broadcasters\textsuperscript{43}. Incidentally, all antitrust proceedings are currently initiated \textit{ex officio}\textsuperscript{44} a fact that does not preclude ‘injured’ or, indeed any other interested parties from filing complaints or providing the UOKiK President with data on alleged infringements. However, such submissions no longer compel the authority to initiate antitrust proceedings allowing it to free itself from the duty to take actions on ‘personal’ interests of market players\textsuperscript{45}.

Formal competition law proceedings were opened against EMITEL on 29 December 2005 on request from ZPMP that explicitly argued against the incumbent’s market practices against its members, including most importantly, price discrimination and exploitation. The fact that antitrust proceedings against EMITEL were initiated by a group of its clients is strongly reflected by the great extent of the involvement of the claimant in the UOKiK’s assessment of the case. It also directly emphasises the ‘individualistic’ focus of antitrust enforcement as they are bound by the alleged existence of a given prohibited practice used against a specific entity or group of entities\textsuperscript{46}. It is also the origin of a very court-like framework of the assessment where two independent undertakings argue

\textsuperscript{40} According to Article 19(2) PT, the issuance of a regulatory decision can be postponed or the regulatory process suspended if the Commission objects to the draft as far as the establishment of SMP or market definition different from the Recommendation where it endangers the development of the single market or is in breach of EU law; see S. Piątek, \textit{Prawo Telekomunikacyjne. Komentarz}, Warszawa 2005, pp. 214–219.
\textsuperscript{42} For more details see T. Skoczny, A. Jurkowska, D. Miąsiki (eds.), \textit{Ustawa...}, p. 1389.
\textsuperscript{43} The decision of the UOKiK President established ultimately only the existence of prohibited discrimination.
\textsuperscript{44} See Article 49 Competition Act 2007.
\textsuperscript{45} See Article 86, 87 and 101 Competition Act 2007.
\textsuperscript{46} It is worth noting that in July 2007 ZPMP successfully requested a limitation of the extent of the proceedings to an alleged infringement of Article 8(2) point 3 only; UOKiK decision page 5.
with each other in front of the judge-like-figure of the UOKiK President. By contrast, sector-specific regulators are bound by the existence of market power only and thus view market practices from the point of view of the incumbent as opposed to ‘the entire/potential rest of the market’. The individualistic character of competition law enforcement is thus in opposition to the far more wide-ranging approach employed by the regulator.

The difference between the ‘specific’ as opposed to ‘general’ nature of the two interventions was stressed by both the UOKiK and the UKE Presidents. Unlike the consultation procedure provided for by the PT, the Polish competition authority is not legally obliged to consult anyone before it reaches its decision, be it another public body or an individual or undertaking, unless they are party to the proceedings. Nevertheless, the UOKiK President sought confirmation from the UKE President whether the NRA believed that a competence dispute existed between the two parallel proceedings. The UKE President responded that the two interventions do not collide seeing as one has an *ex-ante* (more general, future oriented) while the other an *ex-post* character (very specific, focusing on past conduct). The NRA pointed out also that while its own proceedings will have horizontal consequences for telecom operators competing with EMITEL, the antitrust proceedings will affect directly the vertical relationship between the incumbent and broadcasters as its customers/clients. The UOKiK President confirmed the conclusions of the NRA adding also that it is stated already in Article 1 PT that it does not constitute *lex specialis* to the Competition Act, in other words, that the application of the PT in regulatory proceedings does not preclude the possibility of a parallel antitrust intervention. UOKiK also correctly stressed that, unlike EMITEL’s claims, the competition body is very much competent to assess and intervene into the vertical relationship between the incumbent and its clients, that is, broadcasters.

2. Between the markets

Although no such obligation arose from the Liberalisation package, Article 22 (1)PT stated at the time of the regulatory proceedings that markets which

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47 Unless of course the case is of interest to the EU resulting in an involvement of the Commission or the competition authorities of other MS.
50 UOKiK decision page 30.
51 This approach was confirmed by the Supreme Court on 19 October 2006 (III SK 15/06).
52 The need for an executive Regulation and thus hopefully the resulting problems concerning the relationship between the national list and individual relevant market definition have now been eliminated by the Act of 24 April 2009 on the amendment of the Act – the Telecommunications Law (Journal of Laws 2009 No. 85, item 716).
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might need to become subject to _ex ante_ regulation in Poland will be specified by the Communication Minister. An appropriate executive Regulation was issued on 25 October 2004 identifying the exact same markets listed in the 2003 Commission Recommendation\(^53\). According to the Polish NRA, the 18 pre-determined markets were to be further specified (narrowed down in particular) by the regulator in the course of its individual proceedings. The regulatory decision stressed in this context that while the Commission was obliged\(^54\) to issue its Recommendations and to prepare separate Guidelines on market analysis and the assessment of significant market power\(^55\), the NRA was obliged to respect their provisions. Nevertheless, the NRA was right to consider itself able to define markets differently to those specified by the Commission due to existing national circumstances\(^56\). The UKE decision made it clear that the NRA, not unlike the Commission, saw itself as obliged to base its relevant market definition process on competition law principles\(^57\). The UKE President was therefore bound by Article 4 point 8 of the Competition Act of 2000 applicable in this case, whereby the relevant product market should comprise all those transmission services which are regarded as interchangeable or substitutable by those acting on the demand side of the market (their buyers) by reason of the products’ characteristics, their prices and their intended use.

The UKE President concluded on this basis that market 18 as listed in the 2003 Recommendation and repeated in the Polish executive Regulation of 2004, needed to be further segmented. Ultimately, the relevant market was set to solely cover terrestrial transmission\(^58\) as the only distribution method able of reach the entire Polish population at a relatively low cost, but also on


\(^{54}\) Article 15(1) of the Framework Directive.

\(^{55}\) OJ [2002] C 165/6; on the applicability of the Guidelines see K. Kowalik-Bańczyk, ‘The publication of the European Commission’s guidelines in an official language of a new Member State as a condition for their application: Case comment to the order of the Polish Supreme Court of 3 September 2009 (III SK 16/09) to refer a preliminary question to the Court of Justice of the European Union’ (2010) 3(3) _YARS_ [do wstawienia później].

\(^{56}\) That is so provided they acted in accordance with Article 7 of the Framework Directive – failure to notify a draft measure which affects trade between Member States as described in Recital 38 of Directive 2002/21/EC may result in infringement proceedings being taken.

\(^{57}\) See Notice on the definition of relevant market for the purposes of Community competition law, OJ [1997] C 372/3.

\(^{58}\) The need to segment market 18 into terrestrial and other transmission services was clearly noted already in the public consultation preceding the 2003 Recommendation and while the
the basis of a very limited offer. The narrowing down of the relevant market was notified to the Commission which requested an additional study of the substitutability between terrestrial and cable transmission\textsuperscript{59}. By contrast, analogue and digital services were not separated seeing as the latter was only just emerging\textsuperscript{60}. Furthermore, the product market was said to include all types of broadcasting transmission services: diffusion/broadcasting (in Polish: \textit{emisja}) as well as signal transfer from one point to another (in Polish: \textit{dosył}), on the basis of the assumption that they are generally supplied in one package despite the fact that they are not directly substitutable\textsuperscript{61}. Transmission services for television and radio signal were also not separated and neither were any local or regional markets. As a result, the UKE decision identified a \textbf{national market for terrestrial transmission} as the narrowed down segment of the Polish ‘market 18’ that was susceptible to \textit{ex ante} regulation.

The introduction of a national ‘list’ however, caused unnecessary uncertainty in the context of relevant market definition by the NRA. In its comments to the draft regulatory decision, the UOKiK President supported the view that a definition diverging from that of the list is only acceptable if it is assumed that it relates to the same markets\textsuperscript{62}. The competition body was very insistent in stressing that according to its analysis of Polish legislation, the authority entitled to define relevant markets for \textit{ex ante} regulation was at that time the Communication Minister and not the UKE President. While this objection is understandable considering the ambiguity that surrounded the relationship between the markets defined in the executive Regulation and those established in individual regulatory proceedings, it is at the same time unfounded. The views of the UOKiK President go against the essence of liberalisation which is based on the assumption that \textit{ex ante} regulation is to be introduced only in those economic fields which are not subject to effective competition – supporting therefore further market segmentation by NRAs. It was not however until very recently that the ECJ explicitly confirmed that the obligation to define

\footnotesize{Commission decided to set a very wide definition of market 18, it has subsequently agreed to it narrowing down in particular MS such as Italy or Estonia.}

\footnotesize{\textsuperscript{59} Satellite transmission was omitted since it is not provided by any of the Polish telecoms operators.}

\footnotesize{\textsuperscript{60} Similarly to France or Spain; by contrast, far greater segmentation is present in Finland and especially UK where OFCOM divided the markets not only into analogue v. digital radio and digital and analogue v. digital television transmission}

\footnotesize{\textsuperscript{61} The importance of the provision (demand & supply) of service bundles for the definition of relevant markets is stressed by J. Gual, ‘Market definition in the telecoms sector’ [in:] P.A. Buigues, P. Rey (eds.), \textit{The Economics of Antitrust...}, p. 59.}

\footnotesize{\textsuperscript{62} Comments of the UOKiK President to the draft decision.}
relevant markets is placed by the liberalisation package on the NRAs and not on legislators\textsuperscript{63}.

The European Commission has also recently clarified that the process of identifying markets in its Recommendation ‘is without prejudice to markets that may be defined in specific cases under competition law... Moreover, the scope of ex ante regulation is without prejudice to the scope of activities that may be analysed under competition law\textsuperscript{64}. The antitrust authority has indeed established a different relevant market than the NRA even though it assessed the very same economic segment of the broadcasting transmission services. The UOKiK President agreed with the regulator that terrestrial transmission services cannot be substituted in Poland by cable or satellite primarily by reasons of their characteristics and prices. On the other hand, only diffusion (broadcasting) services were included in the relevant market leaving out signal transfer. Finally, the competition authority established that transmission services for television and radio were forming part of the same relevant market without also establishing any geographical segmentation. Ultimately, the competition protection body defined a national market for terrestrial diffusion (broadcasting) services for radio and television programmes\textsuperscript{65}.

However, according to Article 4 point 8 of the Competition Act of 2000, a relevant product market comprises all those services which are regarded as interchangeable or substitutable by those acting on the demand side of that market. Unfortunately, both decisions lack a comprehensive analysis of direct demand substitutability of broadcasters that unquestionably represent the buying side of the intermediate, wholesale transmission services market. The UOKiK President was right to criticise the UKE President for placing both clients (broadcasters) as well as competing operators on the demand side of the same market\textsuperscript{66} and yet the antitrust authority later failed to precisely define the vertical structure on the distribution chain in its own decision. Furthermore, while it had justified reservations about the NRA’s decision to include all types of transmission services in the same relevant market; the antitrust body itself failed to fully consider the direct substitutability of demand, focusing instead on indirect substitutability on retail markets and the substitutability of supply.

\textsuperscript{63} See ECJ judgment of 3 December 2009, C-424/07 Commission v Republic of Germany, recital 53-61, 74.

\textsuperscript{64} Commission Recommendation 2007.

\textsuperscript{65} EMITEL rightly argued that the demand for television and radio broadcasting transmission services is not substitutable at all and can therefore not form part of the same product market. EMITEL argued also, incorrectly this time, that the market should not be limited to terrestrial transmission only.

\textsuperscript{66} The EU speaks of multiple wholesale markets for transmission services and access.
There is no demand substitutability on the intermediate market, even though it might very well exist on up-stream access markets seeing as transmission services for radio and television are not substitutable for broadcasters! They have fundamentally different prices and they often use very different infrastructure elements with different levels of compatibility and intended use. Moreover, the market structure itself has proven that some elements of radio transmission infrastructure can be successfully replicated – the creation of an alternative television transmission infrastructure is very unlikely, especially if it was to reach the entire country. Thus, while supply substitutability might indeed exist at least to a certain extent or in some geographic areas and should not be overlooked\(^67\), there is certainly no demand substitutability for broadcasters. Indeed, the separation of the intermediate wholesale markets into transmission services for radio and those for television is supported by the UK Competition Commission which assessed the same segment of the UK market ‘It would not, in practice, be possible for a provider of radio MTS/NA to act as a competitive constraint upon a hypothetical provider of MTS/NA to television\(^68\).’

Conversely, while market definition is meant to be based on the same criteria for both regulatory intervention and antitrust enforcement, the approach to it of those subject to parallel proceedings is essentially opposite – while entities subject to an antitrust scrutiny argue for the widening of the relevant markets (the wider the market the lesser the chance to establish market power which is the pre-requisite of the finding of its abuse), they argue for their narrowing down in regulatory proceedings (assuming that the existence of significant market power is prevalent especially in wholesale telecoms markets, the narrower the markets the fewer the market activities subject to the involvement of regulators).

Acknowledging that the completeness and objectivity of the data collected in the course of both proceedings is open to debate, it would be unreasonable to claim that there is a one and only correct relevant market definition applicable to broadcasting transmission services in Poland which one or indeed both of the authorities failed to establish. In reality, both proceedings concerned the very same segment of the distribution chain (transmission services) both trying to establish whether it was competitive and both reaching the conclusion that

\(^67\) The importance of supply substitutability for the definition of relevant markets in telecoms is noted by J. Gual, ‘Market definition...’ [in:] P.A. Buigues, P. Rey. The Economics of Antitrust...; similarly, D. Adamski stresses the importance of price elasticity of demand see D. Adamski, Europejskie prawo łączności elektronicznej. Telefonia, telewizja, Internet, Warszawa 2005, pp. 119-120.

\(^68\) Available at http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/537.pdf, point 4.30
the market was still largely under EMITEL’s control. Yet the actual market definition established by the UKE and the UOKiK Presidents were neither the same as each other (the regulator included more types of transmission services) nor as the definitions established by the Commission (the Polish authorities limited the assessment to terrestrial transmission services only) nor in fact in line with the examples of far more experienced authorities from different MSs. The resulting differences might be a reflection of analytical mistakes committed by the two authorities such as, for instance, the accumulation of television and radio broadcasting transmission services in the same market which is very questionable considering their complete lack of substitutability for broadcasters. Some divergences however, particularly whether all or only some of the types of available transmission services form part of the relevant market, can be attributed to the different focus of the two proceedings. While the NRA considered the relationship between EMITEL and the market overall, the UOKiK President was bound by the allegations submitted in the antitrust case by a very specific group of EMITEL’s clients.

III. State of play: action or reaction?

The fact that the Recommendation of 2003, or indeed the executive Regulation of the Polish Communication Minister issued a year later, identified 18 markets susceptible to ex ante regulation does by no means mean that they will always be subject to regulatory intervention. The liberalisation package is based on the very premise that regulatory obligations may be imposed only on those markets that are not subject to effective competition, in other words, where an undertaking with significant market power exists. The NRAs were thus obliged to take action to individually assess which of the relevant markets, pre-determined by the Commission which they themselves further delineated, fulfilled the three criteria of ex ante regulation. The presence of high and non-transitory barriers to entry (structural, legal and regulatory) was unquestionable in the Polish broadcasting transmission field. They included extremely high sunk costs associated with the creation of alternative infrastructure and near impossibility of gaining permission to build new masts in urban areas. Existing entry barriers practically precluded the possibility of the structure of the transmission services market to independently evolve towards effective competition in any foreseeable time. The market share of the incumbent was set on a level exceeding 85% in 2005\(^6\) as it remained the

\(^6\) Taking into account the fact that the market was defined as including terrestrial transmission only but covering both television and radio transmission services.
only operator able to broadcast both television and radio signals to the entire country. The UKE President concluded that it was unlikely that antitrust enforcement alone could adequately address the profound lack of competitive pressure on the incumbent\textsuperscript{70}. The specific and individualistic character of the application of antitrust rules was identified as a decisive factor in this respect and so was the fact that it is triggered by the existence of a prohibited market practice, such as an abuse, an issue much harder to establish than the existence of market power.

At the same time, Article 8(2) of the Polish Act on Competition and Consumer Protection of 15 December 2000\textsuperscript{71} contained a prohibition of the abuse of a dominant position. Among the exemplary forms of abuse it listed was: unfair price imposition (Article 8(2) point 1), use in similar agreements of burdensome or dissimilar contractual conditions creating dissimilar conditions of competition for the parties (Article 8(2) point 3) and exploitation (Article 8(2) point 6). These three categories of abuse were named in the original complaint submitted by ZPMP and thus delineated at first the scope of the antitrust proceedings. However, the claimant’s later request has narrowed down the scope of the final intervention to a violation of Article 8(2) point 3 only\textsuperscript{72}.

As a reaction to the practices alleged in the complaint, an antitrust procedure was opened which ended with the adoption by the UOKiK President on 25 October 2007 of a decision establishing that EMITEL has indeed abused its dominant position on the national market for terrestrial broadcasting services for television and radio programmes by way of discrimination.

The incumbent was said to have unjustifiably applied dissimilar contractual conditions that favoured commercial broadcasters (not completely dependent on EMITEL) over PSBs that remain obliged, by the very nature of their public service remit, to provide full coverage – a condition possible to fulfil only on the basis of the transmission network controlled by EMITEL. Unlike commercial broadcasters, PSBs had to acquire transmission services from the incumbent since it was the only operator capable of providing full broadcasting coverage. This fact alone was said to have given EMITEL the leverage necessary to extort unfairly high prices from public broadcasters while it applied a more market oriented pricing policy in its business dealings with private operators. The antitrust decision prohibited EMITEL from the continuation of the

\textsuperscript{70} See M. Szydło, Regulacja sektorów..., p. 95.
\textsuperscript{71} Journal of Laws 2005 No. 244 item 2080, analogue to Article 9(2) point 5 and 7 of the Act on Competition and Consumer Protection of 16 July 2007, Journal of Laws 2007 No. 50, item 337.
\textsuperscript{72} On the basis of Article 67 of the Competition Act 2000, no longer in effect, UOKiK has thus discontinued the proceedings as far as the other two forms of abuse are concerned.
contested practice and levied on the incumbent a fine of over 19 million PLZ (about 5 million EURO) which was of a size reflecting major abuse.

Seeing as both of the aforementioned relevant market definitions are subject to many potential inaccuracies, it would be futile to try to assess the correctness of the reasoning behind the establishment of market power on any of these markets. Unlike national legislative solutions applied in the context of potential procedural intertwining and relevant market definition, the existence and abuse of market power constitute however far more straightforward variables affecting the relationship between regulation and the enforcement of competition law in practice. Even without an in-depth analysis by the antitrust authority or the regulator, EMITEL was correctly perceived as an operator with significant market power. That fact was confirmed in 2008 when EMITEL became the only subsidiary part of the TP SA Capital Group to find itself on the Polish Treasury’s list of companies of key importance to the country because it was the only operator capable to broadcast television and radio signal to the entire country73.

The fact that EMITEL would be subjected to some regulatory obligations was not generally questioned and neither was the realisation that it held a dominant position making it possible for the incumbent to engage in abuse. Indeed, while the scope of the regulatory intervention would have ultimately depended on the state of competition found by the NRA on particular relevant markets in Poland, some regulation of EMITEL’s economic activities was seen as inevitable. Similarly, since it was clear that public broadcasters were practically dependent on the provision of transmission services by EMITEL74, the incumbent was seen as having the market power enabling it to abuse it at least with respect to those broadcasters that had no alternative but to contract with EMITEL. It remained thus for the competition authority together with those affected, to prove that any of the incumbent’s market practices constituted in fact an abuse, that is, an economic behaviour that could not be sustainable by entities without a dominant position.

It is thus fair to say here that a direct intertwining of the two public interventions occurred in Poland because the economic field in question was not generally competitive and because some of the practices of the entity that dominated it were questionable from the point of view of competition law. This realisation is reflected by the comments submitted by the UOKiK President to the draft regulatory decision where the competition authority agreed that EMITEL was indeed in control of significant market power on the relevant

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74 The obligation for the broadcast of public operators to reach the entire population derived from Articles 21-25 of the Broadcasting Act of 29 December 1992 applicable at that time.
market as defined by the NRA. Truthfully, unlike the problems associated with the accurate relevant market definition, the establishment of significant market power or dominance of the incumbent is not as controversial. Even if markets were to be defined much more narrowly that was ultimately the case, EMITEL would most likely have been found to hold market power on at least some, if not even most of them.

VI. Divergent characteristics: from separation to combination?

According to the Polish authorities, the two parallel proceedings concerning EMITEL were fundamentally different. Both stressed the ex-ante character of regulatory intervention and its far more general nature. They pointed out that while the UOKiK President assessed and acted on past conduct only, the relevant market definition undertaken by the regulator was fundamentally forward-looking – it was meant to predict the likely future of the scrutinised economic field even if it was primarily based on past data. Finally, the concluding realisation that the regulatory intervention had no bearing on the antitrust proceedings was associated with the difference in the addressees of the respective decisions: while the regulator dealt with the horizontal relationship between EMITEL and other telecoms operators, UOKiK was concerned with the incumbent’s vertical relations with broadcasters.

The observations concerning the differences in the character, nature and time horizon of a regulatory intervention as opposed to the antitrust case are valid but the two decisions do not reflect them very clearly. Considering the general features of regulation and antitrust enforcement, their ex-ante v. ex-post character is meant to be of key importance. However, the difference that should result from this fact in the emphasis of the two parallel assessments, (whereby regulation concentrates on significant market power and antitrust on abuse), is largely absent. Establishing abuse is not necessary for regulation; it merely confirms the existence of market power. Yet a large part of the regulatory decision was devoted to EMITEL’s alleged mistreatment of PSB without any concrete consequences being drawn from this fact. Thus, the expected more general character of regulation was somewhat lost since the UKE President put far too much emphasis on EMITEL’s market practices. It is also hard to see whether any of the differences in the establishment of the relevant market contained in the two decisions derived from the more future-oriented approach that the NRA claimed to have employed. The divergence seems more likely to have resulted from a misinterpretation of substitutability patterns rather than the different time horizon of the assessment. Thus, the
diverging characteristics of regulation and antitrust proceedings noted by the
authorities are not actually greatly reflected in the two respective decisions.

Moreover, the aforementioned differences cannot be generalised – they refer
specifically to the relationship between regulation and a traditional approach
to the antitrust scrutiny of abuse applied in Poland at the time. Antitrust
assessments of multilateral agreements, or of a planned concentration for that
matter, often resemble regulation to a great degree. The conditional approvals
that can be issued in such cases have many quasi-regulatory features such as
their prescriptive and detail. In practice, it was the unconditional character
of the prohibition of a dominant position abuse that notably set apart the
two types of public intervention rather than any general differences between
regulation and antitrust. Clearly, from among the many practices of interest
to competition law, the existence of an abuse is the one most likely to result in
parallel proceedings but it is by no means the only one. With the introduction
of commitment decisions into the Competition Act 2007, the antitrust authority
has now also the option to apply a negotiated solution even to alleged abuse
cases and even though the traditional approach is still predominant in Poland,
the recent ZAIKS decision shows the UOKiK President’s will to move
towards more proactive instruments. If this was indeed the case the separate
decisions reached by the regulator and the antitrust authority could have been
far more similar.

The above realization is especially important considering that the final
differentiating factor noted by the UOKiK President, the diverging addresses
of the two decisions, is not actually a reflection of a general difference between
regulation and antitrust, or even regulation and the enforcement of the
abuse prohibition, but merely a result of the type of abuse established in this
case. If the antitrust authority found, in a different set of circumstance, that
EMITEL had abused its dominance on an emerging broadcasting transmission
infrastructure market, for instance by limiting access to an essential facility
such as a transmission mast built in a very remote location, both decisions

75 The increasingly prescriptive character of antitrust enforcement is noted in general by
commentators such as R. Whish, Competition law, 6th edition, London 2008 and in particular by
I. Maher, ‘Regulating Competition’ [in:] Ch. Parker, C. Scott, N. Lacey, J. Braithwaite (eds.),
php?news_id=2217 concerned ZAIKS, the ‘incumbent’ Polish copyright collecting society; it
established that a likely violation of Article 9 of the Competition Act 2007 as well as of Article
102 TEFU took place and ‘redesigned’ some of ZAIKS’s contractual provisions; for a detailed
assessment of the Polish commitment procedure see T. Kozieli, ‘Commitment Decisions under the
Polish Competition Act – Enforcement Practice and Future Perspectives’ (2009) 3(3) YARS.
77 At least some elements of EMITEL’s broadcasting transmission infrastructure could
qualify as an essential facility due to its un-replicable & indispensable character.
could very well have concerned the horizontal relationship of EMITEL with other telecoms operators.

What set apart the two types of public intervention against EMITEL were in practice the legal instruments used. According to the Commission, ‘regulatory obligations must be appropriate and be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Directive 2002/21/EC, in particular maximising benefits for users, ensuring no distortion or restriction of competition, encouraging efficient investment in infrastructure and promoting innovation, and encouraging efficient use and management of radio frequencies and numbering resources’ 78. In that light, UKE imposed on EMITEL nearly every regulatory tool at its disposal. The incumbent was obliged to consider all reasonable requests submitted by other operators for access to its infrastructure (Article 34 PT); to refrain from discrimination (Article 36 PT) and to disclose certain technical data (Article 37 PT). EMITEL was also obliged to use regulatory accounting (Article 38 PT) and cost-based access prices approved by UKE (Article 40 PT). Finally, the incumbent had to prepare a framework offer for its transmission services (Article 42 PT) which was approved, subject to some changes, on the 28 November 200779. Considering the extent of the regulatory obligations imposed on EMITEL, it is worth stressing that UKE was aware of the fact that the incumbent was the only entity burdened with the costs associated with the upkeep and expansion of its infrastructure; these burdens were however said to be nothing in comparison to what other operators would have to spend to build an alternative network.

The regulatory decision identified also three separate forms of ‘abuses’ of EMITEL’s market power but took no direct actions to counteract them. In the opinion of the regulator, the incumbent was greatly independent allowing it to: overcharge public broadcasters and impose on them onerous contractual conditions; discriminate against them; and use cross subsidies whereby it offered its lowest prices on markets subject to some competition but charged extremely high prices on segments which were still monopolised. The NRA noted in particular that prices for low and medium strength transmission are falling while prices for high strength transmission are increasing. Interestingly therefore, the regulator assessed in detail EMITEL’s vertical relationships with broadcasters even though it did not have the authority to do anything about them, seeing as its regulatory competences do not extend to entities other than telecoms undertakings. Thus, while the NRA identified all these issues, it did not place any direct price control obligations on EMITEL even though the Commission had suggested this in its comments to the draft decision. Instead,  

78 Recommendation 2007, recital 18.
79 It is worth noting the wide use of pre-approval even though it is the most intrusive form of public intervention see A. Ogus, Regulation: Legal Form and Economic Theory, Oxford 2004, p. 9.
access obligations were placed on EMITEL relating to its infrastructure based on the assumption that if other operators gain wholesale access to its network, the prices for broadcasting services will fall overall.

Considering how difficult it can be to actually prove the existence of abuse in antitrust enforcement (as opposed to the discursive declarations contained in the regulatory decision), the UOKiK President formally established that EMITEL had engaged in a single form of abuse only, that is, discrimination against public broadcasters. The antitrust decision contains no prescriptive elements at all – it is a clear reflection of the enforcement of the unconditional prohibition of a dominant position abuse – its only instruments of intervention are the order for the abuse to be ceased, even though it was already discontinued at the time of the decision, and the imposition of a fine.

While the authorities stressed the division between the two interventions, the assessment presented by both public bodies was similar: they analysed the same economic field, the same entity controlling it and finally, the same practices used by it again the same single group of clients. What set apart the two interventions in practice were ultimately the different immediate effects that they aimed to achieve using the fundamentally diverse instruments of intervention at the disposal of the telecoms regulator and the antitrust authority. However, the unquestionable pro-activeness of the effects of the regulatory decision and the profound re-activeness characterising the antitrust scrutiny of its dominant position abuse is very much a reflection of the specific case at hand and the procedural choices of the Polish legislator. It is truly a shame that the authorities perceived the differences between them as an argument merely justifying their separation rather than an opportunity to use their complementary nature to open the way to their combination.

V. Afterthoughts

Considering the entirety of public intervention against EMITEL, it is fair to say that the telecoms regulator influenced, or at least tried to influence, its horizontal relationship with other telecoms operators on the top-tier infrastructure market while the antitrust authority aimed directly at its vertical relationship with broadcasters on the intermediate wholesale transmission 80 Antitrust intervention directed towards multilateral practices and concentrations can have a prescriptive nature in cases of conditional decisions.

services market. In other words, while the UKE President prescribed its actions up-stream, the UOKiK President restricted its actions on the mid-level wholesale market. EMITEL’s freedom to act has therefore been considerably restricted – at least in theory – both in the horizontal and vertical context. However, both authorities intervened in order to improve the situation on the mid-level market – the regulator tried to make it more competitive while the antitrust authority tried to eliminate abuse that persisted because the market still lacked competition.

What conclusions can be drawn therefore about the overall impact of public intervention into the activities of EMITEL? The analysis has clearly shown that Poland’s transposition of the Electronic Communication Package was lacking. The first problem related to the uncertainty surrounding the legal qualification of the executive Regulation issued by the Communications Minister that re-listed the markets originally identified in the Recommendation and their impact on the definition of relevant markets by the UKE President. This ambiguity will hopefully now be resolved with the recent PT amendments that have eliminated the need for an executive Regulation. From now on, the UKE President is explicitly expected to define its relevant markets in light of the Commission Recommendation (Article 23-25 PT) and on the basis of competition law principles.

The second problem associated with Polish telecoms legislation persists to this day and concerns the weakness of its consultation procedure. The antitrust authority is still expected to comment on draft regulatory decisions without the time of the consultation being specified in the PT. The NRA remains free also to choose whether to act on the observations submitted by the UOKiK President or not, unlike the comments received from the Commission which must be respected to the greatest possible degree. A consolation lacking in an ‘imperative’ seems to complicate the proceedings unnecessarily without ensuring that it will achieve its objective. It seems fair to say that it should either be eliminated or reformed, by law or practice, so as to combat its current shortcomings. Without an amendment in this respect, it is the willingness of the NRA to incorporate the comments of the UOKiK President, or indeed any other body that submitted its observations within the consultation process, that remains crucial in this context. The regulator has made some notable corrections to the draft of its 2010 decision showing that some improvement

82 The change brings the PT in line with the ECJ judgment C-424/07 Commission v Germany; see K. Kosmala, ‘2009 Legislative and Juridical Developments in Telecommunications’ (2010) 3(3) YARS strona do wstawienia
83 E.g. it acted on UOKiK suggestion to redefine the demand side of the relevant market separating alternative operators from broadcasters; point 4.2; see a document available at http://www.uke.gov.pl/__gAllery/29/25/29255/Komentarz_rynek18.pdf .
in this respect can be achieved by enforcement practice alone. Unfortunately, it remained largely adamant when it comes to its relevant market definition refusing to acknowledge EMITEL’s justified objections concerning the lack of demand substitution between transmission services for television and radio. Once again, the NRA’s market definition is based primarily on supply substitution\textsuperscript{84}.

The new decision adopted by the UKE President shows also that 4 years since the imposition of regulatory obligations including infrastructure access and a framework offer, EMITEL provided little access. Not much has thus been achieved in practice with respect to the competitiveness of the Polish transmission services market. Leaving aside the rather speculative issue of whether the incumbent is actively obstructing the conclusion of access agreements by the application of exaggerated price and prolonging negotiations\textsuperscript{85} or simply acting in accordance with regulatory provisions that lack accuracy, it seems that EMITEL’s position on ‘market 18’ has fallen only slightly since 2006. Conversely, rather than moving to cheaper competitors, some of the business loss experienced by the incumbent might be associated with the fact that some of its old clients (e.g. local broadcasters) have found it cheaper to build their own infrastructure elements than to continue their contractual relationship with the incumbent.

The assessment of the two interventions suggest that the authorities should fully acknowledge that the state of competition found on the Polish terrestrial broadcasting transmission services market differs greatly between its various segments. Local radio transmission is to some extent competitive and does not seem to justify \textit{ex ante} regulations; national transmission services of television are still controlled by EMITEL suggesting that a different access imposing mechanism must be found. The fact that EMITEL TP is still monopolising the television transmission market 4 years after the original UKE decision might suggest that an overall regulation of the entire field (relatively widely defined relevant market that encompasses all types of transmissions services and all types of signal) cannot function properly in such diversified environment. It might however indeed mean that the incumbent is purposefully obstructing access negotiations, in which case an antitrust intervention would be in order.

The market assessment contained in the new regulatory decision shows the ineffectiveness of the measures imposed by the NRA in 2003. SOKiK’s recent annulment of the 2004 antitrust decision explicitly condemns the weakness

\textsuperscript{84} Ibidem, point 1.5; note also UKE unconvincing treatment of the UOKiK President’s comment in point 4.1.
\textsuperscript{85} UKE seems to believe so on the basis of the data acquired from other market players; ibidem, point 1.8.
of its market definition stage. While it remains to be seen whether the UKE President’s new decision will prove more successful in facilitating mid-level competition than its predecessor, the already largely ‘past’ nature of the practices subject to the original antitrust decision is clear. For that reason, how much can competition gain now from a renewed SOKiK ruling? Perhaps the antitrust authority should address the evident lack of progress on raining in the incumbent by searching for possible abuses on the national top-tier access market and subject them to completely new proceedings based on the essential facilities doctrine. Or perhaps the antitrust authority could use the commitment procedure available now thanks to Article 12 of the Competition Act of 2007 to negotiate a workable solution with EMITEL even though it is known to be cautious to use it in ‘evident’ abuse cases. If not, the UOKiK President can always look to Article 102 TEFU in conjunction with Article 7 Regulation 1/2003 and bravely embrace the more regulatory-like enforcement instruments available to national antitrust authorities on the basis of the decentralised system of European competition law enforcement.

Still, antitrust enforcement’s growing regulatory-like effects are not without dangers and thus an improvement in inter-agency cooperation could be pursued instead as a less controversial solution. Greater cooperation among regulators and antitrust authorities has recently been advocated by G. Monti concerning the relationships of the Commission and it has been several years already since M. Szydło considered its advantages specifically in the Polish context. This certainly seems to be the simplest way forward to improve the competitiveness of the Polish broadcasting transmission field. What cannot be achieved single-handedly by one public body might succeed when two of them work together – the current ‘separatist’ approach has clearly shown its ineffectiveness. An institutionalised co-operation on the national level could also diminish the likelihood of a potentially very counterproductive dispute between the NRA and the Commission. The EMITEL experiences seem to suggest that a conscious alliance between the UOKiK President and the UKE President should be advocated whereby they combine, rather than merely

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86 Essential facilities and discrimination have long since been identified as the point of intersection between antitrust and sector-specific regulation see P. Larouche, *Competition law...,* pp. 165–232; see also J. Majcher, *Dostęp do urządzeń kluczowych w świetle orzecznictwa antymonopolowego,* Warszawa 2005.

87 G. Monti, ‘Managing the Intersection...’; it is worth noting that Monti correctly predicted the outcome of the Deutsche Telekom case, spelling out the supremacy of European competition law over national regulation but explicitly noting also the weakness of the German, and Spanish NRA as one of the causes for an intervention by the Commission.

respect, their complementary powers. Whether by legal amendments or by a major shift in enforcement practice, a new balance should be found in order for both authorities to achieve their ultimate aim – a truly competitive sector that will benefit consumers. With the judicial confirmation of the Commission’s right to take actions on the basis of Article 102 TEFU against autonomous practices of a ‘regulated’ operator, even EMITEL might now prove more amicable to a coordinated solution domestically.

**Literature**


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89 The weaknesses in the institutional designs and lacking coordination between NRAs, the Commission and national courts are also among the current EU goals in telecoms note also by A. De Streel, ‘Current and future European regulation of electronic communications: A critical assessment’ (2008) 32(11) Telecommunication Policy Journal.

90 See ECJ judgment of 14 October 2010, C-280/08 Deutsche Telekom, which confirms the ruling of the CFI T-271/03 of 10 April 2008 which in turn upholds the Commission Decision 2003/707/EC of 21 May 2003 fining Deutsche Telecom for abusing its dominant position by way of market squeeze even though its wholesale prices were fixed by the NRA and its retail prices were subject to a price cap. The ECJ confirmed however that DT had enough freedom in setting its retail prices to commit an abuse despite the fact that the NRA has caped them.


Liberalization without a Regulator. The Rail Freight Transport Market in Poland in the Years 1996-2009

by

Marcin Król*

CONTENTS:
I. Introduction
II. Market liberalization process (1997-2009)
III. Troubles with access to railway infrastructure
IV. Railway market regulator in Poland
V. Conclusions

Abstract

This article focuses on the liberalization process of the railway freight transport market in Poland between 1997 and 2009. It shows that the increase in traffic and the fall in prices that occurred in this period took place not because of ‘effective regulation’ but despite its absence. This can indicate that introducing competition in railway freight transport could be profitable where there is significant demand for bulk and containers freight services and the railway infrastructure is well-developed.

Résumé

L’article se concentre sur le processus de libéralisation du marché de transport ferroviaire de fret en Pologne dans les années 1997-2009. Il montre que l’augmentation du trafic et la baisse des prix dans cette période, n’ont pas eu lieu à cause de la ‘régulation efficace’, mais malgré son absence. Cela peut indiquer que l’introduction de la concurrence dans le transport ferroviaire de fret pourra être profitable s’il y a de la demande pour les services du trafic en vrac et par conteneur et si l’infrastructure ferroviaire est bien-développée.

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Classifications and key words: railway transport; economic regulation; market liberalization.

I. Introduction

The first part of the title of this article is a deliberate provocation. Half a century ago, G.J. Stigler and C. Friedland wrote in their classic article entitled ‘What can regulators regulate? The case of electricity’, that the mere existence of regulatory action does not mean ‘effective regulation’ but is only a sign of a ‘desire to regulate’. What happens however if the regulator does not even have the ‘desire to regulate’? It is worth looking in this context at the liberalization of rail freight transport in Poland. A railway transport regulator exists in Poland only in theory. A dynamic development of competition (resulting in the highest rate in the EU of market penetration by non-public freight railway undertakings), an increase in traffic and a decrease in prices has not taken place thanks to ‘effective regulation’ but despite its absence.

The subject matter of this paper is the liberalization of rail freight transport in Poland, rather than an analysis of the concept of ‘effective regulation’. Thus, the conditions that must be met to realize the concept of ‘effective regulation’ will not be discuss in detail at this point. It is assumed that ‘effective regulation’ cannot occur in the initial period after the liberalization of previously monopolized railway markets without an ‘efficient’ way to ensure infrastructure access of new market players (infrastructure is an essential input for this industry). A commitment on the side of the regulator (the ‘desire to regulate’) is also necessary in the sense that the authority considers it appropriate to uphold the new rules of the game. These two issues will be the focus of the later parts of this article after the presentation of the market liberalization process of rail freight in Poland.

II. Market liberalization process (1997–2009)

The liberalization process of Polish rail freight was formally launched by the Railway Transport Act of 1997 which introduced the concept of a ‘licensed operator authorized to provide railway services’ (i.e. a railway undertaking)

and imposed a ‘separate accounting’ obligation for rail operations and rail infrastructure. In the years 1998-1999, 21 operators were granted freight concessions in Poland including the national incumbent – Polskie Koleje Państwowe (Polish State Railways; hereafter, PKP). In the same period, 7 companies received infrastructure management concessions – PKP as well as private undertakings owned mainly by Silesian mining companies.

The Act of 1997 was a step towards the implementation of acquis communitaire (Directive 91/440/EEC\(^3\) followed by Directives 95/18/EC\(^4\) and 95/19/EC\(^5\)) necessary for Poland’s accession to the EU. However, its liberal licensing provisions seemed to have also been designed as an instrument of political pressure on railway unions. The unions were opposed to the acceleration of the government’s restructuring program of the former monopolist, which was being implemented for several years already, organizing particularly frequent and prolonged strikes in the second half of the 1990ties. The government wanted to show those of the railway sector that there could be an alternative to state-owned railways\(^6\).

It quickly became apparent however that the government did not see market liberalization as a remedy to the rail transport crisis of the 1990ties, clearly focusing on the economic recovery of PKP instead. The minister of transport responsible for the surveillance of the rail transport market failed to respond to complaints submitted by other operators concerning network access denials. Before 2002, the fees for the use of railway infrastructure were not under ministerial purview – they were approved by the PKP Board only. After much deliberation with the railway unions, Railway Act on the Commercialization, Restructuring and Privatization of PKP was finally agreed upon in 2000. Importantly, not only did the new law reform the incumbent, it also changed the liberal approach of its predecessor introducing far stricter licensing rules that obliged the railway undertakings that were already operating to apply for new licenses\(^7\).

Consequently, until 2001, the activities of independent operators were generally limited to local freight services provided on the basis of the former industrial railways infrastructure. In 2002 the situation changed. Based on the

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\(^6\) Such opinion is common in the Polish railway industry. See e.g. M. Grobelny, ‘Pięć lat wolnego rynku kolejowych przewozów towarowych w Polsce’ (2008) 9 Rynek Kolejowy.

\(^7\) The new law introduced, among other things, an obligation on railway operators to be equipped with rolling stock before applying for the license which was a major entry barrier.
act of 2000, the PKP restructuring program had the incumbent divided into 24 smaller firms. One of these newly created companies was the infrastructure manager PKP Polskie Linie Kolejowe SA (Polish Rail Lines; hereafter, PLK). PLK remained part of the so-called PKP Group alongside other PKP-demerged operator companies such as the freight market incumbent PKP Cargo SA and local operating broad-gauge company LHS. The infrastructure manager gained however a separate Board while access rules and charges to be applied by PLK were to be approved by the Minister of Transport.

The first publication of the network statement and access charges by PLK took place on 1 April 2002. This date is often regarded as the actual beginning of the development of a free market for rail freight in Poland. Since 2002, the volume of operations of undertakings other than PKP has been gradually growing stimulated by the Polish economy entering into a phase of dynamic growth. This positive economic climate was also the reason to stop the volume decrease of PKP’s operations that took place in earlier years. However, PKP Cargo was not able to take advantage of Poland’s economic growth to generate an increase in its traffic volume, which shows weakness of this company. As illustrated by Figure 1, the entire increase in the total rail freight transport in Poland, which took place before the global crisis in 2008, can be attributed to the activities of new market entrants.

Over the next few years however, most of their activities had a purely regional nature focusing on ‘internal’ freight services provided to industrialized areas of the southern part of Poland. An analysis of the traffic data representing the activities of nearly all private operators in that period indicates a significant

Figure 1. Increase in rail freight transport volume (mil. tonnes) – total vs. PKP Group

![Graph showing rail freight transport volume](image)

Source: UTK
difference between their share in terms of transport volume (tonnes) and their share in terms of transport performance (tonnes/km), in clear favour of the former. This fact alone suggests a highly localized character of competition in the freight market in Poland over this period. For instance, for the year 2004 – when Poland joined the EU – the transport volume share of the freight weight record-holders PTKiGK Zabrze and PTKiGK Rybnik was respectively 13.5 and 9.6 times greater than their transport performance share. It is possible to state on this basis that the average distance travelled by them was significantly lower than the average for the sector overall. Since those companies have bases in their home cities, the geographic range of their activities had to be relatively small. Indeed, they produced the bulk of their revenues (and continue to do so) from freight transport services provided to Silesian coal mines. PKP Cargo’s persistent monopolistic position was confirmed in 2004 by the President of the Polish antitrust authority Urząd Ochrony Konkurencji i Konsumenta (hereafter, UOKiK).

The legal basis for competition in the Polish railway industry was finally determined by a new law on railway transport adopted in 2003 (hereafter, the law on railway transport) and implementing provisions of the so-called first EU railway package of 2001. It was the Act of 2003 that established the position of the President of the Urząd Transportu Kolejowego (Railway Transport Office; hereafter, UTK) and listed rail market regulation among the authority’s primary tasks. The Polish railway market gained on this basis, at least formally, an independent regulator appointed and dismissed by the Prime Minister. The main market-regulatory task assigned to the UTK President was the supervision of the upstream market (i.e. infrastructure) – combating monopolistic practices in the downstream market (i.e. operations) was left to the UOKiK President, the regulator was obliged however to co-operate with the antitrust authority in this regard.

The seemingly clear division of responsibilities between these two bodies of public administration was facilitated by the legal recognition of the vertical separation of railway infrastructure from rail transport operation, introduced

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<table>
<thead>
<tr>
<th>Operator</th>
<th>Freight transported [ tonnes, thousands ]</th>
<th>Market share [%]</th>
<th>Dynamics %</th>
</tr>
</thead>
<tbody>
<tr>
<td>PKP Group</td>
<td>156 425,80</td>
<td>153 475,19</td>
<td>142 217,32</td>
</tr>
<tr>
<td>CTL Group</td>
<td>13 487,35</td>
<td>15 439,63</td>
<td>13 621,30</td>
</tr>
<tr>
<td>DB Schenker Group</td>
<td>64 969,96</td>
<td>65 296,59</td>
<td>60 928,44</td>
</tr>
<tr>
<td>PTK Holding Zabrze</td>
<td>35 409,56</td>
<td>35 439,42</td>
<td>31 374,70</td>
</tr>
<tr>
<td>KP Kotlarnia</td>
<td>3 677,68</td>
<td>4 136,87</td>
<td>4 303,62</td>
</tr>
<tr>
<td>Pol-Miedź Trans</td>
<td>3 586,40</td>
<td>4 004,29</td>
<td>3 688,07</td>
</tr>
<tr>
<td>Lotos Kolej</td>
<td>2 494,22</td>
<td>4 284,31</td>
<td>5 146,40</td>
</tr>
<tr>
<td>Rail Polska</td>
<td>1 519,03</td>
<td>1 597,14</td>
<td>2 050,46</td>
</tr>
<tr>
<td>Others</td>
<td>8 740,04</td>
<td>10 274,19</td>
<td>12 981,22</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>290 310,04</strong></td>
<td><strong>293 947,63</strong></td>
<td><strong>276 311,53</strong></td>
</tr>
</tbody>
</table>

Source: UTK
earlier by the restructuring process of the PKP and the creation of PLK\textsuperscript{10}. The law of 2003 introduced a ban, referred to in economics literature as a ‘line of business restriction’\textsuperscript{11}, preventing the infrastructure manager from acting on the downstream market\textsuperscript{12}. Thus, while PLK remained part of the PKP Group, its actions came under the supervision of a specialized regulatory body. PLK was obliged to submit its network statement and charges list for approval, which made it to a large extent immune to any kind of pressure from the PKP holding company. As a result, access to the infrastructure managed by PLK no longer caused controversy – with the exception of the level of its access charges. Indeed, access charges remained much higher in Poland than in most other EU countries due to the low level of public funding available to rail infrastructure and the lack of any incentives for PLK to lower its costs.

In subsequent years, the market shares of private operators continued to grow to reach nearly 55% of the transport volume at the end of 2009 (see Tab. 1). It is worth noting that their share in transport performance has also risen from less than 8% in 2004 to over 30% in 2009 which is a sign of increasing competitive pressure exerted by private undertakings on the incumbent (see Tab. 2). It is also estimated that growing competition resulted in a gradual decline, of about 25%, in the rates charged on the Polish rail freight market in the period between 2004 and 2008. The freight rates fell by another 20% in 2009 due to a price war caused by the economic crisis. Nonetheless, growing competition was accompanied by market consolidation and a number of takeovers undertaken by external players\textsuperscript{13}. In 2009, freight services were provided in Poland by 40 railway operators.

However, the recent rapid development of competition in Polish rail freight was certainly not a result of the introduction of the non-discriminatory access to railway infrastructure, nor of the activities of the market regulator.

\textsuperscript{10} For detailed description of vertical separation concept in railway transport see, e.g., M. Król, ‘Benefits and Costs of Vertical Separation in Network Industries. The Case of Railway Transport in the European Environment’ (2009) 2(2) \textit{YARS}.


\textsuperscript{12} There are derogations from this provision in the law on the basis of which integrated rail undertakings can operate in Poland i.e. PKP SKM and PKP LHS.

\textsuperscript{13} In 2007, PTKiGK Rybnik was taken over by PCC Rail and a 75% share package of CTL Logistics was acquired by the British private equity fund Bridgepoint. In 2009, the German Deutsche Bahn acquired, by way of its daughter company DB Schenker, the logistics branch of PCC group (PCC Logistics), PCC Rail included.
<table>
<thead>
<tr>
<th>Operator</th>
<th>Freight transported [mil. tonnes-km]</th>
<th>Transport performance</th>
<th>Market shares [%]</th>
<th>Dynamics %</th>
<th>Year</th>
<th>Year</th>
<th>Year</th>
<th>Year</th>
<th>Year</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>PKP Group</td>
<td>44 331,15</td>
<td>43 558,36</td>
<td>39 209,66</td>
<td>29 945,78</td>
<td>83,19%</td>
<td>80,78%</td>
<td>76,03%</td>
<td>68,68%</td>
<td>23,63%</td>
<td>32,45%</td>
</tr>
<tr>
<td>CTL Group</td>
<td>2 840,68</td>
<td>3 244,84</td>
<td>3 188,03</td>
<td>3 785,97</td>
<td>5,33%</td>
<td>6,02%</td>
<td>6,18%</td>
<td>8,68%</td>
<td>18,76%</td>
<td>33,28%</td>
</tr>
<tr>
<td>DB Schenker Group</td>
<td>2 241,87</td>
<td>2 298,27</td>
<td>2 893,11</td>
<td>2 629,69</td>
<td>4,21%</td>
<td>4,26%</td>
<td>5,61%</td>
<td>6,03%</td>
<td>9,11%</td>
<td>17,30%</td>
</tr>
<tr>
<td>PTK Holding Zabrze</td>
<td>1 171,16</td>
<td>1 106,71</td>
<td>1 293,63</td>
<td>1 349,97</td>
<td>2,09%</td>
<td>2,05%</td>
<td>2,51%</td>
<td>2,60%</td>
<td>12,26%</td>
<td>3,09%</td>
</tr>
<tr>
<td>KP Kotlarnia</td>
<td>112,02</td>
<td>112,23</td>
<td>127,58</td>
<td>126,96</td>
<td>0,21%</td>
<td>0,21%</td>
<td>0,25%</td>
<td>0,29%</td>
<td>0,49%</td>
<td>13,34%</td>
</tr>
<tr>
<td>Pol-Miedź Trans</td>
<td>392,27</td>
<td>461,63</td>
<td>498,67</td>
<td>596,88</td>
<td>0,74%</td>
<td>0,86%</td>
<td>0,97%</td>
<td>1,37%</td>
<td>19,69%</td>
<td>52,16%</td>
</tr>
<tr>
<td>Lotos Kolej</td>
<td>1 086,06</td>
<td>1 644,19</td>
<td>2 225,40</td>
<td>2 472,07</td>
<td>2,04%</td>
<td>3,05%</td>
<td>4,32%</td>
<td>5,67%</td>
<td>11,08%</td>
<td>127,62%</td>
</tr>
<tr>
<td>Rail Polska</td>
<td>345,61</td>
<td>246,76</td>
<td>298,39</td>
<td>332,42</td>
<td>0,65%</td>
<td>0,46%</td>
<td>0,58%</td>
<td>0,76%</td>
<td>11,40%</td>
<td>3,82%</td>
</tr>
<tr>
<td>Others</td>
<td>770,21</td>
<td>1 250,08</td>
<td>1 835,47</td>
<td>2 576,67</td>
<td>1,45%</td>
<td>2,32%</td>
<td>3,56%</td>
<td>5,91%</td>
<td>40,38%</td>
<td>234,54%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>53 291,02</strong></td>
<td><strong>53 923,06</strong></td>
<td><strong>51 569,95</strong></td>
<td><strong>43 601,42</strong></td>
<td><strong>100,00%</strong></td>
<td><strong>100,00%</strong></td>
<td><strong>100,00%</strong></td>
<td><strong>100,00%</strong></td>
<td><strong>15,45%</strong></td>
<td><strong>18,18%</strong></td>
</tr>
</tbody>
</table>

Source: UTK
III. Troubles with access to railway infrastructure

It should be stressed that the vertical separation of the former monopolist’s railway network from its transport operations did not cover the entire Polish railway infrastructure. As a result of the restructuring of PKP, some sidings were left in the purview of the incumbent PKP Cargo which is under no obligation to make them available to other operators\textsuperscript{14}. This situation results from an inappropriate implementation of EU provisions concerning the principle of ‘non-discriminatory access to infrastructure’. According to Polish law, the only part of the network infrastructure which should be made available to other railway undertakings is that which remains at the disposal of the infrastructure manager. Railway companies are therefore entitled to ‘non-discriminatory access’ but not to the entire infrastructure. A railway undertaking that controls goods loading and unloading points is under no obligation to share them. This is an obvious breach of EU legislation.

What is more, Polish law has not considered railway sidings as part of the national railway infrastructure since 2007. Consequently, there is currently no obligation to make them accessible to others even though they constitute a necessary element of railway freight operations. This approach is not only in breach of EU rules and contradicts the very idea of liberalization, it also defies common sense.

It seems that the key reason for the failure to treat sidings as part of railway infrastructure was the government’s desire to impose fees for the perpetual use of the land on which they are situated. An important fragment of the legal justification for this exclusion reads as follows: ‘In accordance with Article 8 of the Law on railway transport, the land occupied by rail infrastructure is exempt from the fees for perpetual use, which means that businesses located on such land would not be subjected to such fees’\textsuperscript{15}. The fee problem seemed to have made Polish lawmakers blind to the issue of competition on the railway market. This raises the question of the way the market regulator performs its duties while finding itself in such a gross violation of the principles of liberalization. This issue will be addressed in more detail later on in the discussion.

While PLK makes its sidings available (as do other infrastructure managers), the incumbent PKP Cargo eagerly takes advantage of the opportunity created

\textsuperscript{14} Approximately 1/3 of the total number of sidings of the former monopolist (UTK unofficial information)

\textsuperscript{15} The justification of the governmental draft law changing the Act on Rail Transport and the Act on Environmental Protection (druk sejmowy nr 2013 z dnia 13 sierpnia 2007 r.)
for it by the legislator to engage in vertical market foreclosure\textsuperscript{16} and strategic deterrence of potential market entrants. PKP Cargo routinely denies access to loading and unloading points that are under its control. It is worth quoting here, as a typical example, one of the statements given by the President of PKP Cargo in an interview for a renowned national newspaper: ‘[...] PKP CARGO SA has terminals, sidings […], but this infrastructure is not widely available to all. It is the property of the company. And we have no obligation to provide access to this infrastructure on the basis that our competitors want us to […]. [… ] It is unacceptable to demand access to someone’s property without taking into account the rights of the owner. And this is the way many private companies approach our terminals, sidings […], usurping the right to access\textsuperscript{17}. This opinion is repeated in other official statements made by the representatives of PKP Cargo and its parent company (PKP SA). Moreover, the authors of the government’s ‘Strategy for Railway Transport till 2013’ decided to make such actions even easier for the incumbent. They suggested that PKP Cargo should be granted ‘property which constitutes production potential for the economic tasks of the operator in the areas of logistics and freight services, such as sidings, ramps, warehouses and logistics facilities’\textsuperscript{18}.

IV. Railway market regulator in Poland

It seems justified to say that there is no real railway market regulator in Poland. The UTK President, appointed to perform this function, fails to do so. The authority’s actions are limited to what can be described as ‘politics of survival’ or ‘politics of failure to act’. In practice, the regulator focuses on the admittedly very important tasks relating to rail transport safety. While the supervision of railway infrastructure access remains its key responsibility in the field of market regulation, the authority’s approval of the aforementioned method of infrastructure access regulation in Poland constitutes an instructive example of the regulator’s passive approach.

\textsuperscript{16} The expression ‘vertical market foreclosure’ is used 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. For detailed economic description see, e.g., P. Rey, J. Tirole, \textit{A Primer on Foreclosure}, IDEI, Toulouse 2006.

\textsuperscript{17} Interview with W. Szczepkowski, PKP CARGO S.A. Managing Director published [in:] \textit{Gazeta Prawna}, 26 September 2007.

Many reasons have contributed to this situation, the most important of which seems to be the regulator’s lack of independence from the Minister of Transport. Even though the UTK President is appointed by the Prime Minister, the latter acts on request submitted by the Minister. It is also the Minister that may ask the Prime Minister to dismiss the UTK President. Even so, Polish legislation does not contain an exhaustive list of the circumstances in which such a request can be made, nor does it specify the UTK President’s terms of office indicating only that the regulator is supervised by the Minister of Transport. As a result, the latter is not only entitled to nominate the candidates for the UTK President but also able to exert pressure on the regulator. Needless to say, the appointment and dismissal of the two UTK Vice-Presidents remain at the sole discretion of the Minister. Consequently, the railway transport office is in practice treated as, and performs the function of one of the departments of the ministry responsible for transport matters, carrying out the tasks of market-regulation in a manner consistent with the policy pursued by successive ministers (or, in practice, their deputies responsible for rail transport).

The ministry of transport was and remains, to quote one of the experts, ‘a ministry of state transport companies’\(^{19}\). Its priority has been the improvement of the financial condition of the PKP Group and, with respect to the railway freight market, the strengthening of the position of PKP Cargo as a ‘national operator’ with ‘a significant share in the market’\(^{20}\). Since PKP Cargo continues to rapidly lose its position, the ministry and consequently also the UTK President tends to turn a blind eye to its anti-competitive practices and the flawed institutional and legal framework of the Polish railway transport market. The incumbent is thus encouraged to block the development of competition. It is worth stressing also that it is the Minister of Transport that exercises proprietary functions in relation to the PKP Group.

As it can be seen from the above, there is a fundamental conflict between the government’s regulatory, proprietary and economic functions with respect to the railway freight market. Another conflict, relating this time to the UTK itself, is associated with its dependence on the members of the PKP Group. There are two dimensions to this conflict. First, PKP executives exert pressure on the regulator to make the authority issue administrative decisions favorable to their interests, taking advantage of the fact that the Minister of Transport that oversees their activities is at the same time the superior of the UTK President. Second, it is not uncommon for senior UTK officials, directly


\(^{20}\) Such objectives are formulated in the *Strategy for Railway Transport till 2013* (p. 31, 32).
responsible for the administrative decision-making process, to be connected with the entities subject to those decisions\textsuperscript{21}.

The UTK President’s ‘politics of failure to act’ in the area of market regulation can be attributed to other factors also, besides the authority’s lack of independence. Until recently, both the UTK President and its senior officials were appointed from the so-called ‘state human resources’ list which greatly limited the circle of eligible candidates. The appointment procedure failed to guarantee an appropriate level of expertise, nor did it ensure impartiality (absence of a conflict of interests) and market awareness. Relevant in this context is also the very modest staffing (about 15-20 people including the UTK Vice-President and the director of the department) of the market-regulation division of the UTK and the fact that the knowledge and experience of its employees leaves a lot to be desired.

The ‘politics of failure to act’ means that the UTK President does not take any actions to amend the defective institutional and legal framework of the Polish railway market. Not to mention, the railway authority fails to encourage the government to consistently liberalize another markets subjected to its supervision (i.e. passenger rail services), which is the mission of every active regulator. The UTK President fails also to co-operate with the antitrust authority in preventing monopolistic practices in the downstream market. Only once has a decision on railway infrastructure access been issued by the regulator ex officio, its work is rated very low by the market and it would be an understatement to say that it has developed very little in terms of public authority within the sector.

\section*{V. Conclusions}

The regulation of the rail freight market in Poland is ‘producer protection’ focused even though its only beneficiary is the incumbent PKP Cargo. Lower prices and higher service quality, resulting from growing competition have so far seemed to be of no value to the public authorities. It even seems justifiable to suggest that regulatory policy has often been implemented in such a way as to impede new firms from entering the market and reduce the growth rate of those that managed to do so already – exactly the situation that was once described by G.J. Stigler in his renowned and controversial economic theory of regulation\textsuperscript{22}.

\textsuperscript{21} In extreme cases, they were the employees of railway companies send on unpaid leave for the duration of their employment in the UTK.

\textsuperscript{22} G. J. Stigler, \textit{The Theory of Economic Regulation} (1971) 2(1) \textit{Bell Journal of Economics and Management Sciences}. 
For example, in order to start operating in the rail freight market in Poland, one is obliged by the railway transport law of 2003 to obtain a license that confirms that company’s ability to perform the functions of a railway undertaking. An applicant is required to meet specific criteria to acquire a license – the UTK President cannot refuse to grant it if these are met. Still, the regulator refused to grant a license to Connex Polish Railways Sp. Ltd. (a subsidiary of one of the largest transport companies operating on European markets – Veolia Transport) referring to the vagueness of the applicant’s declaration concerning its equipment with railway vehicles including locomotives and wagons. The refusal was issued despite the fact that details of such declarations are neither specified by Polish legislation nor by EU law. This highly controversial decision of the UTK President effectively prevented Connex from entering the Polish rail freight market23.

Despite this, until the onset of the global financial crisis, the rail freight business in Poland was consistently expanding thanks to the growth of new market players. This fact may show correctness of the decision to introduce competition (both for the market and in the market) on rail markets characterized by well-developed infrastructure and significant demand for transport of bulk commodities and containers. But there is of course always a way to do it ‘better’.

In the case of the Polish rail freight market, the ‘better way’ should come down to the urgent implementation of the following recommendations:

- Reintroduce sidings into the catalogue of railway infrastructure;
- Make the obligation to grant access to railway infrastructure applicable regardless of who it belongs to;
- Transfer the entire infrastructure of the former state monopoly PKP to the infrastructure manager PLK (i.e. extend vertical separation to the entire core railway infrastructure);
- Demerge the PLK company from the PKP Group (i.e. strengthen vertical separation with the separation of ownership);
- Ensure the independence of the regulatory authority both from the Minister of Transport and from those subject to regulation (at least introduce a set term of office for the UTK President and a legally binding list of causes for dismissal by the Prime Minister);

23 Another highly controversial matter which gained a lot of publicity among market participants was connected with the obligation to acquire a document certifying the right of a vehicle to move on the railway infrastructure – a license for the exploitation of a type of railway vehicle. The UTK President issued such documents for Freightliner PL locomotives at first but then suddenly withdrew the decision, making it impossible for the company to start operations and exposing them to a capital freeze in the very capital-intensive means of production (traction vehicles).
• Equip the authority with regulatory tools appropriate for the upstream market\textsuperscript{24} as well as with the human resources necessary to carry out its mission;
• Considered might also be the separation of the UTK’s regulatory department from the its overall structure and the creation, on its basis, of a regulatory office which could start building its authority in the industry from scratch; in such case, the UTK would remain the ‘rail office’ responsible for security and the supervision of traffic.

If the planned privatization of the incumbent PKP Cargo takes place, it will probably be more profitable to this company than the protection against competition in the market. It will also entail the elimination of the conflict between the proprietary and regulatory functions of the public authority in the downstream market, which will be conducive to a further development of the latter.

Literature

Interview with W. Szczechkowski, PKP CARGO S.A. Managing Director, Gazeta Prawna, 26 September 2007.
Justification of the governmental draft law changing the Act on Rail Transport and the Act on Environmental Protection (druk sejmowy nr 2013 z dnia 13 sierpnia 2007 r.).

\textsuperscript{24} Under the current provisions, one of the tasks of the UTK President is to ‘approve and coordinate the charges for using the allocated paths of trains in the terms of compliance with the principles of determining these charges’. There is nothing there however, to motivate PLK to keep its operational costs at a reasonable level. In particular, the UTK president cannot refuse to approve infrastructure access charges because of their excessive increase compared to the past. PLK has the right to take into account all of its costs when determining the charges. As a result, the UTK President is more of a supervisor of PLK than a market regulator.
2008 and 2009 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland

by

Dagmara Koska, Krzysztof Kuik*

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Abstract

The 2008 issue of YARS contained an overview of EU law developments in the period of time from 2004 to 2007. This overview covers the years 2008-2009. It confirms that State aid cases remained numerous (6 in total) and that the Commission’s enforcement activities in the area of State aid control continued at a similar pace as before. With respect to other areas of competition law and policy, the overall picture shows a relatively high level of scrutiny in mergers (5) and antitrust cases or inquiries (2).

Moreover, EU Courts adopted several decisions in Polish cases, notably in the regulatory field (electronic communications) and State aid control (partial annulment in Huta Częstochowa (Operator) as well as the rejection of a request for interim

* Dagmara Koska and Krzysztof Kuik are officials of the European Commission (DG Competition). The views expressed in this overview are the authors’ personal views, and do not necessarily represent the position of the European Commission. The authors are grateful to Anna Mościbroda for her input to this paper.
measures in *Technologie Buczek*). The regulatory court cases show the Commission’s consistency in pursuing Member States in their failure to implement or to correctly implement the EU Electronic Communications package. In the state aid related *Huta Częstochowa (Operator)* judgement, the General Court (GC, formerly the Court of First Instance, CFI) partially annulled the scrutinised Commission decision since the Commission failed to identify the actual benefit related to the receipt of the aid in question. The jury is still out in the case concerning *Technologie Buczek* because the interim measures judgement says little about the potential outcome of the pending main appeals.

**Résumé**

Le YARS de 2008 contenait un aperçu des développements du droit de l’UE pendant la période de 2004 à 2007, alors que celui-ci couvre les années 2008-2009. Il confirme que les cas d’aides d’État sont restés nombreux (6 au total) et que la mise en œuvre du contrôle des aides d’État par la Commission a continué au même rythme. En ce qui concerne les autres secteurs du droit de la concurrence et de la politique de concurrence, le nombre de contrôles des concentrations et des cas ou des enquêtes antitrust est relativement élevé (2).

En outre, les cours de l’UE ont rendu plusieurs arrêts dans des cas polonais, notamment dans le domaine réglementaire (communications électroniques) et du contrôle d’aides d’État (l’annulation partielle dans *Huta Częstochowa* (opérateur) ainsi que le rejet d’une demande de mesures provisoires dans *Technologie Buczek*). Les arrêts dans le domaine réglementaire montrent la cohérence de la Commission dans les actions contre les États membres qui ont manqué à leur obligation de mettre en œuvre, ou de mettre en œuvre correctement, le Paquet Télécom de l’UE. Dans l’arrêt *Huta Częstochowa* (opérateur) concernant les aides d’État, le Tribunal (précédemment le Tribunal de Première Instance, TPI) a partiellement annulé la décision de la Commission puisque la Commission n’a pas réussi à identifier l’avantage réel de la réception de l’aide en question. Le jury est toujours en train de délibérer dans le cas concernant *Technologie Buczek* parce que l’arrêt sur les mesures provisoires dit peu sur les résultats potentiels des appels principaux en cours.

Classifications and key words: Access Directive; active ingredient; airline industry, antitrust; bankruptcy; broadband; collective management; competition law; copyright; divestiture; e-communications; economic crisis; electronic communications; EU competition law, European Commission; fine; Framework Directive; full-function joint venture; insurance; interconnection; interim measures; liquidation; merger; national regulatory authority, NRA; patent; performing right; pharmaceutical industry; pharmaceutical sector inquiry; Polish Law on telecommunications; Polish shipyards; recovery decision; recovery of the aid; regional aid; remedies; reproduction right; restructuring aid; shipyards; State aid, subscriber.
I. Introduction

The 2008 issue of YARS provided an overview of EU law developments in the period from 2004 to 2007. The cases described in that overview brought about important legal clarifications. Some raised important legal issues. Others contained a Polish element (e.g., a merger which affected Polish markets). State aid matters (of which there were 9) clearly outweighed other cases, including mergers (5), antitrust (1) and regulatory cases (1).

This overview confirms that State aid cases remained numerous and the Commission’s enforcement activities in the area of State aid control (6 in total) continued at a similar pace in 2008 and 2009. The period included significant State aid decisions regarding shipyards and regional aid to Dell. In particular, the Dell Poland case is noteworthy as the Commission’s first in-depth assessment of regional aid to large investment projects under the 2009 Guidance Paper (including a more economic approach to analysing State aid). However, the overall picture also shows relatively high scrutiny in other areas of competition law and policy, including merger (5) and antitrust (2) cases or inquiries. The authors expect that this development, combined with a high number of cases pursued by the Polish Competition Office (UOKiK) under EU competition law\(^1\), will provide useful and specific guidance to Polish market participants in their efforts to comply with applicable EU rules and regulations.

This is the first time the overview covers EU jurisprudence. The EU Courts adopted several decisions in Polish cases, notably in the regulatory field (electronic communications) and State aid control (partial annulment in *Huta Częstochowa (Operator)* and rejection of interim measures in *Technologie Buczek*). The regulatory judgements illustrate the Commission’s consistency in pursuing Member States’ lack of or incorrect implementation of the EU Electronic Communications framework. Poland is not the only Member State that has been subjected to the Commission’s vigilance in this regard. In the *Huta Częstochowa (Operator)* judgement, the General Court (GC) (formerly the Court of First Instance, CFI) partially annulled the Commission decision, as it could not identify an advantage which would result from the acquisition by the special purpose operating company, of the non-steel assets of Huta Częstochowa. The jury is still out in the case concerning *Technologie Buczek*, as the interim measures judgement says little about the potential outcome of the pending main appeals.

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\(^1\) See an overview of UOKiK’s cases in its annual reports available at: http://www.uokik.gov.pl/sprawozdania_z_dzialalnosci urzedu.php.
II. Case summaries

1. Antitrust

*CISAC Prohibition Decision – collective management of copyright (performing rights)*

In July 2008, the European Commission adopted an antitrust prohibition decision addressed to a number of European collecting societies (societies) managing the rights of music authors, including the Polish collecting society, Związek Autorów i Kompozytorów Scenicznych (ZAIKS) (the CISAC Decision).\(^2\) The CISAC Decision concerned collective management, administration and licensing of performing rights (part of the exclusive copyright in musical works)\(^3\) for satellite, cable and internet (on-line) uses.\(^4\)

The CISAC Decision aimed to promote choice for the rights holders (authors and publishers) regarding which society they wanted to entrust with the administration of their rights (the prohibited restrictions prevented any such competition between the societies). It also sought to create conditions for competition between the mandating and mandated society for licensing the repertoire of the former. The prohibited restrictions protected a monopoly of each national society to license the world repertoire to commercial users located in its territory. Finally, the CISAC Decision sought to create conditions

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\(^3\) A performing right is an exclusive copyright vested in musical works, which enables an author to authorise or prohibit the public performance of his/her work by a commercial user, and to receive royalties for exploitation of the work. It is a term which is widely used by the industry and corresponds to the right of communication to the public (including making the right available) under the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ [2001] L 167/10. In Europe, it is commonly considered that online exploitation of musical works implies both their communication to the public and their reproduction. For that reason, the online exploitation requires both performance and mechanical rights licences (the mechanical right corresponds to the reproduction right under the 2001 Copyright Directive).

\(^4\) The CISAC Decision relates to the exploitation of a performance right of musical work over the Internet – i.e. on-line use – either as a stand-alone service (download, streaming, etc.) or part of a satellite broadcast or cable retransmission. These three modes of exploitation have specific features distinguishing them from other, traditional types of use (off-line use, e.g. in discothèques), notably the possibility of remote monitoring beyond national boarders. Therefore, the Commission takes the view that on-line exploitation should not be treated ‘mechanically in the same way’ as off-line exploitation.
for developing licences covering more than one territory for cable, satellite and on-line users\textsuperscript{5}.

Traditionally, the management, administration and licensing of copyright is organised locally. An author becomes the member of a society, usually the society operating in his/her Member State. He/she entrusts this society with an exclusive worldwide mandate to manage his/her rights. The catalogue of all rights assigned by all members to their society constitutes the society’s ‘own’ repertoire.

A performing rights’ collecting society exploits its repertoire by directly licensing rights to perform within its domestic territory. However, the societies also license their repertoires internationally by entering into reciprocal representation agreements (reciprocals) with other societies around the world. By means of such agreements, societies have mandated each other with the authority to license each other’s repertoires to users in each other’s territories. As a result of the network of reciprocals, each society could offer the repertoire of authors represented by all the other societies (i.e. world repertoire), but only to the interested commercial users operating within its domestic territory.

The CISAC case has its origin in two complaints related to the CISAC model contract\textsuperscript{6}. The first complaint was filed by RTL Group in November 2000 against the German collecting society, GEMA, and GEMA’s refusal to grant RTL an EU wide licence covering its own repertoire and the repertoire of other European societies. The second complaint was filed in April 2003 by Music Choice Europe against CISAC, and concerned the CISAC model contract.

On 31 January 2006, the Commission issued the Statement of Objections (SO) against CISAC and 24 EEA collecting societies (all CISAC members). The SO raised concerns as regards the membership restriction\textsuperscript{7} and territorial restrictions of the CISAC model contract, and their implementation in the reciprocals concluded by the EEA societies.

Following the SO, CISAC and 18 of the societies offered commitments\textsuperscript{8}, whereby they proposed to remove the membership and exclusivity clauses

\textsuperscript{5} A. Andries, B. Julien-Malvy, ‘The CISAC decision - creating competition between collecting societies for music rights’ (2008) 3 EC Competition Policy Newsletter.

\textsuperscript{6} CISAC (International Confederation of the Societies of Authors and Composers) is an umbrella association for the authors’ collecting societies. It proposes to its member societies a model reciprocal representation agreement, which is largely followed in the reciprocals between the CISAC members.

\textsuperscript{7} The ‘membership clause’ in the reciprocals of 24 societies prevented authors from affiliating themselves with a society other than their domestic one or becoming members of several different EEA societies.

\textsuperscript{8} The commitments were offered in March 2007 and were market-tested by the publication of the notice on 9 June 2007, OJ [2007] C 128/12. The market participants who submitted their observation considered that the exceptions and conditions listed in the commitments would result in few, if any, commercial users obtaining the multi territorial licence.
from the model contract and reciprocals. The societies also offered to grant multi-repertoire, multi-territorial mandates to licence on-line, satellite and cable retransmission services to societies that fulfil certain minimum qualitative criteria. In response to the proposed commitments, the Commission received over 80 observations. It concluded that the proposed commitments would not give an appropriate answer to all competition concerns raised in the SO.

In light of the outcome of the market test of the proposed commitments, and on the basis of the remaining serious concerns, the Commission adopted a prohibition decision against EEA societies. The CISAC Decision reaffirms the position that certain clauses in the reciprocals concluded between EEA societies (namely, membership and territorial exclusivity clauses) constitute an infringement of Article 101 TFEU and Article 53 of the EEA Agreement. The Decision prohibits those two clauses for all, off-line and on-line, modes of exploitation, and requires their removal. The CISAC Decision also condemns the concerted practice between the 24 EEA societies on the territorial delineation of mandates incorporated in reciprocals as regards satellite, cable and internet (on-line) uses. The CISAC Decision found that the societies had coordinated their behaviour, thereby restricting the territorial scope of mandates granted to each other to the domestic territory of the mandated society. As a result, they partitioned the EEA into national markets. The CISAC Decision required a review of the reciprocals in a non-coordinated manner and, as it did for the membership and exclusivity clauses, obliged their addressees to refrain from any act or conduct having the same, or similar, object or effect.

As one of the addressees of the CISAC Decision, ZAIKS, the Polish authors’ collecting society, was found in breach of EU competition law by incorporating the two restrictive clauses in its reciprocals with other EEA societies and by

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9 Those criteria related, among other requirements, to the administrative and technical infrastructure, capabilities, certain service levels as regards the tariffs and distribution, and transparency.

10 Collecting societies have a long history of persistent application of membership restrictions. In the 1970s and the 1980s, the Commission clarified that the societies, as dominant undertakings, cannot discriminate on the basis of an author’s nationality (GEMA I, Case IV/26.760, decision of 2 June 1971) or refuse to conclude a management contract with a non-resident right-holder (GVL, Case IV/29.039, decision of 29 October 1981; judgment of the Court of 2 March 1983). Furthermore, in GEMA II (Case IV/26.760, decision of 6 July 1972), the Commission provided guidance regarding the duration and the scope of the contract between the societies and the authors by means of which the authors mandated the societies with the administration of their rights. GEMA II allowed authors to withdraw one or more categories of rights (the so called GEMA categories of rights) or rights for certain use of works after a certain period of time (up to 3 years). In the Daft Punk case (Case COMP/37.219, decision of 12 August 2002), the Commission confirmed that it should be possible to withdraw certain rights from collective management.
participating in the concerted practice of territorial delineation of mandates. ZAIKS appealed the CISAC Decision on 22 September 2008\textsuperscript{11}, requesting also interim measures\textsuperscript{12}. On 14 November 2008, the General Court (GC) rejected ZAIKS’s application for interim measures\textsuperscript{13}.

Like many European societies, ZAIKS has also been subject to the scrutiny of the national competition authority (\textit{Urząd Ochrony Konkurencji i Konsumentów}; hereafter UOKiK). In recent years, UOKiK found several ZAIKS practices restrictive against, depending on the case, either commercial users or its own members. On 16 July 2004, UOKiK, acting upon the complaint by the music group ‘Brathanki’, adopted a prohibition decision\textsuperscript{14} which established that ZAIKS had abused its dominant position by (i) requiring its members to give ZAIKS an exclusive mandate to administer both performing and mechanical rights and (ii) accepting the mandates to administer the right on condition that the right holder transfers all of his/her rights to ZAIKS. UOKiK also imposed a fine of PLN 500,000\textsuperscript{15}. In a decision of 29 August 2008, UOKiK prohibited the agreement between ZAIKS and \textit{Stowarzyszenie Filmowców Polskich} (SFP) fixing the level of copyright royalties due for the use of the audiovisual works and the related refusal to negotiate, as well as imposed a fine of PLN 1 million\textsuperscript{16}. On 21 July 2009, UOKiK adopted a decision which found that ZAIKS had abused its dominant position by imposing on authors who were not members of ZAIKS an excessive duration of the agreement mandating ZAIKS with administration of their rights, without the possibility of terminating such agreement before the lapse of the five-year term\textsuperscript{17}. The decision also imposed a fine of approximately PLN 400,000 on ZAIKS.

The CISAC Decision, as well as the national case-law developments, show clearly the growing importance of collective rights management and related issues in Europe. Issues arising from collective management of copyrights have been identified as one of key obstacles to the digital single market. A framework directive on collective rights management is one of the flagships of the Commission’s Digital Agenda. As stated by the Vice President of the European Commission and Commissioner for Competition, Joaquin

\textsuperscript{11} Case T-398/08.
\textsuperscript{12} Case T-398/08 R.
\textsuperscript{13} ZAIKS did not sufficiently substantiate the serious and irreversible damage that it would suffer in case of the implementation of the decision before the final judgement.
\textsuperscript{14} Decision RWA–21/2004.
\textsuperscript{15} The 2004 Decision was upheld by the Polish Supreme Court on 6 December 20007 (III SK 16/07). On 24 June 2008, UOKiK imposed an additional fine of approximately PLN 1.5 million for non-implementation of its previous decision (Decision RWA–19/2008).
\textsuperscript{16} Decision DOK–6/2008.
\textsuperscript{17} Decision RWA–10/2009.
Almunia\textsuperscript{18}, ‘collecting societies serve a vital role but the way they manage licensing agreements needs to change. The fragmented national monopoly model and the de facto allocation of customers can no longer stand in their current form’.

\textit{Pharmaceutical industry – Pharmaceutical sector inquiry}

In the field of antitrust, 2008 and 2009 were marked by an extensive inquiry launched by the European Commission into the European pharmaceutical sector. The inquiry began in January 2008\textsuperscript{19}, when the Commission carried out unannounced inspections at the premises of a number of pharmaceutical companies producing innovative medicines (the so-called originators) and generic medicines (the so-called generic companies)\textsuperscript{20}. The objective of the inquiry was to examine the reasons why fewer new medicines were brought to market and why generic entry seemed to be delayed in some cases. The preliminary results were published in November 2008 and the final report was published in July 2009. The inquiry has shown a number of shortcomings in the pharmaceutical sector. It has demonstrated that originator companies use a range of instruments to extend the commercial life of their products without generic entry for as long as possible. The Commission also identified a number of regulatory issues regarding patents and patent litigation in Europe.

The inquiry points to the fact that Poland is one of the countries with the highest generic penetration in Europe (56\% in value terms, 73\% in volume terms as compared to less than 20\% by value in Belgium, Finland, France, Greece, Ireland, Italy and Spain, and 20-40\% in Austria, Denmark, Germany, the Netherlands, Portugal, Sweden, Hungary and the UK). The varying level of generic penetration in the EU is influenced, among other factors, by the different public policy choices made by the Member States (e.g. the Polish patent law as well as patent laws in Hungary, Slovenia and Portugal give generics a head start by allowing testing in connection with an application for marketing authorisation before the patent’s expiry).

\textsuperscript{18} J. Almunia, ‘Competition in Digital Media and the Internet’, UCL Jevons Lecture London, 7 July 2010.
\textsuperscript{20} This was the first time that the Commission launched a sector inquiry with upfront inspections.
2. State aid

In the field of State aid control, the sudden onset of the financial and economic crisis in 2008 shifted the focus onto the role of State aid policy in the context of crises. Despite this and the high workload related to the crisis, the Commission maintained its scrutiny over cases where State aid had been granted before the crisis, such as the cases of State aid to the Polish shipyards and the recovery case of Technologie Buczek. The Commission continued shaping State aid control rules by adopting several guidance papers, including Guidance on in-depth assessment of regional aid to large investment projects. The principles detailed in these guidelines were applied for the first time in the Dell Poland case.

_Gdynia, Gdańsk and Szczecin shipyards (2008–2009)_

Article 107(1) TFUE prohibits any aid granted by a Member State in any form whatsoever which distorts competition and has an effect on trade between Member States, subject to a limited number of exceptions set out in Article 107(3) TFUE. The objective of a derogation foreseen for rescue and restructuring aid to ailing companies (Article 107 (3)(c) TFEU) is to assist a company in financial difficulty. However, certain conditions need to be fulfilled. These conditions are regulated by the Guidelines on State aid for rescuing and restructuring firms in difficulty, which also apply to the shipbuilding sector.

To be eligible for restructuring aid, a firm must qualify as a firm in difficulty. The granting of aid must be conditional on implementation of a restructuring plan, which must be sound, far-reaching and enable the company to restore viability within a reasonable timeframe. The restructuring plan should be based on realistic and verified assumptions and should be sufficiently robust to withstand small changes in the macroeconomic environment. A further

25 Restoration of viability means that the company, after completing restructuring, is able to cover all its costs and generate a sufficient return on capital to compete on its own merits.
condition is that the amount of aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken.\textsuperscript{26} The beneficiary is expected to make a significant contribution (normally more than 50\%) to the financing of restructuring from its own resources or from external financing at market conditions. Lastly, measures must be taken to mitigate any adverse effects of the aid on competitors\textsuperscript{27}. This usually means limiting the company’s market share after the end of the restructuring period. The restrictive nature of these conditions stems from the fact that restructuring aid is generally considered to lead to serious distortions of competition.

The shipyards in Gdynia, Gdańsk and Szczecin have been in difficulty since the 1990s. Since 2002, they benefited from significant amounts of State support which sustained their presence on the market, e.g., through non-enforcement of public liabilities, capital injections, loans, tax write-offs and advance payment guarantees. Without such support, the shipyards would not have been able to conclude contracts\textsuperscript{28}. In April 2004, Poland notified restructuring aid for the three yards\textsuperscript{29} and the Commission opened formal investigations in June 2005. Poland submitted a restructuring plan for the yards in 2005 and several revised restructuring plans later on, after Poland’s decision to privatise the shipyards. Given the complexity and political sensitivity of the issues, the Commission’s investigation lasted over four years and involved intensive exchanges between the Polish government and the Commission on the details of the proposed restructuring plans for the yards.

On 6 November 2008, the Commission decided that no suitable market-based solution which would be in line with the EC Treaty (now TFEU) could be found for the shipyards in Gdynia and Szczecin. The Commission rejected the most recent version of the restructuring plan, since it had not been demonstrated that (i) this plan would restore the long-term viability of the two yards, (ii) the aid would be limited to the minimum necessary and (iii) provision would be made for measures to limit the distortion of competition created by the aid (in essence, the restructuring would have been financed entirely by State aid). As a result, the Commission adopted negative decisions

\textsuperscript{26} Point 43 of the Guidelines on State aid for rescuing and restructuring firms in difficulty.

\textsuperscript{27} Points 38-42 of the Guidelines on State aid for rescuing and restructuring firms in difficulty.

\textsuperscript{28} Gdynia shipyard benefited from aid measures amounting to EUR 700 million and from production guarantees of EUR 916 million (both in nominal value). Szczecin shipyard received aid of EUR 1 billion as well as production guarantees of EUR 697 million (in nominal value). Gdańsk shipyard had been benefiting from State aid amounting to approximately EUR 90 million since 1 May 2004 (see para. 171 of the Commission Decision of 22 July 2009).

\textsuperscript{29} Cases C-17/2005, C-18/2005 and C-19/2005, respectively. As regards Gdańsk shipyard, Poland notified additional new aid in November 2006.
with respect to these two yards and required Poland to recover all State aid unlawfully granted to the yards since May 2004.

As regards recovery of State aid, instead of using the standard recovery provisions, the decisions envisaged an implementation by way of an asset sale and subsequent liquidation of assets. The aim of such a solution was to minimise the adverse economic and social consequences of the recovery. Poland made a commitment to ensure that the recovery would be implemented by way of a sale of assets or small bundles of assets in an open, transparent, non-discriminatory and unconditional tender. The proceeds from the sale of the assets would be used to repay creditors, including the recovery claim of the State related to the unlawful aid. The buyers of assets would be able to continue an economic activity at the shipyards’ sites without having to repay the State aid.

The Commission imposed the following conditions to ensure that the asset sale would not lead to circumvention of the recovery order:

− the asset packages on offer would be sufficiently small so as not to constitute an organised part of an undertaking or a business;
− the sale would be conducted by an independent administrator;
− a monitoring trustee would be appointed, whose main role was to give the Commission a detailed insight into the process and to ensure that the process was conducted in line with the agreed conditions;
− no write-off or repayment of public liabilities or repayment of private creditors was permissible and no new aid would be granted as part of the process;
− no new contracts would be concluded; and
− all public claims would be treated as they would in ordinary insolvency proceedings.

Poland agreed to complete the sale by the end of May 2009 and has organised two tendering rounds so far. Nevertheless, the Commission had to extend the implementation deadline of the recovery decision due to complications in the sale process (to date, not all assets have been sold successfully). As regards the Gdańsk shipyard, the new majority owner ISD Polska, a subsidiary of the Ukrainian steel producer Donbas and formerly a minority shareholder in the Gdańsk shipyard, submitted a revised version of a standalone

30 This model had been developed in the Olympic Airways cases, see Cases N 321/2008 – Olympic Airlines, N 322/2008 – Olympic Airways Services (1st part) and N 323/2008 – Olympic Airways Services (2nd part).
31 See EUROPA Press Release IP/08/1642.
32 The Commission decision envisages that, should the asset sale be unsuccessful, Poland would put any remaining assets into liquidation, see EUROPA Press Release IP/08/1642 and MEMO/08/680. As of 31 December 2009, Poland has not launched insolvency proceedings.
Restructuring plan for Gdańsk Shipyard in May 2009 (2009 Restructuring Plan). The Commission accepted the 2009 Restructuring Plan and, on 22 July 2009, decided that State aid for the plan’s implementation is compatible with the common market. However, the implementation of the State aid was authorised under the condition that the 2009 Restructuring Plan and the envisaged compensatory measures be duly implemented and that the envisaged ratio of the company’s own contribution free of State aid to the restructuring costs be respected. Poland was obliged to submit regular detailed reports to the Commission, enabling it to monitor implementation and financing of the restructuring plan, as well as compliance with arrangements for capacity reduction and production restrictions.

The Polish shipyard cases should be seen against the background of a number of similar past State aid cases in the shipbuilding sector in Europe in which the Commission has adopted both positive and negative decisions. On the one hand, there were a number of negative decisions ordering repayment of past aid (for example, the Spanish public shipyards IZAR, German Kvaerner Warnow Werft and the Hellenic shipyards33). On the other hand, the Commission approved State aid granted to five shipyards in Eastern Germany that had undergone an in-depth restructuring in the 1990s, benefiting from substantial amounts of State aid of approximately EUR 3 billion.

There are significant differences between the cases of the Gdynia and Szczecin shipyards and the East German privatisations. The latter were conducted more swiftly. Public monetary support was used not only to support their operations, but also for a genuine modernisation of the yards. The restructuring was accompanied by a substantial capacity reduction of 40% overall, including a closure of two shipyards. By comparison, the Gdynia and Szczecin shipyards had benefited from prolonged operating aid and had been artificially kept afloat for many years. The aid had not been used for modernisation and restructuring. The long privatisation effort had not attracted an investor capable of preparing a convincing restructuring plan that would permit the yards’ operation without continuous recourse to State aid34. Moreover, the contribution of the shipyards would have been less than 15% of the restructuring costs (as opposed to 50% required by EU State aid law). Lastly, restructuring of the Gdynia and Szczecin yards would not be timely, as a positive pay-back on equity would be achieved only in 2018. The Gdańsk yard was in a different situation as it was smaller than the two other yards, already privatised in 2007, with the necessary private capital, and received a considerably lower level of subsidies.

33 See EUROPA press releases IP/04/1260 and IP/08/1078.
34 It should be noted that the Commission required that financing of restructuring was secured up-front to avoid company’s recourse to additional State aid to complete its restructuring.
Technologie Buczek (2008)

As a preliminary matter, rescue and restructuring aid cases in the steel sector are extensively covered in the contribution to the 2008 issue of YARS. The 2008 contribution discussed, *inter alia*, the Commission’s negative State aid decision regarding the Polish seamless tube producer Technologie Buczek Group (the *Buczek* Decision)\(^35\).

The Buczek Decision was appealed by Huta Buczek (hereafter, HB)\(^36\), Technologie Buczek (hereafter, TB)\(^37\) and Buczek Automotive (hereafter, BA)\(^38\) on a number of grounds. In parallel, BA and HB applied to the GC for interim measures in form of a suspension of operation of the Commission’s recovery decision\(^39\). On 13 February 2008, the GC suspended the execution of the Buczek Decision until the final order concerning interim measures. On 14 March 2008, the GC dismissed BA’s and HB’s applications for interim measures. In both cases, the GC held that the applications were partly inadmissible (as regards pleas raised for the benefit of other group members)\(^40\). It duly dismissed BA’s application for interim measures, considering that (i) BA had filed for its own bankruptcy and did not withdraw its application after the GC’s February suspension order (demonstrating the lack of urgency) and (ii) BA failed to provide detailed financial information about the new group of companies to which it belonged (over 50% of BA’s assets were acquired by Severstallat); thus, demonstrating the lack of serious and irreparable harm\(^41\).

In its interim measures application, HB argued that it was in a dire financial situation and would thus need to file for insolvency should the Commission’s decision be implemented. Insolvency and ensuing exit from the market would take place before the GC’s decision on the appeal and would constitute a serious and irreversible harm. The GC considered, however, that HB did not prove that it would need to exit from the market. First, the insolvency

\(^{35}\) On 23 October 2007, the Commission adopted a negative decision with recovery regarding Technologie Buczek Group (TB) and its subsidiaries Huta Buczek (HB) and Buczek Automotive (BA) (Case C-23/2006). According to the decision: (a) approx. PLN 1.4 million (plus recovery interests) had to be recovered from TB; (b) PLN 13.6 million (plus recovery interests) had to be recovered from HB Huta Buczek; and (c) approx. PLN 7.2 million (plus recovery interests) had to be recovered from BA.

\(^{36}\) Case T-440/07 *Huta Buczek v Commission*, application filed on 5 December 2007.

\(^{37}\) Case T-465/07 *Salej and Technologie Buczek v Commission*, application filed on 20 December 2007; case withdrawn and removed from register on 7 July 2010.

\(^{38}\) Case T-1/08 *Buczek Automotive v Commission*, application filed on 8 January 2008.


\(^{40}\) Para. 27 of judgement of 14 March 2008 in Case T-1/08 R and para. 26 of judgement of 14 March 2008 in Case T-440/07 R.

\(^{41}\) Paras 32-42 of judgement of 14 March 2008 in Case T-1/08 R.
administrator of TB (HB’s mother company) could support HB financially, and HB could also benefit from interim measures available in insolvency proceedings in national law. Second, even if HB would be forced to file for insolvency, Polish law foresees a possibility to continue business activity during insolvency proceedings. Finally, the applicant did not demonstrate that there were extraordinary circumstances that would outweigh public interest in safeguarding effective competition42.

BA’s and HB’s appeals on the merits are still pending before the GC. As regards the recovery proceedings, to date, Poland has not achieved full recovery of the illegal aid (over a year after the deadline, Poland did not recover the illegal and incompatible aid from TB’s subsidiaries despite the fact that the Commission decision places the main burden of the recovery on the subsidiaries). Therefore, the Commission concluded that the implementation of the Commission’s recovery decision by Poland was not satisfactory and referred Poland to the Court of Justice (CJ) (formerly the European Court of Justice, ECJ) for failure to comply with the Buczek Decision43.

According to the Polish authorities, apart from obstacles of a purely technical nature, the reason for the significant delay in recovering the aid lies in the provisions of the Polish law on insolvency44. The Commission, however, took the view that it was not sufficient that Poland availed itself of all measures open to it. The application of those measures must result in the effective and immediate implementation of the Buczek Decision, as otherwise it would be necessary to assume that Poland has not complied with its obligations. Breach of the obligation of a Member State to recover aid arises when the steps taken by that Member State have had no influence on the actual recovery of a particular amount45.

The case illustrates that the Commission enforces the Treaty provisions on State aid not only by launching investigations and issuing negative State

42 Paras 64-65, 70 and 78 of judgement of 14 March 2008 in Case T-440/08 R.
44 OJ [2009] C 312/17. The Polish authorities explained that the State aid referred to in the Buczek Decision took the form of exemption for TB from its liabilities, even though its subsidiaries were the actual beneficiaries of the aid. In that situation TB was formally accountable for all liabilities, including the amounts to be recovered from HB and BA. The provisions of Polish law allegedly make it impossible for such claims to be written off, with the exception of cases involving ‘complete impossibility’. In addition, if these claims are submitted, the official receiver dealing with the insolvency of TB is obliged to pay out the amounts owing, which may include the amounts to be recovered from the subsidiaries. Furthermore, if those amounts are recovered there will no longer be any legal basis on which recovery of those same amounts may be sought from HB and BA.
aid decisions but also by monitoring the actual recovery of illegal State aid continuously. In some cases, this may lead to action against a Member State that does not recover State aid from unlawful aid beneficiaries.

**Dell Poland (2009)**

In 2009, the European Commission adopted a guidance paper setting out criteria for the in-depth assessment of regional aid to large investment projects. The Regional Aid Guidelines 2007-2013\(^{46}\) foresee that large investment projects above certain thresholds need to be individually notified to the Commission. For projects where the aid beneficiary has a market share of more than 25% or where the production capacity created by the project exceeds 5% of the EEA market (if the market concerned is considered as under-performing), the Commission has to open a formal investigation. Regional aid to such large investment projects may carry a greater risk of distorting competition and therefore requires a detailed compatibility assessment. The criteria for the in-depth assessment of regional aid to large investment projects\(^{47}\), which are based on the principles of the State Aid Action Plan\(^{48}\), and in particular the balancing test, detail how the Commission will evaluate the positive and negative effects of such aid. Member States are required to provide information on the project’s contribution to regional development as well as the appropriateness, proportionality and incentive effect of the aid. Negative effects include the crowding-out of private investment or effects on trade such as displacement of investments.

The Dell Poland\(^{49}\) case was the first case where the Commission conducted the type of assessment referred to above.

Dell built a plant for the production of desktops, notebooks and servers which was expected to create up to 3,000 direct jobs in the Łódzkie region. The Łódzkie region was eligible for regional aid under Article 87(3)(a) of the EC Treaty (now Article 107 (3)(a) TFEU) as an area with an abnormally low standard of living and high unemployment. The investment costs taken into account for the calculation of the aid amounted to EUR 189.58 million. The manufacturing plant was opened in January 2008 and employed 1,700 workers in 2009.

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\(^{49}\) Dell Products Poland Sp.z o.o., a company wholly owned by Dell Inc. (US).
Due to Dell’s high market share as well as other uncertainties\textsuperscript{50}, the Commission decided to open a formal investigation procedure into the intended regional aid of EUR 54.5 million to support Dell’s investment. After a detailed economic analysis of the market and of the impact of the aid\textsuperscript{51}, the Commission decided that Dell’s project would significantly contribute to regional development and job creation in the disadvantaged region and that these benefits outweighed any potential negative effects on competition and loss of jobs elsewhere\textsuperscript{52}. The Commission’s investigation found that the aid provided an incentive for Dell to locate its manufacturing plant in Łódź by compensating for less favourable investment conditions in comparison with another envisaged location in Eastern Europe. The aid was limited to the amount necessary to compensate for the net additional costs of locating the plant in Łódź. Regarding the negative effects of the aid, the Commission found that the aid would not cause the crowding-out of competitors or the creation of significant production capacity in an under-performing market (desktops) since it had been demonstrated that the plant would have been built in any event, regardless of the aid, albeit in a different location. For the same reason, the Commission also concluded that job losses at other locations in the EU, such as those that would result from Dell’s decision to close its manufacturing facility in Ireland, were not a consequence of the aid granted by the Polish authorities.

\textit{Huta Częstochowa (Operator) (2009)}

As described in the 2008 issue of YARS, on 19 May 2005, the Commission opened a formal investigation\textsuperscript{53} into the restructuring process of Huta Częstochowa (HCz)\textsuperscript{54} and, on 5 July 2005, adopted a mixed decision (hereafter, \textit{HCz Decision})\textsuperscript{55}. The \textit{HCz Decision} held, \textit{inter alia}, that around EUR 4 million of restructuring aid given to the company between 1997 and 2002

\textsuperscript{50} Other uncertainties included doubts about the market definition of the products made at the plant, the increase in production capacity generated by the project, the possible decline in the desktop market and Dell's market share for servers.

\textsuperscript{51} During the in-depth investigation, the Commission verified whether the thresholds of the regional aid guidelines were respected, whether the aid was necessary for the investment to take place in the assisted region, and whether the benefits of the measure outweigh the resulting distortion of competition. For this purpose, the Commission took into account information received from the Polish authorities and from interested parties, including two of Dell’s competitors.

\textsuperscript{52} Commission Decision of 23 September 2009 in Case C 46/08 (ex N 775/07) on the aid which Poland is planning to implement for Dell Products (Poland) Sp. z o.o., OJ [2010] L 29/8.

\textsuperscript{53} OJ [2004] C 204/6.

\textsuperscript{54} Case C-20/2004 (ex NN/25/2004) – Restructuring aid to steel producer Huta Częstochowa.

\textsuperscript{55} OJ [2006] L 366/1.
constituted aid incompatible with EU State aid rules, and thus, had to be returned. While the recovery concerned a period of time before accession (where the Commission normally has no jurisdiction), it was ordered under Protocol No. 8, which covers the time frame starting before and continuing after accession and clearly differs from other State aid provisions of the Treaty, such as the interim mechanism56. The Commission considered that Protocol No. 8 could be regarded as *lex specialis* that, with regard to its subject matter, would supersede any other provision of the Accession Act. HCz’s purchaser, Donbass, HCz and other third parties57 appealed the HCz Decision. On 11 December 2006, the GC dismissed HCz’s application for interim measures.

On 1 July 2009, the GC issued a judgement partially annulling the HCz Decision in so far as it concerned Operator ARP sp. z o.o. (Operator)58. The Court held that the Commission had found Operator erroneously to be an entity jointly and severally liable to repay the aid in question. Where negative decisions are taken in cases of unlawful aid, the Commission is required to decide that the Member State concerned is to take all necessary measures to recover the aid from the ‘beneficiary’59. The term ‘beneficiary’ does not designate solely the original beneficiary of the aid but, where appropriate, any undertaking to which assets have been transferred in order to render the provisions of its recovery order inoperative60. However, in the case of Operator, on the date on which the HCz Decision was adopted, no assets had been transferred to the applicant 61. Moreover, the widening of the group of entities required to repay the aid can only be justified if the transfer of assets leads to the risk of circumvention of the effects of the recovery order, in particular if the original beneficiary is left

56 See Kuik K., ‘State Aid and the 2004 Accession – Overview of Recent Developments’ (2004) 3(3) *European State Aid Law Quarterly*.
57 Case T-288/06. Case 291/06 and Case 297/06, respectively.
58 Operator was created during the restructuring of HCz which took place between 2002 and 2005. In 2002, Huta Stali Częstochowa sp. z o.o. (HSCz), ultimately controlled by the Polish Treasury, was formed to continue HCz’s steel production. In 2004, the two holding companies, wholly owned by HCz, were formed and received HCz’s steel assets and certain other assets necessary for production. Assets not linked to production (non-steel assets) and the electricity company Elsen were transferred to Operator, a company answerable to Agencja Rozwoju Przemysłu S.A. (the Polish Industrial Development Agency, owned by the Polish Treasury) (ARP), to settle public-law claims subject to restructuring (taxes and social security contributions).
59 Article 14(1) of Regulation No. 659/1999.
61 Although the HCz restructuring operation contemplated that assets would be transferred to ‘operator’, Operator gave its agreement to exercising such function in the HCz restructuring procedure only several days after the decision had been adopted.
like an ‘empty shell’\textsuperscript{62}. That widening may also be justified by the fact that the acquirer(s) retain(s) the actual benefit of the competitive advantage connected with the receipt of the aid granted\textsuperscript{63}.

No advantage in relation to other market operators results from the asset purchase where assets are bought at the market price\textsuperscript{64}. For the purposes of checking the financial conditions of a transfer, the national authorities may take into consideration, in particular, any expert’s report prepared at the time of the transfer\textsuperscript{65}. In Operator’s case, an independent expert’s report assessed the market value of the assets received at PLN 156 million. In contrast, the total value of the public-law obligations assumed legally amounted to more than PLN 280 million, i.e. they exceeded significantly the market value of the assets transferred to Operator.

The GC also noted that, given that Operator was neither a company belonging to the vendor’s group nor present on the steel production market (it fulfilled the role of a buyer of debts and assets of undertakings in difficulty to, in return, satisfy their creditors), the Commission should have demonstrated more specifically a risk of circumvention and actual benefit to Operator of a competitive advantage related to the receipt of the aid in question\textsuperscript{66}.

The Court held that the Commission erred in including Operator in the group of entities jointly and severally liable to repay the aid in question and, consequently, annulled the HCz Decision in so far as it concerned Operator.

3. Mergers

The years 2008 and 2009 have marked some gradual changes in EU merger control\textsuperscript{67}. Despite the economic and financial downturn, there were several cases of consolidation, notably in the pharmaceutical and airline sectors, that affected Poland. That said, it is also noteworthy that unlike in other countries,

\textsuperscript{62} Case T-324/00 CDA Datenträger Albrechts v Commission [2005] ECR II 4309, para. 98 et seq.

\textsuperscript{63} Case C-277/00 Germany v Commission [2004] ECR I-3925 (SMI), para. 86.

\textsuperscript{64} Para. 67 of of judgement in Case T-291/06. In the case of the takeover of assets, since the purchaser has paid a purchase price in line with the market for the takeover of assets, the purchaser does not retain the actual benefit of the competitive advantage connected with the receipt of the aid granted to the vendor. In such a case, it cannot be found that the original beneficiary of the aid is left like an ‘empty shell’ or that the purchaser has retained the actual benefit of the aid (CDA Datenträger Albrechts, para. 99).

\textsuperscript{65} Case C-214/07 Commission v France [2008] ECR I-0000, para. 59 and 60.

\textsuperscript{66} Para. 69 of judgement in Case T-291/06.

the financial crises did not lead to rescue mergers or nationalisation of banks in Poland.

The Commission’s policy with respect to remedies has continued to be scrupulous with the Commission’s preference for structural remedies, such as divestitures. In order to provide improved guidance on questions related to remedies, in October 2008, the Commission adopted a new Notice on Remedies\(^8\), which codifies recent practice of the European Union Courts and the European Commission and provides a number of clarifications.

**Teva / Barr Pharmaceuticals (2008)**

On 19 December 2008, the Commission approved the proposed acquisition of Barr Pharmaceuticals (United States) by Teva Pharmaceutical Industries (Israel), subject to conditions\(^9\). The merger was cleared after Teva submitted commitments in a number of national markets for pharmaceutical products\(^10\) to offset the Commission’s competition concerns that had arisen in the Phase I investigation.

Both merging parties primarily engaged in production and marketing of generic medicines. Teva was the largest generics producer in the world. Within the EEA, the parties had overlapping activities in 11 countries (including Poland).

In terms of the product market definition, for several medicines, the Commission departed from its traditional starting point of defining the relevant product markets according to the therapeutic indication (i.e. intended use) pursuant to the third level of the Anatomical Therapeutic Chemical classification (ATC3). Following the results of the market investigation, the Commission analysed some markets at the molecular level\(^11\) under the assumption that medicines based on the same molecule are each other’s closest competitors (regardless of whether they are originator medicines or their generic copies). In line with previous decisions, the Commission considered the relevant markets to be national in geographic scope.

As regards the relevant markets in Poland, the Commission identified competition concerns regarding two cancer medicines (based on paclitaxel and on calcium folinate) where the parties combined market share would amount to 60–70%, and prescription vitamin products (riboflavin and pyridoxine), where

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\(^9\) Case No. COMP/M.5295 – Teva/Barr Pharmaceuticals.

\(^10\) In total, 15 cancer medicines in the Czech Republic, Hungary, Poland, the Slovak Republic and Slovenia, as well as two other medicines in Poland.

\(^11\) A molecule is the most active pharmaceutical ingredient.
their combined market share would be 90–100%. The Commission concluded that barriers to entry were significant for generic drugs given that entry required significant investments to obtain market authorisations and there were lengthy development and administrative procedures. For oncology drugs specifically, entry was additionally hampered by the medicines’ hazardous (cytostatic) nature which lead to special production and handling requirements. The proposed remedy consisted in the divestment of the relevant Teva businesses, thus removing the entire overlap between the merging parties.

**Pfizer / Wyeth (2009)**

On 17 July 2009, the Commission approved another proposed acquisition in the pharmaceuticals sector, namely of the pharmaceutical and health care products company Wyeth (United States) by the global pharmaceutical company Pfizer (United States)\textsuperscript{72}. The approval was conditional upon Pfizer’s commitment to divest several types of animal health vaccines, pharmaceuticals and medicinal feed additives in the EEA or in specific Member States, whereas the transaction was not considered problematic in human health pharmaceuticals where the companies’ activities were to a large extent complementary.

With respect to product market definition, the Commission divided the animal health market into three main categories: (i) biologicals (vaccines), (ii) pharmaceuticals and (iii) medicinal feed additives. The markets were considered to be national in scope for similar reasons as described above for human health pharmaceuticals. Competition concerns in the Polish markets were found in relation to vaccines for prevention of respiratory infection in swine (mycoplasma hyopneumoniae vaccines), where the parties’ combined market share would be 30-40%. The Commission found that, despite the presence of two other competitors, the segment is subject to very high entry barriers. It is highly concentrated and dominated by a few well-established multinational players. The market is mature and has been stable in the last three years with no changes expected.

To address the Commission’s competition concerns, Pfizer proposed to divest a number of specific products for each of the markets where competition concerns had been identified, i.e. several national markets in the vaccine and pharmaceutical area and in one medicinal feed additives area. Pfizer also offered to divest Wyeth’s vaccines manufacturing facility in Sligo, Ireland, because the existing production capacity is scarce and building new capacity is a lengthy and complex process.

\textsuperscript{72} Case No. COMP/M. 5476 – Pfizer / Wyeth.
Aviva / Bank Zachodni (2008)

The Aviva / Bank Zachodni case\textsuperscript{73} concerned a creation of two new full-function joint ventures\textsuperscript{74} in the insurance sector in Poland by the UK's Aviva insurance group and the Polish Bank Zachodni WBK S.A. The first joint venture, BZ WBK – CU Towarzystwo Ubezpieczeń na Życie S.A., would be active in underwriting life insurance for mortgage borrowers and investment products, whereas the second joint venture, BZ WBK – CU Towarzystwo Ubezpieczeń Ogólnych S.A., would underwrite general insurances, such as card theft, cover for unemployment, home contents and civil liability\textsuperscript{75}. The Commission approved this concentration unconditionally in Phase I on 5 February 2008.

Aviva is an international insurance group that is also active in long term savings and fund management. Bank Zachodni WBK S.A. is a universal bank, offering services to personal customers, small and medium enterprises, large corporate companies, as well as a wide range of services such as mutual funds, brokerage activities, factoring and asset management. In the relevant period of time, it was controlled by the Allied Irish Banks group.

The Commission’s investigation focused on insurance products in the Polish market, where the two joint ventures would exclusively be active and on a possible vertical relationship as regards the market for asset and pension fund management, where both parent companies are active. The Commission’s investigation indicated that in line with previous Commission decisions, the Polish insurance market should be divided into non-life insurance, life insurance and reinsurance with possibly further distinction between different types of insurances belonging to each of these three broad segments. Asset management and pension funds were each considered to be a separate market, distinct from life and non-life insurance. In terms of geographic market definition, insurance pension funds markets in Poland have been regarded as mainly national in scope due to, inter alia, differing regulatory systems and fiscal constraints, but some product markets within the life insurance segment (such as saving and investment products) could, according to the Commission market investigation, be wider in scope. The market investigation provided evidence for the asset management being global in scope.

The Commission’s market investigation did not indicate any horizontal or vertical competition concerns resulting from the planned transaction. It also did not provide any indications pointing towards coordinated effects in

\textsuperscript{73} Case No. COMP/M.4950 – Aviva/Bank Zachodni.
\textsuperscript{74} For a discussion on the concept of full-functionality, see the Consolidated Jurisdictional Notice, OJ [2008] C 95/23 et seq.
\textsuperscript{75} The Polish law requires life insurance to be run separately from non-life insurance.
the meaning of Article 2(4) of Regulation 139/2004. As regards horizontal overlaps, the parties’ combined market share was below 15% with an increment below 5%. Regarding the vertically related market for asset and pension fund management, Aviva and Bank Zachodni would have combined market shares between 20% and 30%, which as such was considered to be unlikely to lead to input or customer foreclosure76.

**Consolidation in the European airline industry (2009)**

The year 2009 was marked by a wave of mergers in the European airline industry77. The Commission reviewed a number of cases, namely *Iberia/Vueling/Clickair*78, *Lufthansa/bmi*79, *Lufthansa/SNAH (Brussels Airlines)*80 and *Lufthansa/Austrian Airlines*81. The merging parties provided air transport services, *inter alia*, on routes connecting Polish airports to other European hubs, however the competition concerns identified by the Commission on a number of short-haul routes did not relate to routes originating or destined in Poland.

It could be noted for the future that the Commission has modified its traditional approach to mergers in the airline industry according to which in earlier cases the Commission had analysed not only overlaps between the merging parties but also overlaps between one party and the other party’s alliance partner. In the latest cases, the Commission decided to restrict its analysis to overlaps between the merging parties and to consider other markets to be affected only if there is solid evidence that the cooperation between one merging party and a third party (its alliance partner) will be extended to the other merging party82. This had a bearing on overlaps between Lufthansa’s Star Alliance partners (such as LOT Polish Airlines) on the one hand, and Brussels Airlines or Austrian Airlines on the other hand. In principle, such overlaps were not considered as reportable markets. In addition, as the result of the change in its approach, the Commission did not aggregate LOT’s market share

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82 In other words, a market is considered as affected only if there is evidence that one party will be integrated into the other party’s partnership with another airline on this market, or that competition will otherwise be reduced as a result or as a foreseeable consequence of the merger.
with that of Lufthansa’s on overlap routes between the respective merging parties but considered LOT as a fully-fledged competitor.

4. Electronic communications – regulatory framework

4.1. Progress Report 2009

According to the European Commission’s Progress Report on the Single European Electronic Communications Market 2009, Europe’s e-communications are still fragmented along national borders due to inconsistent implementation of existing EU regulation by national regulators.

Analysing the regulatory developments, the Commission has referred to Poland in the context of three issues: the national regulatory authority’s (NRA) independence, the market analysis necessary to impose regulatory measures and broadband.

Independence of NRAs

Independent NRAs are a prerequisite for ensuring fair and effective regulation of the sector. The conditions for the appointment or removal of the head of the Polish NRA led the Commission to refer Poland to the CJ and to launch an infringement proceeding against Romania. The Commission has also been examining the conditions under which the head of the Slovakian NRA was dismissed.

Market analysis by NRAs

The Commission noted in the report that significant progress had been made with the second round of market analyses. In some cases, the third round has already started (e.g. Finland, Austria and Hungary). While following some recent notifications, almost all Member States have completed the first round of market analyses; this was not the case for Poland, Bulgaria and Romania.

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Broadband price controls

The Commission noted that the approaches to setting price control obligations for wholesale broadband access varied significantly across Member States. Some NRAs rely on “retail minus” methodologies while others apply cost-orientation. Some NRAs, e.g. the Polish UKE, have not been able to implement the cost orientation obligations which they have imposed and rely in the meantime on other methods such as benchmarking.

4.2. Judgments in regulatory infringement cases

Access Directive – interconnection negotiation obligation (2008)\textsuperscript{84}

The Access Directive\textsuperscript{85} is part of the ‘Electronic Communications Package’ which, with four other directives, aims at making the communications networks and services sector more competitive. The Access Directive applies to all forms of communication networks carrying publicly available communications services\textsuperscript{86}. It establishes rights and obligations for operators\textsuperscript{87} and for undertakings seeking interconnection\textsuperscript{88} and/or access\textsuperscript{89} to their networks. Its objective is to establish a framework, which will encourage competition by stimulating the development of communications services and networks, and also to ensure that any bottlenecks in the market do not constrain the emergence of innovative services that could benefit users. However, insofar as there is no effective competition on the market, the NRAs must act, including by imposing obligations on operators with significant market power.

The Access Directive establishes a fundamental rule regarding interconnection to the effect that all network operators have rights and obligations as regards


\textsuperscript{86} These include fixed and mobile telecommunications networks, networks used for terrestrial broadcasting, cable TV networks, and satellite and Internet networks used for voice, fax, data and image transmission.

\textsuperscript{87} The term ‘operator’ is defined by the Directive as an undertaking providing a public communications network or an associated facility.

\textsuperscript{88} The term ‘interconnection’ is defined by the directive as the physical and logical linking of public communications networks in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking.

\textsuperscript{89} The term ‘access’ means the making available of facilities and/or services to another undertaking for the purpose of providing electronic communications services.
interconnection agreements, namely to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services. Additionally, the Directive imposes obligations on NRAs. They are responsible for carrying out regular market analyses to determine whether one or more operators have significant power on the market in question. Where, following a market analysis, an operator is identified as having significant power on a given market, the NRA will impose, inter alia, obligations of access to, and use of, specific network facilities, such as to negotiate in good faith with undertakings requesting access.

Member States were obliged to transpose the Access Directive into national laws by 24 July 2003. In 2005, the Commission informed Poland that it had concerns regarding the transposition of the Directive and after issuing a reasoned opinion to that effect in 2006, it initiated an infringement procedure under Article 226 EC (now Article 258 TFEU) before the ECJ (now the CJ) in May 2007.

The Commission believed that the Polish Law on telecommunications, in particular Article 26, had not been in line with Articles 4(1) and 5(1) of the Access Directive. Whereas the Access Directive provides for the NRA to be empowered to impose an obligation to negotiate access agreements only following a market analysis and only towards operators of telecommunications networks with significant market power, the Polish law imposes such an obligation without prior evaluation of the degree of effective competition on the market concerned. Moreover, the Commission criticised the wide powers of intervention set out in Articles 26-30 of the Polish law as it considered that NRAs should be empowered to act only in certain specified cases.

The CJ held that the Polish law imposes a general obligation to negotiate agreements for access to the telecommunications network and agreed with the Commission that the law therefore did not allow for any assessment of circumstances, such as the level of competition, which is required under the Access Directive. Therefore, the Court decided that Article 4(1) has not been properly transposed. The Court however did not agree with the Commission’s second plea, pointing out that Article 5(1) provides for a general power for the NRA for the purpose of achieving the objectives of the Access Directive and the Commission failed to demonstrate that the relevant provisions of the Polish law do not achieve these objectives.

The CJ followed the same principles in interpreting Articles 4 and 5 of the Access Directive for the purposes of TeliaSonera v iMEZ.\(^{90}\)

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The Framework Directive\textsuperscript{92} forms also part of the Electronic Communications Package mentioned above. It contains a definition of a subscriber. In 2005, the Commission launched infringement proceedings against Poland for the incorrect transposition of the Framework Directive into national law\textsuperscript{93}. The Commission considered that the definition of a ‘subscriber’ in the Polish law is not in line with the definition set out in the Framework Directive. Pursuant to Article 2 of the Framework Directive, a ‘subscriber’ means any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services. The Polish Law on telecommunications defines a subscriber as a legal entity, which was party to a written contract with such a provider. In the Commission’s view such a narrower definition deprived subscribers, who did not enter into a written contract, of certain rights resulting from the telecoms directives.

The CJ agreed with the Commission and held that although Member States were not obliged to transpose directives literally into national laws, it had been incumbent on Poland to refute evidence presented in this case by the Commission. Poland failed to demonstrate that, despite the difference in definition, the provisions of the Polish law on telecommunications achieved the objectives of the electronic communications directives.

A point of note relates to the Court’s position on the burden of proof in infringement proceedings. The CJ reaffirmed that when the Commission provides sufficient evidence to suggest that the national provisions adopted by the defendant Member State do not ensure the effective implementation of the Directive, that Member State has the burden of proof to challenge these findings and the resulting consequences.


\textsuperscript{93} See EUROPA press release MEMO/05/478; the deadline for implementation expired on 30 April 2004.
### III. Tables

**Table A: Court of Justice cases**

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Source: European Union Courts’ website.
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<td>2008-04-10</td>
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</table>

Source: European Union Courts' website.
**Table C: Infringement cases**

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<tr>
<th>Case no.</th>
<th>DG</th>
<th>Subject matter</th>
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<th>Date</th>
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<tbody>
<tr>
<td>1</td>
<td>INFSO</td>
<td>Reutilisation of information from public sector</td>
<td>Court referral</td>
<td>2010-06-25</td>
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<tr>
<td>2</td>
<td>INFSO</td>
<td>Withdrawal from end-user contracts</td>
<td>Letter of formal notice</td>
<td>2008-01-31</td>
<td>2009-06-25</td>
</tr>
<tr>
<td>3</td>
<td>INFSO</td>
<td>Broadband retail regulation</td>
<td>Judgement</td>
<td>2010-05-06</td>
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<tr>
<td>4</td>
<td>INFSO</td>
<td>Non-availability of caller location information for 112</td>
<td>Court referral</td>
<td>2007-11-28</td>
<td>2008-10-16</td>
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<tr>
<td>5</td>
<td>INFSO</td>
<td>Independence and impartiality of the NRA</td>
<td>Court referral</td>
<td>2008-01-31</td>
<td>2009-06-25</td>
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<tr>
<td>6</td>
<td>ENER</td>
<td>Non conformity with the EU Gas Directive 2003/55/EC</td>
<td>Reasoned opinion</td>
<td>2006-12-12</td>
<td>2007-12-11</td>
</tr>
<tr>
<td>7</td>
<td>ENER</td>
<td>Non conformity with the EU Electricity Directive 2003/54/EC</td>
<td>Court referral</td>
<td>2008-06-05</td>
<td>2009-02-19</td>
</tr>
<tr>
<td>8</td>
<td>INFSO</td>
<td>Failure to carry out market reviews</td>
<td>Reasoned opinion</td>
<td>2006-04-04</td>
<td>2009-10-29</td>
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<tr>
<td>9</td>
<td>INFSO</td>
<td>Lack of comprehensive directories of subscribers</td>
<td>Court referral</td>
<td>2006-06-28</td>
<td>2008-02-28</td>
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<td>INFSO</td>
<td>112 emergency number</td>
<td>Reasoned opinion</td>
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<td>INFSO</td>
<td>Number portability</td>
<td>Reasoned opinion</td>
<td>2005-07-05</td>
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Source: Commission's infringement website.
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<tr>
<th>Case no.</th>
<th>Beneficiary</th>
<th>Type</th>
<th>Objective</th>
<th>Launch / Proposal</th>
<th>Decision</th>
<th>Date</th>
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<tbody>
<tr>
<td>1</td>
<td>C 49/2008</td>
<td>PZL Dębica</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Pending</td>
<td>2008-12-19</td>
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<tr>
<td>2</td>
<td>C 47/2008</td>
<td>Przedziałnia Zawiercie</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Withdrawn</td>
<td>2009-03-03</td>
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<tr>
<td>3</td>
<td>C 46/2008</td>
<td>Dell Poland</td>
<td>Individual</td>
<td>Other</td>
<td>Positive</td>
<td>2009-09-23</td>
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<tr>
<td>4</td>
<td>C 40/2008</td>
<td>PZL-Hydral S.A.</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Positive</td>
<td>2010-08-04</td>
</tr>
<tr>
<td>5</td>
<td>C 32/2008</td>
<td>Hartwig-Katowice</td>
<td>Individual</td>
<td>Other</td>
<td>Withdrawn</td>
<td>2009-06-16</td>
</tr>
<tr>
<td>6</td>
<td>C 11/2008</td>
<td>BVG Medien Beteiligungs GmbH</td>
<td>Individual</td>
<td>Other</td>
<td>Positive</td>
<td>2008-12-10</td>
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<tr>
<td>7</td>
<td>C 48/2007</td>
<td>WRJ i WRJ-Serwis (formerly Huta Jedność)</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Other</td>
<td>2010-07-06</td>
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<tr>
<td>8</td>
<td>C 43/2007</td>
<td>Huta Stalowa Wola</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Positive</td>
<td>2009-03-10</td>
</tr>
<tr>
<td>9</td>
<td>C 34/2007</td>
<td>Maritime transport</td>
<td>Scheme</td>
<td>Other</td>
<td>Positive</td>
<td>2009-12-18</td>
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<tr>
<td>12</td>
<td>C 52/2006</td>
<td>Odlewnia Żeliwa Śrem</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Positive</td>
<td>2008-12-10</td>
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<td>13</td>
<td>C 51/2006</td>
<td>Arcelor Huta Warszawa</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Negative with recovery</td>
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<td>14</td>
<td>C 32/2006</td>
<td>Huta Cynku Miasteczko S.</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>No aid</td>
<td>2007-09-11</td>
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<tr>
<td>15</td>
<td>C 23/2006</td>
<td>Technologie Buczek</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Negative with recovery</td>
<td>2007-10-23</td>
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<tr>
<td>16</td>
<td>C 49/2005</td>
<td>Chemobudowa Kraków</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Withdrawed</td>
<td>2006-09-26</td>
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<td>17</td>
<td>C 44/2005</td>
<td>Huta Stalowa Wola</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>Positive Revocation/Positive</td>
<td>2009-10-03</td>
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<tr>
<td>Case no.</td>
<td>Beneficiary</td>
<td>Type</td>
<td>Objective</td>
<td>Launch / Proposal</td>
<td>Decision</td>
<td>Date</td>
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<tr>
<td>18</td>
<td>C 43/2005</td>
<td>Stranded costs</td>
<td>Individual</td>
<td>Other</td>
<td>2005-11-23 Mixed: positive and negative without recovery</td>
<td>2007-09-25</td>
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<tr>
<td>19</td>
<td>C 22/2005</td>
<td>Poczta Polska</td>
<td>Scheme</td>
<td>Other</td>
<td>2005-06-29 Withdrawn</td>
<td>2006-04-25</td>
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<td>20</td>
<td>C 21/2005</td>
<td>Poczta Polska</td>
<td>Individual</td>
<td>Other</td>
<td>2005-06-29 Termination (non-implementation of aid) Conditional</td>
<td>2007-01-09</td>
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<tr>
<td>21</td>
<td>C 19/2005</td>
<td>Stocznia Szczecińska Nowa</td>
<td>Individual</td>
<td>R&amp;R</td>
<td>2005-06-01 Negative with recovery</td>
<td>2008-11-06</td>
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Source: State Aid Register (DG Competition).
<table>
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<tr>
<th>Case no.</th>
<th>Party/ies</th>
<th>Type</th>
<th>Industry</th>
<th>Filed/opened</th>
<th>Decision</th>
<th>Date</th>
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<tbody>
<tr>
<td>1</td>
<td>COMP/39.525 Telekomunikacja Polska</td>
<td>Antitrust</td>
<td>Telecommunications</td>
<td>2009-04-26</td>
<td>Opening of proceedings</td>
<td>2009-07-17</td>
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<tr>
<td>2</td>
<td>COMP/M.5476 Pfizer/Wyeth</td>
<td>Mergers</td>
<td>Pharmaceuticals</td>
<td>2009-05-29</td>
<td>Conditional approval in Phase I</td>
<td>2009-07-17</td>
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<tr>
<td>3</td>
<td>COMP/M.5335 Luftansa/SN Airholdind</td>
<td>Merger</td>
<td>Air transport</td>
<td>2008-11-26</td>
<td>Conditional approval in Phase II</td>
<td>2009-06-22</td>
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<tr>
<td>4</td>
<td>COMP/M.5295 Teva/Barr Pharmaceuticals</td>
<td>Mergers</td>
<td>Pharmaceuticals</td>
<td>2008-11-03</td>
<td>Conditional approval in Phase I</td>
<td>2008-12-19</td>
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<td>6</td>
<td>COMP/38.698 CISAC Agreement</td>
<td>Antitrust</td>
<td>Collective rights management</td>
<td>2006-02-07</td>
<td>Cartel infringement/prohibition</td>
<td>2008-07-16</td>
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<tr>
<td>7</td>
<td>COMP/M.4950 Aviva/Bank Zachodni</td>
<td>Merger</td>
<td>Financial services</td>
<td>2007-12-20</td>
<td>Unconditional approval in Phase I</td>
<td>2008-02-05</td>
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<tr>
<td>9</td>
<td>COMP/M.4532 Lukoil/ConocoPhilips</td>
<td>Merger</td>
<td>Automotive fuel</td>
<td>2007-1-17</td>
<td>Unconditional approval in Phase I</td>
<td>2007-02-21</td>
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<td>10</td>
<td>COMP/M.4552 Carrefour/Ahold Polska</td>
<td>Merger</td>
<td>Retail</td>
<td>2007-02-16</td>
<td>Full referral to NCA</td>
<td>2007-04-10</td>
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<td>11</td>
<td>COMP/M.4348 PKN/Mazeikiu</td>
<td>Merger</td>
<td>Petrochemicals</td>
<td>2006-09-29</td>
<td>Unconditional approval in Phase I</td>
<td>2006-11-07</td>
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<tr>
<td>14</td>
<td>COMP/M.4141 Linde/BOC</td>
<td>Merger</td>
<td>Industrial gases</td>
<td>2006-04-06</td>
<td>Conditional approval in Phase I</td>
<td>2006-06-06</td>
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</table>

Source: DG Competition’s website.
Table F: Regulatory (Article 7) proceedings in telecoms cases

<table>
<thead>
<tr>
<th>Case no.</th>
<th>Sector</th>
<th>Legal basis</th>
<th>Decision</th>
<th>Date</th>
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<tr>
<td>1</td>
<td>PL/2006/0524 Electronic</td>
<td>Article 7(4) of Directive 2002/21/EC</td>
<td>Retail access to the public telephone network at a fixed location for non-residential customers in Poland</td>
<td>2007-01-10</td>
</tr>
<tr>
<td>2</td>
<td>PL/2006/0518 Electronic</td>
<td>Article 7(4) of Directive 2002/21/EC</td>
<td>Retail access to the public telephone network at a fixed location for residential customers</td>
<td>2007-01-10</td>
</tr>
</tbody>
</table>

Source: DG Information Society’s website.

Literature


Annual reports

European Commission’s Annual Report on Competition Policy 2008
European Commission’s Annual Report on Competition Policy 2009
Progress Report on the Single European Electronic Communications Market 2009
Polish Antitrust Legislation and Case Law Review 2009

by

Agata Jurkowska-Gomulka*

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* Dr. Agata Jurkowska-Gomulka, Department of European Economic Law, Faculty of Management, University of Warsaw; Scientific Secretary of the Centre of Antitrust and Regulatory Studies.
6.1. Bringing an infringement to an end
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Abstract

The article presents key developments in Polish antitrust legislation and case law in 2009. Regarding legislation the article focuses on a new leniency regulation and legal acts amending the Polish Competition and Consumer Protection Act, adopted in 2008, that entered into force in 2009. The article provides a general characteristics of antitrust cases, mainly ones ruled by the Supreme Court and the Court of Appeal in Warsaw. A description of cases is divided into thematic parts referring to particular kinds of practices restricting competition, identification of relevant markets, relationships between the Competition Act and other legal acts and problems related to adopting and implementing decisions by the UOKiK President.

Résumé

L’article présente les développements clés de la loi polonaise d’ententes et la jurisprudence en 2009. Par rapport à la législation, l’article se concentre sur les nouvelles règles de clémence et les actes modifiant le Droit de la concurrence et de la protection du consommateur, adoptées en 2008, entrées en vigueur en 2009. L’article présente caractéristiques générales des cas en matière d’ententes, surtout ceux règles par la Cour Suprême et la Cour d’Appel de Varsovie. La description des cas est divisée en parties thématiques concernant les types particuliers des des pratiques restreignant la concurrence, identification des marchés, relations entre le Droit de la compétition et les autres actes et problèmes relatifs à l’adoption et l’exécution des décisions par le président de l’UOKiK.

Classifications and key words: abuse of a dominant position; anticompetitive agreements; antitrust case law; antitrust legislation; commitment decision; energy law; fines; leniency; market sharing; refusal to deal; relevant market; unfair prices.
I. Antitrust legislation

1. Amendments to the Competition Act

Two main changes affected Polish antitrust rules in 2009: the amendments introduced indirectly to the Competition and Consumer Protection Act of 17 February 2007 (Competition Act¹) and the issue of a new procedural regulation on leniency.

On 21 March 2009, the Act of 21 November 2008 on civil service² came into force. Its Article 188 modified Article 29(3) of the Polish Competition Act reintroducing a competition as the selection method for the President of the Polish antitrust authority (in Polish: Urząd Ochrony Konkurencji i Konsumenta; hereafter, UOKiK).

On 7 March 2009, the Act of 19 December 2008 on the Amendment of the Act on the Freedom of Economic Activity and Other Acts³ came into force. On its basis, some of the provisions contained in the Competition Act concerning the conduct of inspections of those subject to antitrust proceedings were changed. The Amending Act annulled the inspection rules initially regulated by Articles 62-69 of the Competition Act. Instead, a new Chapter 5 was added to Part VI of the Competition Act entitled ‘Inspections in proceedings before the President of the Office’. The content of the old provisions was repeated, with minor adjustments, in a new Article 105a-105l. The most important qualitative change introduced by this Amendment Act was the introduction into the Competition Act of the provisions that used to be contained in paragraphs 4, 6-9 of the Council of Ministers’ Regulation of 17 July 2007 concerning inspections in antitrust proceedings⁴. The latter change should be applauded but the legislative technique applied in this context overall leaves a lot to be desired (adding a new chapter to Part VI of the Competition Act and transplanting legal provisions in an almost untouched form from one place of the Act to another). It is rather doubtful if the significance of inspection rules will actually increase after their move from general procedure contained in Part VI Chapter 1 to its new Chapter 5. Furthermore, the addition of Chapter 5 has disturbed the so far logical structure of Part VI whereby its first Chapter covers issues common to all types of proceedings before the UOKiK President, dedicating its further chapters their particular categories.

¹ Journal of Laws 2007 No. 50, item 331, as amended.
³ Journal of Laws 2009 No. 18, item 97.
2. New Leniency Regulation

On the basis of Article 109(5) of the Competition Act, the Council of Ministers adopted on 26 January 2009 a regulation on the procedure to be followed in cases of enterprises’ applications to the UOKiK President for the immunity from or the reduction of fines\(^5\). The new Regulation entered into force on 24 February 2009, replacing the previous act of 17 July 2007\(^6\).

The goal of the 2009 Regulation is primarily to harmonize the Polish leniency procedure with the EU model (Leniency Notice of 2006). However, leniency is still applicable in Poland to both horizontal and vertical competition restraints. Unlike the EU Notice, the Polish act makes no difference between the procedures to be followed on immunity and those on a fine reduction. The Regulation specifies what the desired content of a leniency application is (paragraph 3 of the Regulation) but does not contain a uniform submission form to be used by those interested. Moreover, the Polish leniency procedure cannot be initiated by a phone call; it may be started however by an oral application (for the record) in the form of a statement given before a UOKiK employee. An undertaking cannot be informed at the moment of the notification whether others have already made submissions in the same case. One of the most significant changes introduced by the new Regulation is the possibility of submitting a summary application (‘marker application’), patterned on the practice of the European Commission (paragraph 5 of the Regulation), that guarantees the applicant a ‘place in the queue’.

The Leniency Regulation of 2009 is accompanied by separate Leniency Guidelines issued by the UOKiK President. Lacking the legally binding nature of law, the Guidelines constitute however an important set of ‘instructions for those enterprises which intend to apply for leniency’ (point I.2 of the Guidelines).

The new Regulation is expected to increase the number of leniency applications in Poland and thus to improve the effectiveness of the combat against illegal competition restricting practices. In order to achieve these results, the UOKiK prepared a multimedia advertising campaign on leniency.

\(^6\) Journal of Laws 2007 No. 134, item 938.
II. Antitrust case law

1. General remarks

The case law analysis conducted for the purpose of this article covered the judgments of the Supreme Court, the Court of Appeals in Warsaw and the Court of Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumenta; hereafter, SOKiK) delivered in 2009 on the basis of the Competition Act. The emphasis of this article is clearly placed on those legal issues which were assessed by the higher instance courts (Court of Appeals and Supreme Court). Far less attention is paid to the judgments of SOKiK since its verdicts, especially if they concern controversial issues, are usually subject to a revision by the higher instance courts. As a matter of exception, presented here is also a single judgment delivered in 2009 by the Supreme Administrative Court because it directly concerns the activities of the UOKiK President in his/her capacity as a body of public administration.

Considering no general database exits for Polish jurisprudence, which would make it possible to identify all judgements delivered at any given time by a particular court, the choice of the rulings assessed in this article has been made on the basis of the resources collected by CARS. 26 judgements delivered by SOKiK, 18 rulings by the Court of Appeals in Warsaw (in Polish: Sąd Apelacyjny w Warszawie; hereafter, SA) and 8 by the Supreme Court (in Polish: Sąd Najwyższy; hereafter, SN) were ultimately identified.

The rulings of the higher instance courts (Court of Appeals and Supreme Court) predominantly referred to practices that had infringed (or at least had been declared to have done so) the previous Competition and Consumer Protection Act of 2000. By contrast, the first instance judgements delivered by SOKiK referred to practices that were assessed in the light of the current Competition Act. In some circumstances resulting from an earlier intervention by the higher instance courts, SOKiK and/or the Court of Appeals have ruled on the same case twice. Indeed, some judgements delivered in 2009 can be classified as another step in a ‘judicial saga’ – situations where cases restarted as a result of the Supreme Court (rarely Court of Appeals) annulling a judgement of a lower instance court. The most significant judicial sagas that continued in 2009 included, among others, the Rychwał Commune case (judgement of SA of 23 June 2009, VI Aca 580/09) and the Tele 2 case (judgement of SOKiK of 17 June 2009, XVII Ama 102/08).

The jurisprudence of 2009 shows a clear predominance of cases dedicated to competition restricting practices. Only one of the judgements referred indirectly to concentration control (it focused on the imposition of a fine for
the non-fulfilment of the obligation to notify the intent to concentrate, SOKiK judgement of 2 December 2009, XVII Ama 13/09, \textit{SADROB}). Not unlike in previous years, most of the case-law concerned abuses that took the form of: the imposition of unfair prices (e.g. judgement of the Court of Appeals of 27 May 2009, VI Aca 1407/08, \textit{Telekomunikacja Polska}); the imposition of onerous contractual terms yielding unjustified profits to the dominant undertaking (e.g. judgement of the Court of Appeals of 30 October 2009, VI Aca 464/09, \textit{ENION}); the use of discriminatory terms (e.g. judgement of SA of 6 January 2009, VI Aca 846/08, \textit{Carston}) and; counteracting the formation of the conditions necessary for the emergence or development of competition (e.g. judgement of the Court of Appeals of 27 May 2009, VI Aca 1404/08, \textit{Katowice Commune}). Most of the agreements subject to juridical review in 2009 were price related (e.g. judgement of SA of 10 November 2009, VI Aca 297/09, \textit{Budmech}).

The majority of the scrutinised abuses took place on local, municipal markets including: a local waste collection market (e.g. judgement of the Supreme Court of 12 February 2009, III SK 29/08, \textit{Nowy Targ Commune}; judgements of the Court of Appeals of 18 March 2009, VI Aca 990/08, \textit{MPGK Katowice} and 27 May 2009, VI Aca 1404/08 \textit{Katowice Commune}) and; a local market for the provision of water (e.g. SOKiK judgements of 4 September 2009, XVII Ama 69/08, \textit{Jastków Commune} and 27 August 2009, XVII Ama 145/07, \textit{PRWK Katowice}). Only a few abuse cases concerned practices employed on national markets such as the market for the origination of interregional and international connections in fixed telecoms networks and the access market to these connection services (SOKiK judgement of 17 June 2009, XVII Ama 102/08, \textit{Telekomunikacja Polska}). In the great majority of cases, the assessment covered potentially anticompetitive practices used on local markets including: the local market for parking management in the town of Zakopane (judgement of the Court of Appeals of 18 June 2009, VI Aca 1532/08, \textit{Zakopane Town}); local markets for services of leasing telecommunications technical channel systems (judgement of the Court of Appeals of 27 May 2009, VI Aca 1407/08, \textit{Telekomunikacja Polska}) and; the local market for the lease of recreational territories on the Niedzięgiel lake in the Witkowo commune (judgement of the Court of Appeals of 8 September 2009, VI Aca 1377/08, \textit{Witkowo Town and Commune}).

By contrast, most of the anticompetitive agreement cases assessed by Polish courts in 2009 concerned national markets such as: the national market for the trading of rights to broadcast Polish football league matches (judgement of the Supreme Court of 7 January 2009, III SK 16/08, \textit{PZPN and Canal+}) and the national market for the distribution of drainpipes systems (judgements of the Court of Appeals of 10 November 2009: VI Aca 297/09, \textit{Budmech}; VI
Agreements presumed to have violated Polish antitrust rules referred to local markets far less frequently, among them was: a market for the provision of personal river shipping services on the Vistula river near Kazimierz Dolny (judgement of the Supreme Court of 14 January 2009, III SK 26/08, *Skoczek, Pieklik*) and a local taxi market in the city of Poznań (judgement of the Court of Appeals of 22 April 2009, VI Aca 1083/08, *City of Poznań*).

2. Agreements restricting competition

2.1. Forms of anticompetitive agreements

Article 6(1)(6) of the Competition Act speaks of the limitation of access to the market or the elimination from the market of undertakings not party to the agreement as one of the prohibited forms of competition restricting agreements. In the judgement of 7 January 2009 (III SK 16/08, *PZPN and Canal+*)\(^7\), the Polish Supreme Court dismissed a cassation request concerning a ruling of the Court of Appeals that delivered a judgment on an agreement between the Polish Football Association and the pay TV provider Canal+. The agreement in question was prohibited because it foreclosed the relevant market by giving the TV operator a priority option to purchase exclusive broadcasting rights for the Polish football league. A large part of the Supreme Court judgment is dedicated to the issue of public interest as a prerequisite for the application of the prohibition of competition restricting practices: ‘The good being protected in the public interest in this case is competition as such, seen as a mechanism of economic freedom, an established market functioning rule. It can be said therefore (...) that this is how the essence of competition as a public good is defined by the group of prohibited competition restricting practices which are described in Part II of the Competition Act, among them, agreements restricting competition, prohibited by Article 5(1)(6) of the Competition Act of 2000 (currently Article 6(1)(6) of the Competition Act 2007)’.

In the judgement of 14 January 2009 (III SK 26/08, *Skoczek, Pieklik*), the Supreme Court considered the definition of the anticompetitive practice specifically prohibited by Article 6(1)(6). The Court contested there the opinion that a practice can only then be declared as an anticompetitive practice taking the form of ‘limiting access to the market or eliminating from the market undertakings which are not party to the agreement’ if all market

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players participated in it or if it covers such a large part of the market that competition from other market players is insignificant.

Article 6(1)(7) speaks of tender collusions. Regarding the definition of a ‘tender collusion’ the Supreme Court stated in its judgement of 14 January 2009 (III SK 26/08, Skoczek, Pieklik) that the practice prohibited by Article 6(1)(7) (at the time of ruling – Article 5(1)(7) of the Competition Act 2000) may take the form of ‘fixing the terms of the offers to be submitted’ within the procedure while it is ‘insignificant if the parties to the agreement actually manage to influencing the results of the tender’.

2.2. Other selected issues related to agreements

Consciousness of the violation of the prohibition of competition restricting agreements

The Supreme Court stressed in the aforementioned judgement of 14 January 2009 (III SK 26/08, Skoczek, Pieklik) that ‘the consciousness of an infringement of the prohibitions contained in the Competition Act is irrelevant from the point of view of the assessment of the undertakings’ activities as a competition restricting practice’. This statement does not diverge from the Supreme Court’s past jurisprudence seeing as similar views, based on EU case-law, can be found in earlier Polish judgments.

Proving the existence of an agreement

The Supreme Court sustained also in the aforementioned judgement (III SK 26/08, Skoczek, Pieklik), its earlier views that the existence of anticompetitive practices can be proven in court proceedings ‘on the basis of indirect evidences, on the basis of the rules referring to factual presumptions. (…) Such presumptions make it possible to equate facts of key importance to the outcome of the case, if conclusions can be drawn from other established facts, so that they constitute the reasoning of the ruling court which should be presented, with respect to all the interconnected facts, in the justification of the judgement in a way that makes it possible to control the correctness of the identification of the facts and conclusions drawn from them’. Similarly, in the judgement of 22 April 2009 (VI Aca 1083/08, Pietrzyk), the Court of Appeals stated that ‘when a claim is raised against undertakings that they have concluded an illegal (prohibited by law) agreement concerning price fixing, being seen as one of the gravest infringements of the prohibition of competition restricting practices, it is possible – and sometimes even necessary – to apply presumptions of facts because agreements of that kind (…) can not only fail to take a written form but are also treated by the participants
with deepest secrecy. Thus, price agreements can be proven by either direct or indirect evidence. In practice, the possibility to use direct evidences by the UOKiK President is limited because undertakings are conscious of the illegality of such activities’. 

A SOKiK’s judgment concerning an agreement concluded on a national market for the distribution of drainpipe systems was annulled by the Court of Appeal because the first instance court failed to conduct the necessary evidentiary proceedings ‘in order to clarify whether the statement of the appealing party was correct in that it claimed that it cannot be treated as a participant of an illegal price agreement (…) because in this case only unconnected parallel behaviours took place, not covered by the charges contained in the decision, which were imposed on the plaintiff’ (judgement of the Court of Appeals of 10 November 2009, VI Aca 297/09 Budmech; see also other judgements of the Court of Appeals of 10 November 2009: VI Aca 292/09 Gamrat; VI Aca 221/09 PSB).

**A buying & selling group as a participant of a prohibited agreement**

The Court of Appeals noted also in the same judgement (VI Aca 221/09, PSB) that SOKiK should have analyzed the market status of a buying & selling group that was considered to have participated in a vertical competition restricting agreement. The Court of Appeals agreed with the argument that the market role fulfilled by this group was different from that of distributors to which the antitrust decision was addressed. A buying & selling group does not operate on the same market as its members; rather than being a part of the delivery chain, it is the entity that organizes it. The Court of Appeals stressed the need to analyze if the specific character of the buying & selling group, mainly its economic goals and internal organization, should be considered while imposing a fine.

**3. Abuse of a dominant position**

**3.1. Public interest as a prerequisite for the application of the Competition Act in abuse cases**

The Supreme Court delivered a judgement concerning a presumed abuse of dominance held on local buying markets of hatchling eggs (duck and goose) that had some effects on a neighbouring veterinary services market (judgement of 19 February 2009, III SK 31/08 DROP). The Court evaluated here its

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8 See A. Piszcz, ‘Is the forcing of services on suppliers an abuse of a dominant position? Case comment to the judgment of the Supreme Court of 19 February 2009 – DROP’ (2010) 3(3) YARS
older *acquis* concerning the interpretation of the concept of ‘public interest’ as a pre-condition for the application of the Competition Act. The Supreme Court repeated that ‘it is not necessary to infringe an interest of an individual to apply the instruments of intervention stipulated in the Competition Act (judgement of 7 April 2004, III SK 27/04) – the concept of ‘public interest’ should be interpreted from the perspective of the antitrust axiology (judgement of 16 October 2008, III SK 2/08 and of 5 June 2008, III SK 40/07)’. The Court referred also to the criterion of ‘touching a broader scope of market participants’ that used to be seen as a preliminary condition of an intervention by the UOKiK President. The Supreme Court stressed in this context that this criterion ‘constitutes only one of the forms of the factual appearance of a public interest’. The Court stated also that ‘infringing a public legal interest takes place when the behaviour of an undertaking that is the subject of antitrust proceedings caused or can cause negative – from the perspective of antitrust law – market effects by influencing quantity, quality, price of goods or the scope of consumer choice or that of other purchasers, because the existence of a public legal interest should be assessed in a broader context covering all of the negative effects of monopolistic practices on a given market’. This definition is likely to become the standard for the future interpretation of the concept of public interest in Polish antitrust.

### 3.2. Imposing unfair prices and trading conditions

The imposition of unfair prices and other trading conditions, prohibited by Article 9(2)(1) of the Competition Act (Article 8(2(1) of the Competition Act 2000), was the object of frequent juridical review in 2009 (e.g. the judgment of the Supreme Court of 12 February 2009, III SK 29/08 *Nowy Targ*, of 19 February 2009, III SK 31/08 *DROP* and of 19 August 2009, III SK 5/09 *Marquard Media*).

In the *Nowy Targ* case, the Supreme Court annulled a ruling of the Court of Appeals and referred the case back for renewed assessment. In the opinion of the Supreme Court, the Court of Appeals had failed to focus on the essence of the case, that is, the price structure applied by the *Nowy Targ* commune on...
a local market for sewage collection from the surrounding areas. The original decision of the UOKiK President declared that the commune had abused its dominance on that market by imposing unfair and excessive prices. The Court of Appeals stated that no competition restricting practice took place because, as shown by the plaintiff, the commune’s price list was based on cost calculations presuming a profit of only 2%. The Supreme Court claimed that ‘the setting of prices to be applied on a relevant market is clearly not the subject of an antitrust case. It is impossible however, to consider (...) the issue of charging (or not charging) by the dominant undertaking of unfair excessive prices without clarifying and assessing by the Court of the essence of the dispute in the case’. It was the job of the Court of Appeals to conduct a detailed examination of the underlying price structure considering the excessive price imposition charge.

The problem of imposing unfair prices and contractual terms appeared also in the judgement of the Supreme Court of 19 February 2009, III SK 31/08, DROP. The Court annulled here both lower instance rulings (by the Court of Appeals in Warsaw and SOKiK) taking note of the fact that Article 8(2)(1) of the Competition Act 2000 (currently Article 9(2)(1) of the Competition Act) referred to the ‘imposition’ and not to the ‘application’ of unfair contractual terms. Terms cannot be said to have been imposed when the contractor makes no attempts to negotiating them or presents irrational expectations towards them or does not respond to the proposals submitted by the dominant company who ends up presenting a unilaterally formulated and non-negotiable draft contract.

In the judgement of 19 August 2009, III SK 5/09, Marquard Media11, the Supreme Court pointed out that ‘a price may be considered unfair even if it is not below costs. (...) Unfair prices may be imposed only on contractors, that is, trading partners of a dominant company, or consumers. An unfair price cannot be imposed on a competitor (not being simultaneously a purchaser of goods from a dominant company) when, through the use of a certain price by the dominant company, a competitor is forced to charge a different price for its own goods in order to be able to meet competition from the dominant company’. In the same judgement, the Supreme Court contested also the way in which point 1 of the UOKiK decision was formulated. The Court claimed that the expressions used in the decision were too general to make it possible to establish which activities of the plaintiff fulfilled the conditions of the use of unfair prices.

11 See K. Kohutek, ‘Shall selective, above-cost price cutting in the newspaper market be qualified as anticompetitive exclusion? Case comment to the judgement of the Supreme Court of 19 August 2009 - Marquard Media Polska’ (2010) 3(3) YARS strona do wstawienia na końcu prac.
3.3. Counteracting the formation of the conditions necessary for the emergence or development of competition

The Supreme Court referred to an abuse of a dominant position by way of counteracting the formation of the conditions necessary for the emergence or development of competition in a number of judgments of 2009. It pointed out that Article 9(2)(5) of the Competition Act, which explicitly prohibits this form of abuse, ‘cannot be treated as a general clause covering various types of behaviour that impede the market activities of competitors’ (see judgements of: 12 February 2009, III SK 29/08 Nowy Targ Town and Commune; 19 February 2009, III SK 31/08, DROP, and 19 August 2009, III SK 5/09, Marquard Media). In the DROP case, the Supreme Court stressed that Article 8(2)(5) of the Competition Act 2000 (currently Article 9(2)(5) of the Competition Act 2007) was applied ‘without reference to the prerequisites resulting from the provision’. In the Court’s opinion, counteracting the formation of the conditions necessary for the emergence or development of competition in the meaning of that Article should be understood as ‘an activity of a company holding a dominant position on a relevant market that makes it difficult or even impossible for competitors to act on that relevant market because of the creation of barriers to entry or development of entities already active on that market; the barriers must be of fundamental character as they should concern the conditions necessary for an effective entry or functioning on a market’.

In the Telekomunikacja Polska judgment (III SK 28/09), the Supreme Court stated that ‘Article 8(2)(5) of the Competition Act of 2000 (currently Art. 9(2)(5) of the Competition Act of 2007) speaks about the conditions necessary for the development of competition, these are the conditions without which competitors’ activities would not be possible at all or would not be profitable’.

In the DROP judgment (III SK 31/08), the Supreme Court confirmed that an abuse of a dominant position in the aforementioned form may take place not only on a market where the scrutinised company holds a dominant position but also on a related market. In the latter case, it is necessary ‘to establish the special circumstances that prove the existence of the dominant undertaking’s economic interest in limiting the scope of the activities or excluding other undertakings from a relevant market other than the one where it is dominant’. An abuse of a dominant position on a related market is possible only when a dominant company acts on the market related to that being controlled or when it makes preparations to enter a new market ‘which can be influenced because of the position held on another market (e.g. by controlling deliveries of semi-products on a market of final products)’. An abuse on a related market may occur also when ‘undertakings active on a related market have to co-
operate with a company holding a dominant position on another market in order to be able to offer their products on that related market’ or when ‘a dominant company sets rules for the functioning of another market acting as its organizer’. In the Court’s view, these conditions were not met when dominance held on the hatchling eggs market was said to have been abused on the market of veterinary services seeing as the latter is not directly related to the former ‘because those markets do not cover goods (products or services) comprised in the same production cycle (...) (raw materials – semi-products – final products)’. In this case, the dominant company did not act on the veterinary services marker at all, did not plan to enter it and its dominant position was not strengthened as a result of this practice.

In the Telekomunikacja Polska judgement of 17 June 2009, XVII Ama 102/08, a decision issued by the UOKiK President was modified by SOKiK. Unlike the antitrust authority, the Court was of the opinion that no abuse took place of a dominant position held on the market for the origination of interregional and international connections in the fixed telecoms network in Poland by the incumbent operator Telekomunikacja Polska SA (hereafter, TP SA). The abuse originally established by the UOKiK President was said to have infringed Article 8(2)(5) of the Competition Act 2000 (currently Article 9(2)(5) of the Competition Act) because it impeded the provision of services by other telecoms operators to the clients of the incumbent as a result of delays in fulfilling pre-selection orders already made to TP SA by those operators. SOKiK came to the conclusion that the antitrust authority did not prove the existence of the said practice to a sufficient degree. UOKiK’s analysis covered only 999 orders submitted by alternative operators to the incumbent out of the total of about one million of such orders submitted overall. Even if out of the 999 analysed submissions 254 were not fulfilled to a satisfactory degree, they would still represent a marginal number only in the overall scheme of things not justifying ‘the conclusion that TP SA abused its dominant position. In the Court’s view, establishing by the UOKiK President, on the basis of an analysis of 999 orders, that there are delays in fulfilling orders, should prompt the UOKiK President to move its office to conduct a detailed evidentiary proceeding in order to unequivocally prove that TP has used competition restricting practices’. Limiting the scope of the examination, the UOKiK President ‘was not able to prove a practice but was only able to show it was probable’, ‘in order to prove a practice, the UOKiK President should have treated Tele2’s application, the examination of the 999 orders and the results of its research as preliminary rather than final proof’. Ultimately, SOKiK modified the decision issued by the antitrust body.
3.4. Refusal to deal

Lack of public interest

The *Witkowo Town and Commune* judgement delivered by the Court of Appeals on 8 September 2009, VI Aca 1377/08, focused on a claim of an abuse of a dominant position held by the scrutinised commune. The abuse in question took the form of a refusal to conclude a lease of land contract with a natural person. The Court of Appeals did not find that an infringement took place and thus, it amended the earlier SOKiK judgement, simultaneously modifying the decision issued by the UOKiK President. In the original antitrust decision, the refusal by the Witkowo commune to deal with a natural person was considered to have infringed Article 9(1) of the Competition Act as ‘an unjustified and discriminatory refusal to deal with Ewa Antczak-Izydorek’. SOKiK sustained the decision, despite its criticism of some of its provisions. The Court described the essence of the contested practice in a more precise manner pointed out that it was ‘an unjustified and discriminatory refusal’. SOKiK rejected at the same time the argument that the refusal at hand concerned an individual person only. The Court of Appeals established that through this amendment, SOKiK has actually changed the essence of the UOKiK decision in an unlawful manner because it did not conduct its own evidentiary proceedings. The key problem here was whether a refusal to deal with an individual meets the public interest criterion as a pre-condition for an antitrust intervention. The Court of Appeal adjudged that ‘a clearly proven individual case of refusal to make a leasing deal cannot be treated the same as an unproven practice of refusal to makes leasing deals’. In spite of the fact that ‘it can be sometimes difficult to establish in an unequivocal manner whether a violation of a solely private interest took place or an infringement of a public interest; the arising doubts cannot be explained by suppositions only based on the assumption of the correctness of the reasoning. A single case can be, but does not have to constitute a danger to free competition. The Competition Act does not protect a competitor but competition, so while assessing the effects of a certain practice in the present or in the future one has to consider if granting legal protection to a tenant does not turn in practice into counteracting competition by providing the tenant with a monopoly for the lease of recreational land’.

Essential facility

The *Telekomunikacja Polska* judgement of 27 May 2009 delivered by the Court of Appeals, VI Aca 1407/08, centred on an abuse of a dominant position held on local markets for the provision of (leasing) telecommunications
technical channels in Poland. The abuse took the form of an imposition on the tenants of unfair leasing prices. The UOKiK President saw this practice as an infringement of Article 8(2)(1) of the Competition Act 2000 (currently Article 9(2)(1) of the Competition Act), a finding subsequently sustained by SOKiK. The Court of Appeals changed however the amount of the fine originally imposed by the antitrust authority stressing that the essential facility doctrine could be applied in this case because ‘the necessity of telecommunications technical channels to act and compete by other entities is clear’. That necessity was shown, in the Court’s opinion, by the fact that the market share of TP SA measured by the number of agglomerations where it owned tele-technical channels was over 71,8 % and exceeding 97,86 % if measured by the number of leased channels. The Court of Appeals analyzed the prerequisites of a potential duplication of the infrastructure, stressing that ‘it is rationality that plays the decisive role here’ – it is not enough to find an alternative theoretical solution, that solution must be rational.

3.5. Market sharing

The case law suggests that dominance is rarely abused in Poland by way of market sharing. A market sharing claim, through the differentiation of newspaper prices charged in different Polish regions, was assessed by the Supreme Court in its judgment of 19 August 2009, III SK 5/09 Marquard Media. The Court alleged here that Article 8(2)(8) of the Competition Act 2000 (currently Article 9(2)(2) of the Competition Act) ‘refers to a practice known as unilateral market sharing that takes the form of price differentiation by an undertaking holding a dominant position on the basis of a territorial criterion. Sharing of a market may be done by differentiating the product range (some products are available only in a certain area or only in certain configurations) or the conditions of an offer (for instance: a longer guarantee, hire-purchase, additional services) or a differentiation of prices’. The Supreme Court added also that ‘differentiating prices is not a per se competition restricting practice, even if applied by an undertaking holding a dominant position’ but in specific situations such as this case, price differentiation may be inspired by anticompetitive reasons. In the Court’s opinion there are some factors that indicate the price differentiation had an anticompetitive motivation: the selection of the territory where lower prices are applied (a territory of ‘key competition’) or the exact moment of the price drop (after the competing newspaper became independent, before a beginning of a new football season).
3.6. Other issues related to an abuse of a dominant position

In the judgement of 2 November 2009, VI Aca 349/09, Project Żegluga, the Court of Appeals had an opportunity to express its opinion on the problem of dominance in a duopoly. In the Court’s opinion ‘a duopoly has a specific feature, making it similar to a market with perfect competition and making it different from other structures, in that it generates paradoxically the highest level of potential (and actual) competition between the entities functioning in a duopoly which, especially in case of a mature market, is introduced by price instruments, not rarely even by ‘price wars’.

4. Identification of relevant markets

In some cases, the problem of an inadequate relevant market definition became the reason for the revision of judgements delivered by the courts of lower instances or a UOKiK decision. In the judgement of 19 August 2009, III SK 5/09 (Marquard Media), the Supreme Court stated that a local sport press market was identified as the relevant market ‘without a sufficiently deep analysis of the competitive relationships between newspapers’. The Court sustained the position of the lower instance courts that sport newspapers cannot be substituted by national newspapers because, even if they provide a wide range of sports news, they do not offer the type of information required by a reader of sport press. However, a general statement that sport press titles belong to a single relevant market was seen as insufficient. In the Supreme Court’s opinion, the UOKiK President should have analyzed the scope of the data provided on sporting events held in particular Polish regions in order to determine whether the two scrutinised sport press titles belong to the same relevant market considering the strong ‘regional’ focus of one of them.

Simultaneously, the Supreme Court claimed that ‘if two undertakings act on a certain relevant product market, it is not necessary for the level of the increase in competition to be similar in the whole territory where they are active. It particularly refers to a situation when a weaker competitor is a new market participant’. A relevant geographical market can thus be even national in scope, even if one of the products (in this case, one of the sport newspapers) is not sold in normal distribution outlets in the entire country, on the condition however, that the conditions of competition are homogenous enough in the entire territory.

In the judgement of 14 January 2009, III SK 26/08, Skoczek, Pieklik, the Supreme Court has shown that if a tender collusion referred to access to mooring places on the Vistula river, and the colluding undertakings were
active on a market for the provision of personal inland transport services, than the market for the provision of personal inland transport services was correctly identified as relevant in this case. It would not be adequate to include in this relevant market of other services provided from the same mooring places.

In the judgement of 23 April 2009, VI Aca 1035/08, *DAKU International*¹², the Court of Appeals admitted that although Polish jurisprudence tends to define relevant markets as narrowly as possible, this ‘cannot lead to the identification of a relevant market of a single product and single producer (...), but to its identification in a truly correct way’. In the judgement of 6 January 2009, VI Aca 846/08, *Carston*, the Supreme Court stressed that ‘the sole fact that the market for acquisition services is a market secondary to the market for the services provided in a mobile public telecommunications network does not cause the uniformity of the positions of entities active on those markets or the uniformity of their activities’.

In the judgement of 15 May 2009, XVII Ama 64/08, *Kegler*, SOKiK annulled a UOKiK decision on the termination of antitrust proceedings because of lack of a dominant position. The Court found a mistake in the antitrust decision as far as the identification of the relevant geographic market. SOKiK’s objected for instance to the fact that a questionnaire conducted by UOKiK in order to identify the relevant market was not anonymous.

Attention should also be paid to the *EMITEL* judgement of 19 October 2009, XVII Ama 66/08 where the decision of the UOKiK President was annulled by SOKiK due to an incorrect market definition. The Court claimed that the market established by UOKiK as ‘a national market for the emission of television and radio programmes in a terrestrial network’ was in fact a collection of markets because broadcasters must purchase services corresponding to the technical parameters specified in their specific broadcasting concessions. SOKiK stated therefore that not all emission services are substitutable. However, the Court did not correct the UOKiK decision because it concerned in SOKiK’s view a non-existent market which in turn meant that ‘the decision was premature’ – there were no grounds for adopting it.

5. Relationships between the Competition Act and other legal acts

5.1. Competition Act and Energy Law Act

In the judgement of 12 April 2009, ref. no. III SK 36/08, *ENION*, the Supreme Court considered the problem of a correlation between Article

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9(2)(4) of the Competition Act and Article 8(1) of the Energy Law Act. The case focused on a practice of an energy enterprise holding the position of a natural monopoly on a certain relevant market whereby it used the advantage it enjoyed thanks to its position to make the renewal of the deliveries of electricity conditional upon the fulfilment of payment obligations arising from past unauthorised energy use. In the Supreme Court’s opinion, energy law would be applicable to individual disputes concerning the justification of particular delivery suspensions. It would not be applicable to practices where ‘undertakings, using their monopolistic position, have not continued to provide electricity not because of a suspicion of an illegal use in the past, but only because of failing to make the prescribed payments for electricity that was illegally collected in the past’.

In the judgement of 30 October 2009, VI Aca 464/09, ENION, the Court of Appeals claimed that on the basis of Article 18(1) in relation to Article 3(22) of the Polish Energy Law Act, a commune’s tasks covered the organisation of energy supplies and the planning of street and public roads’ lighting (sustaining lighting points). They did not however cover the financing or co-financing of energy investments beyond this scope. An abuse in the form of the imposition of onerous contractual terms would thus take place in the case of the imposition of such conditions of the provision of lighting services that would make them cover the exploitation and repair of lighting elements other than street lights, and thus make the costs associated with these activities part of the payment for the provision of lighting services.

5.2. Competition Act and Waste Management Act

In the judgement of 27 May 2009, VI Aca 1404/08, Katowice Commune, the Court of Appeals reconfirmed that ‘the Competition Act is not applicable to competition restricting behaviour that is prescribed directly in other legal acts, being lex specialis to the Competition Act (…)’. The UOKiK President cannot declare that a particular practice restricts competition if that practice is prescribed by the provisions of another legal act which does not leave its addressees any freedom of activity’. The Court of Appeals claimed that ‘a rigid establishment of individual waste disposal sites seems to be a practice restricting competition. Answering the question if a given site will accept waste from outside its territory or if it can accept a request from an undertaking

14 UOKiK Official Journal 2009 No. 4, item 34.
to co-operate in the reception of communal wastes coming from outside the commune where the waste disposal site is located, should belong to the prerogatives of the owners or managers of the sites themselves’.

6. Problems related to the adoption and implementation of the decisions of the UOKiK President

6.1. Requirement of bringing an infringement to an end

In the judgement of 2 July 2009, III SK 10/09 (Lubelski Rynk Hurtowy), the Supreme Court considered a number of problems relating to the implementation of a decision issued by the UOKiK President and the requirement to cease a competition restricting practice. The Court claimed that ‘the way in which the decision is implemented can be determined neither in the sentence nor in the justification of a decision because the UOKiK President does not have the right to rule on that issue. The implementation method is determined by the essence of the competition restricting practice that was used by an undertaking. (…) Article 1(2) of the Competition Act refers to the territorial scope of its application and it has a jurisdictional character only. (…) That provision cannot be the source of a norm ordering an undertaking that violated the Competition Act to remove the effects of that infringement’. After the Supreme Court delivered the aforementioned ruling, the Court of Appeals decided to annul a decision of the UOKiK President that imposed a fine for the non-implementation of an antitrust decision by its addressee (judgement of 30 November 2009, VI Aca 1039/09, Lubelski Rynek Hurtowy).

6.2. Commitment decision

In the judgement of 19 August 2009, ref. no. III SK 5/09 (Marquardt Media), the Supreme Court made its views known on the place of commitment decisions among other decisions issued by the UOKiK President in antitrust cases. The ratio legis of the legal provision establishing commitment decisions in the Polish legal systems lies in “enhancing the effectiveness of the antitrust body and accelerating the conclusion of antitrust procedures thanks to the lowering of the standard of proof. This is possible because an antitrust body can work out the solution to an antitrust problem thorough ‘negotiations’ with the undertaking’. The Supreme Court stated however that an undertaking’s application for an adoption of a commitment decision could not be treated as an application for the commencement of a procedure on adopting a commitment decision. ‘Moreover, Article 11a of the Competition Act of 2000
(currently Article 12 of the Competition Act) states that the adoption of a commitment decision is dependent on the discretion of the UOKiK President. The Competition Act does not state in what circumstances can the adoption of commitment decisions be refused’.

6.3. Addresses of decisions of the UOKiK President

The Supreme Court has once again considered also the problem of the status of a commune as an undertaking in a meaning of the Competition Act. In a decision of 13 February 2006 (RPZ 2/2006), the UOKiK President confirmed that the Oborniki Town and Oborniki Commune had abused its dominant position. The abuse took the form of: (1) the adoption by the town mayor of decisions containing a permission to provide communal waste collection services (the decisions were said to have evidently and discretionally established a short duration for the permits); (2) refusing access to communal waste disposal sites to some undertakings. The UOKiK President declared that such refusal, even if made by the ‘administrator’ of a given waste disposal site (an enterprise responsible for communal management – Przedsiębiorstwo Gospodarki Komunalnej i Mieszkaniowej Spółka z o.o. in Oborniki), was de facto ‘inspired’ by the commune’s ownership of that site. Considering the first of the two aforementioned forms of potential abuse, in the judgement of 7 January 2009, III SK 17/08 (Oborniki Town and Oborniki Commune), the Supreme Court shared the opinion of the Court of Appeals that administrative decisions resulting from administrative powers (imperium) of a particular institution (in this case, the town mayor) ‘are not assessed in the context of the Competition Act’. Regarding the second form of the potential abuse, the Supreme Court stated that undertakings involved in the scrutinised activity ‘created a sufficient circle of undertakings participating in the market’ and that ‘the liability of the undertaking acting directly cannot be replaced by the Oborniki Town and Oborniki Commune’.

6.4. Annulment of a decision of the UOKiK President

In the judgment of 6 January 2009, VI Aca 846/08, Carston, the Court of Appeals stated that ‘an annulment of a decision mentioned in the Competition Act refers to a situation when there was no basis for its adoption and after its annulment, there is no need to adopt a new decision on the merits. An annulment followed by the adoption of a new decision with the same content is contrary to Article 78(4) of the Competition Act according to which the UOKiK President can either annul or amend a decision in its entirety or parts, the antitrust body cannot however use those solutions simultaneously’.
In the judgement of 19 August 2009, III SK 5/09 (*Marquard Media*), referring to an abuse of a dominant position on a sports press market, the Supreme Court presented its position on the scope of judicial control of antitrust cases. It held that ‘procedural mistakes concerning evidence cannot cause an annulment of a contested decision if its provisions comply with substantive law. A decision may be annulled in its entirety only if it was adopted without a legal basis, with a severe infringement of substantive law, when a decision was directed to an addressee not party to the proceedings or when a decision referred to a case closed by the final decision in the past. An antitrust decision can also be annulled if full investigations are necessary to solve the case’. The Supreme Court disagreed at the same time with a claim submitted by the plaintiff that ‘proceedings before the UOKiK President are not subject to judicial control’.

6.5. Fines

In the judgement of 19 August 2009, III SK 5/09 (*Marquard Media*), the Supreme Court stressed that a decision imposing a fine is subject to judicial control concerning either the reasons for the imposition of a fine or the factors that influenced its amount. Courts have the right to modify the provisions on fines adopted by the UOKiK President. In order to guarantee the effectiveness of judicial control, an antitrust decision must name all of the factors that have affected the fine. The Supreme Court stressed also that ‘the possibility to mitigate the amount of a fine is accepted by both jurisprudence and doctrine (...) in order to ensure that a decision of the UOKiK President will not result in a restriction of competition due to the partial or total elimination of an undertaking from a market’. The Supreme Court pointed out at the same time that courts analyzing an appeal from a decision of the UOKiK President are not bound by the guidelines on fines adopted by the antitrust authority16.

Regarding the fine imposed in the *Telekomunikacja Polska* judgement of 27 May 2009, ref. not. VI Aca 1407/08, the need of a detailed income assessment was stressed by the Court of Appeals to act as the basis for the determination of the actual amount of a fine: ‘if the actual income was lower than that used as the basis for a fine, that issue cannot be ignored just because the fine does not exceed the maximum 10% income level’.

In the judgement of 2 December 2009, XVII Ama 13/09, *SADROB*, SOKIK established that ‘the termination of illegality cannot influence the sole fact of the imposition of a fine: if a fine was imposed for the non-fulfilment of the duty to notify an intent to concentrate, the fact that the concentration (in the

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16 Guidelines of the UOKiK President on setting fines for competition restricting practices (UOKiK Official Journal 2009 No. 1, item 1).
form of a ‘personal merger’ by members of the board) is not currently being implemented, does not abolish the duty to pay a fine for the non-fulfilment of the legal obligation to notify’.

6.6. Inactivity of the UOKiK President

It is worth noting also a judgement delivered on 1 December 2009 by the Supreme Administrative Court of 1 December 2009, II GSK 237/09, which is likely to influence antitrust enforcement in the future. The case refers to an inactivity problem on the side of the UOKiK President regarding a notification of a suspicion of the use of competition restricting practices by another company. Notifications sent to the UOKiK President do not bid the antitrust authority. According to Article 86(4) of the Competition Act, the UOKiK President sends a written response to the notifying entity informing it about what steps have been taken in response to its submission and the justification of the choices made by the antitrust authority.

In reply to a notification submitted by TP SA concerning a suspicion of the use of competition restricting practices by another telecoms company, the UOKiK President informed the incumbent of the commencement of explanatory proceedings. The initial procedure was closed however with an order adopted on the basis of Article 48(3) of the Competition Act – as a result, full antitrust proceedings were never opened. The UOKiK President sent a letter to TP SA explaining that the accusations contained in its notification did not have an antitrust character and thus, that there were insufficient causes to open full antitrust proceeding. TP SA resubmitted its request to the UOKiK President asking the authority to analyze its claims once again. If the antitrust authority was to sustain its previous position, the incumbent applied for the transfer of the case to the telecoms regulator (in Polish: Urząd Komunikacji Elektronicznej; hereafter, UKE) as the competent institution according to Article 65(1) of the Code of Administrative Procedure in relation to Article 83 of the Competition Act.

Since the UOKiK President did not react to the second letter, TP SA accused the authority of inactivity. Subsequently, it applied to the regional administrative court (in Polish: Wojewódzki Sąd Administracyjny) for the imposition on the antitrust body of a duty to adopt (in two weeks since the delivery of the judgement) an order on transferring the case to the UKE President. The administrative court rejected the submission as unfounded because it did not consider the antitrust authority as inactive. In the opinion of the court, the fact that the UOKiK President wrote a letter informing the notifying entity that its claims were not of an antitrust character did not mean that the authority declared that is was not the appropriate body to deal with
the case. Sustaining this point of view, the Supreme Administrative Court added that the analysis of competences of the UOKiK President to deal with notifications under Article 86(1) was sufficient for this case; there was no need to analyse all the competences of the UOKiK President in the context of Article 29 of the Competition Act. The Supreme Administrative Court confirmed that the UOKiK President is not bound by the content of a notification and the notifying entity is not a party to antitrust proceedings. Notification issues are, in the Court's opinion, exhaustively regulated in the Competition Act. As such, the application of the Code of Administrative Procedure is excluded in this area – its provisions are applicable to antitrust proceedings only with regard to issues that are not regulated in the Competition Act. The Supreme Administrative Court rejected thus the cassation request as unfounded.

6.7. Application for a preliminary ruling to the European Court of Justice

By the order of 15 July 2009 (III SK 2/09), the Supreme Court applied to the European Court of Justice (ECJ) for a preliminary ruling concerning Article 5 of Regulation 1/2003. The ECJ is expected to rule on the following issue: if a national competition body is allowed – in accordance with the procedural autonomy rule – to adopt a decision stating that an undertaking did not infringe Article 82 TEC (currently Article 102 TFEU), is it also allowed to issue a decision stating that there are ‘no grounds for action’ on the basis of a direct application of Article 5 tiret 3 of Regulation 1/2003. The Supreme Court expresses no doubts that a decision stating the lack of an anticompetitive practice, adopted on the basis of Article 11 of the Polish Competition Act 2000, is not covered by the catalogue of decisions mentioned in Article 5 tiret 2 of Regulation 1/2003. However, the Court doubts if a national competition body is allowed – regarding the content of Article 5 tiret 3 of Regulation 1/2003 – to adopt on the basis of national law a decision on the lack of an anticompetitive practice within the meaning of Article 82 TEC (currently Article 102 TFEU) seeing as Article 5 tiret 3 of Regulation 1/2003 authorizes national competition bodies to ‘decide that there are no grounds for action on their part’. The Supreme Court says that Article 5 tiret 3 of Regulation 1/2003 should be applied if a national competition body intends to refuse to initiate an antitrust proceeding because it claims there are ‘no grounds to act’. However, the situation is totally different when a national competition body initiated the proceeding but later decided the claims were unfounded. The Polish Supreme Court believes that the latter situation raises doubts in the context of Article 5 of Regulation 1/2003.
2009 Legislative and Juridical Developments in Telecommunications

by

Kamil Kosmala*

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I. Legislation
II. Jurisdiction

Abstract

This article assesses the 2009 amendments to the Polish Telecommunications Law and the most significant executive regulations that have been passed in its context. The amendments are discussed considering their compliance with EU law, taking into account the rulings of the European Court of Justice on the conformity of some of the Polish provisions with the set of directives constituting the European telecommunications regulatory framework of 2002. The analyzed amendments relate to, in particular, the manner in which ex ante regulation should be implemented, the principles of telecoms services provision to end-users and the performance of state security and defence obligations (the implementation of Directive 2006/24/EC on Data Retention). Furthermore, the article contains an analysis of key Polish case-law issued in 2009 with respect to the telecoms field covering the most controversial cases decided in that period by both, domestic administrative courts as well as the Supreme Court. The jurisprudence under consideration concerns the following regulatory issues: (1) number porting fees, (2) the term for the expiration of claims regarding the provision of telecoms services as well as, (3) the appropriate procedure to be followed when appealing certain decisions of the National Regulatory Authority relating to the performance of regulatory obligations. The lack of a clear distinction of procedural competences of civil as opposed to administrative courts in this latter regard is shown. The article also covers the ruling of the Court of Justice of 1 July 2010 issued in response to a preliminary reference submitted by the Polish Supreme Court concerning the establishment of number porting fees (case C-99/09).

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**Résumé**

Le présent article traite des changements dans le droit de télécoms et dans les principaux règlements d’exécution de la loi qui ont été apportés en 2009. Les modifications de ces dispositions ont été analysées et discutées quant à leur compatibilité avec le droit européen, tout en tenant compte de la jurisprudence de la Cour Européenne de Justice concernant la compatibilité des règles polonaises avec les directives du Paquet télécoms de 2002. Les modifications présentées concernent la manière de traiter la réglementation *ex ante*, les principes de l’activité de prestation de services de télécoms aux usagers finales et l’exécution des obligations du système de défense (transposition de la Directive 2006/24/EC sur la conservation des données). L’article présente également l’essentiel de la jurisprudence des tribunaux nationaux concernant le secteur de télécoms de l’année 2009. Les décisions de la Cour Suprême et des tribunaux administratifs ont été analysées sous l’angle des points le plus controversés concernant: (1) les frais de transfert des numéros, (2) le délai de déclaration des revendications au titre de la prestation de service de télécoms et (3) la voie de recours de certaines décisions de l’organe de réglementation en rapport avec l’exécution des obligations réglementaires. Concernant ce dernier point, le problème de la compétence des tribunaux : civils ou administratifs, reste non résolu. L’article mentionne également l’arrêt de la Cour de Justice - étant la réponse à la question préjudicielle de la Cour Suprême polonaise - dans le domaine de l’établissement des droits de transfert des numéros (arrêt du 1 juillet 2010 C-99/09).

**Classifications and key words:** legislation; jurisdiction; court proceedings; telecommunication; implementation; regulatory obligations; number portability; subscribers rights; expiration of claims; data retention.

**I. Legislation**

In 2009, the most significant changes to the Polish Telecommunications Law (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT)\(^1\) were introduced by the Act of 24 April\(^2\). The amendments were extensive and covered issues such as relevant market analysis and the imposition of regulatory obligations, the rules on the provision of services to end users (including universal service) and the performance of obligations related to national defense and State security.

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Many of these changes arose out of the necessity to amend Polish law in order to meet the requirements of EU law.

In order to improve the functioning of the common market, the legislator has broadened the competences of the President of the Office of Electronic Communications (in Polish: Urząd Komunikacji Elektronicznej; hereafter UKE) as set out in Article 8 PT. The amendments were to allow the National Regulatory Authority (NRA) to pass on the information received from telecom entrepreneurs not only to the European Commission and NRAs of other EU Member States (as it was previously) but also to the regulatory authorities of the Member States of the European Economic Area (other than EU Member States). The UKE President was obliged at the same time to inform those that have provided the said information about its transfer to any of the aforementioned authorities.

A significant amendment related to the performance of the freedom to provide telecoms services. On the basis of the new wording of Article 10 PT, entities from other EU and EEA Member States are now allowed to be entered into the Polish register of telecoms entrepreneurs. Nevertheless, the substance of this change did not concern the entry of foreign entities into the register maintained by the UKE President, seeing as previous provisions did not exclude it. Instead, it concerned the creation of an actual obligation to enter into the register of those which, even on a temporary basis, provide telecoms services on the territory of Poland. This is a controversial solution considering the Treaty right\(^3\) to provide services in the territory of the entire European Union without the necessity to establish a seat in the Member State where the services are to be provided (or in fact, the necessity to satisfy any additional conditions). Still, the new registration duty does not apply to entrepreneurs from another Member State if they request telecoms access from a Polish entity but do not at the same time carry out telecoms activities in the territory of Poland (Article 26(4) PT).

The most important amendments introduced in 2009 in the context of ex-ante regulation concerns the procedure for market analysis and the imposition of regulatory obligations. The key change concerns the means of defining relevant markets that will be subject to telecoms regulation. The Polish legislator has abandoned the unusual (when compared with other Member States) manner of defining the relevant markets by means of an executive regulation to the PT Act\(^4\). Since the amendment, a relevant market definition is carried out each time a telecoms product or services market is analyzed

\(^3\) Article 56 TFEU, OJ [2010] C 83.

in the light of the Commission Recommendation\(^5\). The definition of the relevant market is a compulsory element of both, a decision on the existence of effective competition on a given market (Article 23 PT) as well as a decision on the designation of an entrepreneur holding significant market power and the imposition of regulatory obligations upon such an entity (Article 24 PT). The new solution is clearly superior to the previous one and effectively ensures full cohesion of the PT with binding EU rules. A process of market regulation more compliant with the approach mandated by the European Commission may be undertaken using the new Article 25a PT concerning the assessment of significant market power whereby the UKE President is explicitly obliged to perform this task taking into consideration the Recommendation adopted by the European Commission.

A significant change occurred also with regard to the PT rules on telecoms access and regulatory obligations imposed on wholesale markets. The amendment regarding telecoms access negotiations were a result of an infringement procedure opened by the Commission and the subsequent decision of 13 November 2008 of the European Court of Justice in case C-227/07\(^6\). The Commission objected, subsequently confirmed by the ECJ, to the fact that the PT placed on telecom undertakings obligations with respect to access negotiations that were described in a too broad a manner. According to the previous wording of Article 26 PT, each public telecom network operator, irrespective of its market power, was obliged to negotiate all forms of telecoms access. By contrast, only the interconnection of networks\(^7\) is subject to the negotiation obligation according to Article 4(1) of the Access Directive\(^8\). The new Article 26a PT no longer imposed such an extensive obligation; agreements concerning other forms of access must only be negotiated now if so required by way of specific regulatory obligations imposed on a given operator. This

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\(^7\) For more on agreements on telecoms access, including network interconnection: S.J.H. Gijrath, Interconnection Regulation and Contract Law, Amstelveen 2006. See also: K. Kosmala, ‘Cywilnoprawne aspekty dostępu telekomunikacyjnego’[‘Civil aspects of a telecommunications access’] (2005) 4 Prawo i ekonomia w telekomunikacji.

issue has led to the long awaited amendment of Polish law (five years following the entry into force of the PT) to bring it in line with the principles of EU law concerning the obligation to negotiate telecoms access. In the past, the wider negotiation duty gave rise to a number of problems in Polish telecoms and was used as a basis for the belief that the negotiation obligation was accompanied by a duty to execute telecoms access agreements (going beyond the scope of network interconnection), irrespective of the market power or regulatory obligations imposed on a given undertaking.

The Act of 24 April 2009 also partially amended the PT provisions concerning the imposition of cost-related obligations on wholesale markets. The new wording of Articles 39 and 40 PT fosters the regulation of using benchmarks and other methods of cost verification as well as the cost calculation used by the operator. The earlier use by the UKE President of methods other than benchmarking, for the purpose of verifying cost-related obligations, was questioned in practice by those subject to regulation.

The rules concerning the provision of telecoms services to end users constitute another very significant group of PT provisions that were amended in 2009. Changes were made to Articles 56-61 PT concerning the use and content of documents describing the commercial relationship of telecoms operators with end users. Until now, two types of documents were used in commercial relations with subscribers: agreements and standard terms concerning the provision of services. Currently, all of the necessary elements of the contractual relationship regarding the provision of telecoms services may be covered by an agreement; as such, the service provider is not required to create additional standard terms. Still, the requirement to create them has been maintained in relation to pre-paid services where no written agreements are signed between the users and the service provider. Included may be some obligatory contractual provisions of a more general and repetitive character (such as information on the quality of services, the manner and the time of the termination of the agreement, the scope of the liability of the service provider and complaints). Unlike the provisions of the PT prior to the 2009 amendment9, there is currently no need to duplicate in the standard terms certain provisions included in the contract.

The amendment has also affected the issue of altering the terms of a subscriber agreement by means of distance communications. Despite the fact that such possibility had previously existed, on the basis of general Civil Code rules, an additional obligation to confirm in writing the fact and the scope of the alteration made by means of distance communications was introduced.

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9 Such an obligation was confirmed in some judgments, e.g. the judgment of the Supreme Administrative Court of 27 May 2009, II GSK 975/08, available at: http://orzeczenia.nsa.gov.pl/doc/C1F4323A77.
Moreover, the subscriber was granted the possibility to waive change already made within a 10 day period commencing on the day of the written confirmation. While this solution is certainly advantageous to subscribers, it is nevertheless criticized by service providers as an additional organizational and costly burden. Subscribers benefit also from the introduction of the principle of a proportional decrease of the benefit which has to be re-paid by the subscriber to the service provider in case of a pre-term agreement termination either by the subscriber or by the provider due to the subscriber’s fault (Article 57(6) PT).

As a result on an infringement procedure opened by the Commission in January 2008, the PT was also amended with respect to the scope of the consequences of an alteration of a standard terms of service provision and price-list, provided the change results from an amendment of the law. The former provisions allowed the subscriber to terminate the agreement without the obligation to pay back the reduction received during its execution if the price-list or standard terms were altered, including situations where it was a result of a change in the law. The old provisions were justly questioned by the Commission as non-compliant with the Universal Service Directive and as a source of excessive legal uncertainty. According to the amended Article 60a(3) and Article 61(6-6a) PT, a subscriber is now allowed to terminate the agreement (provided she/he is obliged to pay back the reduction received at its execution) if the alteration of the standard terms or price-list was due to legal amendments. The same procedure applies if abusive (prohibited) contractual clauses are being removed from the standard terms (but not from the price-list).

Furthermore, the principle of a free-of-charge porting of numbers assigned to end users has been introduced at retail level. The possibility for subscribers to terminate agreements without respecting their notice period in the case of a request to port a number to another service provider was also introduced. This change has created a new (particularly with regard to the principles of the Civil Code) basis for an immediate pre-term termination of an agreement. The legislator has accepted the discursive assumption that the will of a subscriber to change her/his service provider (while keeping her/his current number) constitutes sufficient justification for the immediate termination of a contractual relationship by the subscriber.

By modifying the rules regarding the provision of universal services, the Act of 24 April 2009 introduced also (Article 91 PT) the possibility of imposing, inter alia, an obligation to provide a special tariff package on the entrepreneur designated to provide universal service. The principles of universal service provision, coupled with the nature of the fees within the special price package

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used by the fixed incumbent (TP S.A.), used to be questioned by the market as a means of discriminating against end users (e.g. no pre-selection, high unit costs for calls with low fees for access to and line maintenance). According to the new wording of Article 91(3) PT, the terms of service provision within a special package may vary from usual commercial conditions.

The Act of 24 April 2009 amended also the provisions of the PT concerning the performance by telecom undertakings of national defence and State security obligations. The changes introduced in this context were a result of Poland’s duty to implement the Data Retention Directive\(^\text{11}\). The purpose of the latter is to harmonize national rules governing the retention of data processed by telecom operators in order to ensure its availability for the purpose of the investigation, detection and prosecution of serious crime (Article 1(1))\(^\text{12}\). The Polish implementation of the Directive raises concerns however even if one considers only the aforementioned purpose of the Directive. Not only do Polish provisions fail to define the notion of ‘serious crimes’, they introduce also rather ‘strict’ rules regarding the retention of data, which is protected by the principle of telecom confidentiality, for the purpose of combating all forms of crimes, rather than only those crimes which are of a serious nature. In effect, State authorities may access such data in relation to any procedure concerning the investigation of any category of crimes. The Polish measures implementing the requirements of the Directive may therefore be assessed negatively as too strict – when compared to the EU pattern – in relation to the applicability of one of the most basic constitutional values, i.e. the right to maintain the confidentiality of communications\(^\text{13}\). By the way, the ruling of the German Federal Constitutional Court on 2 March 2010 was based on a similar reasoning whereby the Court repealed existing German legislation transposing the provisions of the Data Retention Directive\(^\text{14}\).


\(^{12}\) The legal basis relied upon by the EU legislator for the Data Retention Directive was challenged by Ireland before the ECJ. On 10 February 2009, the ECJ dismissed an action for annulment of the EU Directive on data retention brought by Ireland (Case C-301/06). The court confirmed that the directive was correctly adopted under Article 95 TEC. For more on the lawfulness of the legal basis chosen by the Commission when enacting the Data Retention Directive, see: C. Flynn, ‘Data Retention, The Separation Of Power In The EU And The Right To Privacy: A Critical Analysis Of The Legal Validity Of The 2006 Directive On The Retention Of Data’ (2008) 8 University College Dublin Law Review.

\(^{13}\) Article 49 of the Polish Constitution (Journal of Laws 1997 No. 78, item 483).

\(^{14}\) The court developed several principles which must be respect in order for the retention of data to be lawful and found that the current German provisions were not in compliance with those
The new PT provisions which provide for the mandatory retention of a broad catalogue of information by telecom operators have been complemented by the executive regulation of 28 December 2009\(^{15}\), which describes in detail what data must be retained by particular categories of undertakings.

The Regulation of the Minister for Infrastructure of 17 July 2009 on the tender for the allocation of frequency licenses or orbital resources\(^{16}\) can be considered as one of the most significant executive legal acts adopted in 2009 on the basis of the Telecommunications Law. It introduces the long-awaited possibility of holding auctions during frequency license tenders. The amount to be paid by the tender winner in exchange for the acquisition of the right to use particular frequencies is established by means of an auction. As an auction style model is applied more and more frequently as a means of assigning radio frequencies by telecoms regulators in other countries, the introduction of such a possibility into the Polish legal system will, without a doubt, be evaluated positively.

II. Jurisdiction

The rulings of the Court issued in appeal proceedings concerning the decisions of the UKE President constitute the most significant source of jurisprudence in telecoms. The Polish legal system provides for two distinct procedures for the legal scrutiny of UKE decisions. In the majority of cases, the parties have the right to file a motion requesting the UKE President to reconsider the case and may, subsequently, appeal the decision to administrative courts (county administrative courts as well as the Supreme Administrative Court). However, certain categories of decisions may be appealed to a civil court, that is, the Court for Consumer and Competition Protection (SOKiK) and subsequently, to the Court of Appeals and the Supreme Court\(^{17}\). The latter procedure is applicable to decisions listed in Article 206 PT: regulatory principles. However, according to the court, the preventive retention of telecommunications traffic data is not incompatible with the German constitution *per se*.

\(^{15}\) Regulation of the Minister of Infrastructure of 28 December 2009 on the detailed list of data types and operators of public telecommunications networks or providers of public telecommunications services obliged to the retention and storage of such a data (Journal of Laws 2009 No. 226, item 1828).

\(^{16}\) Journal of Laws 2009 No. 118, item 990.

decisions, decisions imposing financial penalties, post-control decisions, dispute resolution decisions (aside from post-tender decisions) and, commencing in 2010, certain decisions issued on the basis of the Act on the support of the development of telecommunications services and networks\(^{18}\) (the so-called Broadband Act). The issue of the competences to settle particular types of telecoms cases either by administrative or civil courts was the subject of several noteworthy rulings.

In 2009, 165 decisions of the UKE President were appealed to SOKiK and simultaneously, 84 appeals were submitted to administrative courts\(^ {19}\). Mentioned in this context should also be a ruling of the ECJ regarding Poland’s improper implementation of the Framework Directive regarding the definition of a ‘subscriber’ (case C-492/07 launched as a result of a complaint submitted by the Commission). According to Article 2(1) PT as binding until 20 July 2010\(^ {20}\), a subscriber was an entity which was party to a written agreement for the provision of telecoms services. The ECJ stated in its ruling of 22 January 2009 that Poland had failed to fulfill its obligations under the Framework Directive by incorrectly transposing its Article 2(k) with respect to the definition of the notion of ‘subscriber’\(^ {21}\).

The ECJ ruling confirmed the Commissions’ position that, by not including customers that conclude agreements other than written, Poland had effectively discriminated against them by not guaranteeing that they would be privy to the specific rights provided for by the directives. Such rights include, in particular: the right to have their information entered into a publicly available directory service (required by Article 25 of Directive 2002/22); the right to receive non-itemized bills (required by Article 7 of Directive 2002/58); the possibility, by simple means and free of charge, of preventing the presentation of the calling line identification on a per-call basis as well as preventing the presentation of the calling line identification of incoming calls (required by Article 8 of Directive 2002/58); the possibility of preventing automatic call forwarding by a third party to the subscriber’s terminal (required by Article 11 of Directive 2002/58); rights concerning the publication of subscriber directories (required by Article 12 of Directive 2002/58) as well as rights concerning unsolicited communications (required by Article 13 of Directive 2002/58). The adjustment of the provisions of the Polish PT in order to bring them in line with the

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\(^{18}\) The Act of 7 May 2010 on the support for the development of broadband services and network (Journal of Laws 2010 No. 106, item 675).


\(^{20}\) This provision was amended by the law of 2 April 2010 on the amendment of the Act – the Telecommunications Law (Journal of Laws 2010 No. 86, item 554).

The most significant telecoms case to reach the Supreme Court in 2009 was the appeal submitted by Polska Telefonia Cyfrowa against the decision of the UKE President which imposed on that operator a fine of PLN 200,000 for establishing a fee for providing porting services in a manner contrary to the PT (case No. III SK 27/08). The procedure concerning the imposition of a fine per se was not as important as the associated legal issue that the Supreme Court referred to the Court of Justice of the European Union. The Polish Supreme Court questioned the right of the Polish NRA to require, on the basis of Article 30 (2) of the Universal Service Directive that fees for number porting take into account the costs borne by the operator when providing this service. The Court of Justice ruled on 1 July 2010 stating that Article 30(2) of Universal Service Directive is to be interpreted as obliging the national regulatory authority to take account of the costs incurred by mobile telephone network operators in implementing the number portability service when it assesses whether the direct charge to subscribers for the use of that service is a disincentive. However, it retains the power to fix the maximum amount of that charge levied by operators at a level below the costs incurred by them, when a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility.

The aforementioned ruling differs from the ECJ judgment in Mobistar where it was stressed that the fees charged for the reciprocal use of connected networks shall be established in compliance with the principle of cost-orientation and that these prices must not discourage consumers from using number porting services. The decision in the Polska Telefonia Cyfrowa case moves therefore the centre of gravity towards ensuring the accessibility of number porting and allows for the possibility of establishing a porting fee.

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22 See footnote 20.

23 The case is registered in the ECJ as C-99/09 Polska Telefonia Cyfrowa v UKE. For more on this issue, see: E. Galewska, ‘Ustalanie wysokości jednorazowej opłaty za przeniesienie numeru telefonicznego w UE’ ['Determining the amount of a one-off fee for porting phone numbers in the EU'] (2010) 6 Europejski Przegląd Sądowy 24-27; national jurisprudence on number portability is explained by M. Wach, ‘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) YARS 266-270.


which is actually below the cost level of the operator. The issue as to the exact fee that may be set for the provision of number porting services was settled in Poland by the Act of 24 April 2009 which, by amending Article 71(3) PT, introduced the principle of a free of charge number porting service for both subscribers and end users.

Of particular importance in this case is a ruling of the Supreme Court of 7 May 2009 (ref. no. III CZP 20/09) which addressed a legal question posed by one of the Polish regional courts (in Polish: sąd okręgowy). The Supreme Court was asked whether the provisions of the Civil Code governing commissions apply also to contracts concerning the provision of telecoms services. The relevant rules establish, inter alia, a period of two-years for the expiration of claims under agreements that have not been regulated under any specific legal provisions (the so-called unnamed agreements). The Supreme Court concluded that the rules on commissions do not apply to agreements for the provision of telecoms services, as they are regulated separately by the Telecommunications Law of 2004. In effect, the term for the expiration of claims arising from such contracts shall be established according to general principles. The Supreme Court ruling in this case is very significant because it finally removes any doubts in this regard that arose from its older judgment of 17 November 1999 (ref. no. III CKN 450/98), the improper interpretation of which was used as a basis for the belief that claims arising from the provision of telecoms services expired after a two year period.

The most interesting Polish telecoms judgment of 2009 concerned the respective competences of administrative and civil courts to consider appeals against UKE decisions regarding the performance of regulatory obligations by operators holding significant market power (SMP). Administrative courts have developed two divergent approaches in this regard that were addressed in appeal cases concerning either (1) the confirmation or amendment of a reference offer, or (2) the imposition of an obligation to adjust rates for the provision of telecoms access. Both types of decisions may be classified as decisions “correcting” the activities of a SMP undertaking which submits, in

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27 See footnote 2.
29 In accordance with Article 118 of the Civil Code, the period of expiration for claims related to business activities and periodic claims is three years. Other claims expire after 10 years.
30 (2000) 5 OSNC, item 97.
31 For more on this issue, see: K. Kosmala, ‘Przepisy o zleceniu a usługi telekomunikacyjne – głosa do wyroku Sądu Najwyższego’ ['Provisions on orders and telecommunications services – a comment to the judgment of the Supreme Court'] (2004) 1 Prawo i ekonomia w telekomunikacji.
the course of the performance of a regulatory obligation, a reference offer for
the approval of the regulator, or which provides the NRA with information on
the costs of the provision of telecoms access. In both cases, the UKE President
does not interfere with the content of a reference offer (which is drafted on
the basis of Article 42 PT), nor requires the amendment of the rates provided
for the provision of regulated services (which are established in accordance
with Article 40 PT) as long as the draft (or the costs reasoning methodology)
is compliant with the applicable legal and regulatory obligations. Moreover,
if the SMP undertakings do not fulfil those obligations, the UKE President
is entitled to influence the amount of the fees charged by the operator for
the provision of telecoms access, by amending the reference offer (Article
43(1) PT) or by setting maximum, minimum or direct fees for telecoms access
(Article 40(4) PT). Despite the similarity in the reasoning of both categories
of decisions, administrative courts have nonetheless adopted fundamentally
different approaches as to the appropriate procedure to be followed for the
purpose of their verification.

One of the chambers of the Supreme Administrative Court expressed doubts
as to whether a case concerning the approval of a draft reference offer on the
basis of Article 43(1) PT relates to the imposition of regulatory obligations
and thus, whether the decision issued in this matter is actually appealable to
SOKiK. After considering the issue (judgment of 28 September 2009, II GPS
1/09), the seven ruling judges of the Supreme Administrative Court answered
this question in the negative. They stated at the same time that the means
of approving a reference offer does not constitute an issue concerning the
imposition of regulatory obligations. In consequence, the proper procedure for
the verification of a decision issued in such cases is by administrative procedure
alone. The judges stressed that the purpose of Article 43(1) PT (approval by
the UKE President of a draft reference offer) is the execution of a decision
that imposes regulatory obligations, rather than imposing new obligations
related to the determination of the offer’s content. It was further clarified
that the relationship between the imposition of a regulatory obligation on the
basis of Article 42(1) PT (obligation to prepare a reference offer) and the case
described in Article 43(1) PT (approval or amendment of a reference offer by
the UKE President) is similar to the relationship between issues settled within
the framework of a general administrative procedure on the one hand, and an
enforcement procedure on the other. Therefore, while issuing a decision on
the basis of Article 43(1) PT, the NRA does not deliberate on the subject of
a regulatory obligation itself but refers instead to the manner of its execution
by the operator.

The opinion of the Supreme Administrative Court is also worth noting that
the mechanism for the approval and, if required, alteration of a reference
offer, while unknown to EU law, is not actually prohibited by the EU legislation. Referring to the requirement provided for in Article 4 (1) of the Framework Directive (which guarantees the recognition of the merits of each case and the existence of effective appeal remedies), the judges noted that this provision does not require the court to be competent to settle the merits of the case. According to the Court, it is enough for the merits of the case to be investigated in administrative proceedings only, while the court retains the right to assess the legality of the administrative decision. While this approach is controversial, its substantive reasoning is not challenged. It is therefore possible that all of the decisions of the UKE President may be verified, at some point in the future, by administrative courts only.32 It should, however, be noted that two of the seven judges ruling on this case disagreed with the substantive reasoning of the final judgment.

Still, the Supreme Administrative Court followed a completely different line of reasoning in a case relating to a UKE decision imposing an obligation to set a cost-orientated fee for telecoms access (Article 40(4) PT) in accordance with regulatory obligation imposed under Article 40(1) PT. While considering the appeals against these decisions, both the County Administrative Court as well as the Supreme Administrative Court, took the position that decisions issued on the basis of Article 40(4) PT relate to regulatory obligations and, as such, should be verified on appeal by SOKiK. In the opinion of the Supreme Administrative Court presented on 31 March 2009 (ref. no. II GSK 823/08)33, all decisions based on Article 40(1) and (4) are decisions concerning the imposition of regulatory obligations since they refer to Article 25(4) PT in its wording binding prior to 6 July 2009. The latter Article indicates that certain provisions, including Article 40 PT, relate to regulatory obligations imposed by the UKE President concerning the designation of operators with significant market power. In the Court’s opinion, the fact that the PT does not foresee a separate market analysis prior to the issuance of a decision obliging telecoms operators to adjust their access fee (on the basis of Article 40(4) PT) does not prevent such a decision from being recognized as of regulatory nature. Moreover, the Court has clearly stated in its reasoning that the UKE President shall conduct an analysis of the relevant market prior to the adoption of this type of a decision.

32 The draft amendment of the Polish Codes of Civil Procedures, developed by the Commission for the Codification of Civil Law (draft of 11 April 2009) provides, inter alia, the elimination of separate proceedings before SOKiK in matters concerning the regulation of telecom and appropriate changes to the PT.

33 A similar position was taken by the Supreme Administrative Court on 23 March 2010 (II GSK 517/09) as well as by the County Administrative Court in Warsaw in a decision of 9 March 2009 (VI SA/Wa 2478/08) and 10 March 2009 (VI SA/Wa 85/09).
Such position may be considered inaccurate for many reasons. First, the provisions of Article 40(2) and (3) PT set out a separate, specific procedure for the issuance of decisions on the basis of Article 40(4) PT, which does not cover any additional analysis of the relevant market. It could be argued alternatively that the Court’s position is, to some extent, similar to the approach of the European Commission in spite of its reliance on different reasoning. The Commission reached a similar conclusion in this context and held that all of the rulings which establish fees for call termination should be treated as regulatory obligations and should therefore be subject to the consultation procedure set out in Article 7 of the Framework Directive\(^{34}\). UKE considers all decisions obliging operators to adjust telecoms access fees to be decisions imposing regulatory obligations (i.e. the obligations to apply a certain fee) and thus submits them all to a national consultation and consolidation procedure (Articles 6 and 7 of Framework Directive). Consequently, their verification may be undertaken by SOKiK.

To sum up, both the legislative amendments as well as the jurisprudential developments of 2009 focused mainly on the need to harmonize Polish telecoms law with EU provisions and to remove any procedural discrepancies in the domestic legal system. Their analysis suggests however, that they cannot all be considered an unequivocal success, in particular as far as jurisprudence is concerned.

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\(^{34}\) In its communication of 3 December 2008, IP/08/1860, the Commission expressed concerns that the German national telecoms regulatory authority, Bundesnetzagentur, does not present the Commission with its draft rulings establishing the amount of fees for call termination in mobile networks in accordance with the procedure provided under Article 7 of Framework Directive.
The changes that occurred to the Energy Law Act of 10 April 1997\(^1\) (in Polish: *Prawo Energetyczne*; hereafter PE) in 2009 were for the most part not the outcome of the Polish legislator directly amending the PE itself. Instead, they were a consequence of the amendment of other legal acts related to the PE in scope adopted primarily due to the need to adjust the Polish legal order to EU law requirements.

The first of the laws amending the PE that entered into force in 2009 was the Excise Tax Act of 6 December 2008\(^2\). According to the reasoning attached to its draft, the Excise Tax Act was formulated so as to harmonize domestic legislation with its EU counterparts through the introduction of new provisions arising from Council Directive 2003/96/EC of 27 October 2003 on the restructuring of EU framework regulations concerning the taxation of energy products and electrical power\(^3\) and Council Directive 2004/74/EC of 29 April 2004 amending Directive 2003/96/EC in relation to the ability of certain member states to apply temporary exemptions and reductions of taxation toward energy products and electrical power\(^4\). The new Excise Tax Act was also meant to introduce new legal solutions with regard to excise using the experiences gained from the functioning of the Excise Tax Act of 23 January 2004\(^5\) as well as the recommendations made by the business community.


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\(^1\) Journal of Laws 2006 No. 89, item 625, as amended.

\(^2\) Journal of Laws 2009 No. 3, item 11, as amended.

\(^3\) OJ [2003] L 283/1 as amended.


\(^5\) Journal of Laws 2004 No. 29, item 257, as amended.
on general principles pertaining to excise tax, which repealed the hitherto so-called horizontal Directive 92/12/EEC the implementation deadline of which expired on 1 January 2010, together with the need to introduce changes resulting from application of excise law.

In connection with the adoption of the Excise Tax Act, Article 41(2)(2) PE was changed on the basis of Article 144 (‘Changes to binding provisions’). It stipulates that the Chairman of the Office for Energy Regulation (in Polish: Urząd Regulacji Energetyki; hereafter, URE) withdraws a concession granted to a power company in the event of the withdrawal by a director of a relevant customs office of a permit to operate a tax warehouse, or if such permit expires and the entity did not obtain a new permit prior to the expiration of the older one in accordance with principles set forth in separate regulations relating to activities covered by such permit.

From among the laws amending the PE in 2009 only one refers to it exclusively, that is, the Energy Law Amendment Act of 20 February 2009. On its basis, two changes were introduced to the PE. First, Article 23(3) PE received the following wording: ‘An opinion from the proper provincial administration is required in matters noted in sec. 2 points 1 and 5, with the exception of those stipulated in art. 32 sec. 1 point 4 and sec. 5’, that is, matters concerning the granting and withdrawal of concessions as well as the agreement on draft development plans within the scope of satisfying current and future gas fuel or power needs, with the exception of matters concerning trade in fuels or energy or the receipt of a concession for trade in aircraft fuel, if the annual value of trade does not exceed the equivalent of EUR 1,000,000. The second change introduced by the Act of 20 February 2009 eliminated the duty to obtain a trade concession in relation to commercial activity pertaining to trade in aircraft fuel designated with the symbol PKWiU 23.20.11-40 and covered by the code CN 2710 11 31 provided the annual value of trade does not exceed the equivalent of EUR 1,000,000 (Article 32(5) PE). The minutes of the parliamentary Economy and Infrastructure Committees suggest that these amendments were meant to eliminating obstacles for the development of small local airports and air clubs as well as to exert a positive influence on the development of civil aviation and air tourism in Poland. In the view of the authors of the Amendment Act of 20 February 2009, the resulting changes to the PE will not adversely affect Poland’s energy security or the functioning of its fuel and energy markets.

Changes were introduced to the PE by way of the Act dated 4 September 2008 on the Amendment of the Act on trade in financial instruments and

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7 Journal of Laws 2009 No. 69, item 586, as amended.
certain other laws\(^8\). According to the reasoning attached to its draft, the Act of 29 July 2005 on trade in financial instruments had to be amended primarily to implement the European Parliament and Council Directive 2004/39/EC of 21 April 2004 on financial instruments markets\(^9\) and the European Parliament and Council Directive 2006/49/EC of 14 June 2006 on the capital adequacy of investment firms and credit institutions. In addition to the transposition of EU rules, new provisions were also enacted for the further development of the Polish capital market, such as simplified short-sale mechanisms.

Changes to the PE were not considered in the reasoning behind the draft amendment of trade in financial Act; they are simply a consequence of the amendments introduced by this law. Subject to change were primarily PE rules concerning certificates of origin from renewable energy sources. The range of elements that a certificate of origin must include was expanded to cover the identity of the entity that will organise trade in property rights arising from certificates of origin (Article 9e(2)(5) PE). Similarly, the identity of such entity must also be specified in an application for a certificate of origin (Article 9e(4)(5) PE, presently repealed). Finally, an analogous duty was introduced in relation to an application for the issue of a certificate of origin from co-generation (Article 9l(4)(9) PE, presently repealed).

Also modified was the range of entities maintaining registers of certificates of origin (Article 9e(9) PE). Such register is maintained by an entity operating a commodities market within the meaning of the Commodities Markets Act of 26 October 2000\(^{10}\) or, in the Republic of Poland, a market regulated in accordance with the Act of 29 July 2005 on trade in financial instruments\(^{11}\) that organises trade in property rights arising from certificates of origin. Moreover, the amendment introduced the application provisions concerning property rights arising from green certificates in relation to a register of co-generation origin certificates maintained by an entity operating a commodities market and organising trade on such market of property rights arising from co-generation origin certificates or by an entity operating a regulated market in the Republic Poland\(^{12}\) and organising trade in property rights arising from certificates of origin from co-generation (Article 9m(1)(2) PE).

The amendment Act of 4 September 2008 established also the scope of the obligation to obtain a concession for commercial activities relating to the trade in fuels and energy. Accordingly, obtaining a concession was required to conduct a business relating to trade in fuels or energy with the exception of:

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8 Journal of Laws 2009 No. 165, item 1316.
10 Journal of Laws 2000 No. 103, item 1099.
sale of solid fuels; sale of electrical power through an installation with voltage less than 1 kV owned by the recipient; sale of gas fuels if the annual value of trade does not exceed the equivalent of EUR 100,000; sale of liquid gas if the annual value of trade does not exceed the equivalent of EUR 10,000; sale of gas fuels or electrical power on a commodities market within the meaning of the Commodities Markets Act of 26 October 2000 or market organised by an entity operating a regulated market in the Republic Poland within the meaning of the Act dated 29 July 2005 on trade in financial instruments by commodities brokers engaged in commodities brokerage activity on the basis of the Commodities Markets Act of 26 October 2000; sale of heat if the level procured by recipients does not exceed 5 MW (Article 32 point 4 PE, presently altered).

The last of the laws adopted in 2009 that affected the content of the PE was the Act dated 20 November 2009 on the amendment of the Act on environmental protection law and certain other laws13. On its basis, the substitute fees that power companies must pay, in accordance with Article 9a(1)(2) and Article 9a(8)(2), constitute now the revenue of the National Environmental Protection and Water Economy Fund and should be transferred to its bank account by 31 March for the previous calendar year (Article 9a(5)5 PE). The introduction of this provision into the PE was a consequence of significant changes made to the scope of the functioning of the National Environmental Protection and Water Economy Fund on the basis of the Act on amendment of the Act on environmental protection law and certain other laws.

Legislative Developments in Rail Transport in 2009

by

Katarzyna Zawisza*

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I. Introduction

Several major changes were introduced into Polish rail transport law in 2009. As it is often the case with legislative changes of recent years, most of the amendments were inspired by European law. The transposition deadlines for several major directives passed in 2009 accompanied by the entry into force of some key EU regulations in the area of rail transport. The long awaited amendments relating to the liability of railway undertakings and insurance obligations relating to passengers, their luggage and train

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delays\(^1\) were finally introduced in 2009. At the same time, railway undertakings were very concerned with the implementation of Directive 2007/58/EC\(^2\) introducing infrastructure access rights for rail carriers from other Member States in relation to international passenger services.

II. The Act of 25 June 2009 Amending the Act on Rail Transport

1. Rail passengers’ rights

The Act of 28 March 2003 on Rail Transport\(^3\) (in Polish: *Prawo Kolejowe*, hereafter PK) was amended only once in 2009. However, the Amendment Act of 25 June 2009\(^4\) affected several crucial areas of Polish rail transport law. The Amendment Act of 25 June 2009 included provisions eagerly awaited by millions of passengers establishing the responsibility of railway operators for rail schedule delays. Formally speaking, these obligations result from the directly applicable Regulation (EC) 1371/2007 on rail passengers’ rights and obligations. The Amendment Act ensured however that the President of the Rail Transport Office (in Polish: *Urząd Transportu Kolejowego*, hereafter UTK) would have control over their fulfillment. Such institutional oversight was both necessary and required in order to enforce Regulation 1371/2007. The provisions on control over the fulfilment of obligations deriving from the EU act are now contained in Article 14a(3) PK – it is exercised by the UTK President, among other things, by means of decisions issued according to Article 14a(4) PK. UTK decisions concerning the behaviour of entities subjected to obligations imposed by the Regulation may impose a duty to remove the infringement. As they are issued in the form of administrative decisions, their addressees have the right to file a motion for the re-consideration of the case by UTK and subsequently, to file a complaint against a renewed decision to an administrative court. In order to enable the regulator to ensure the enforcement of Regulation 1371/2007, the amended Article 15(1) PK entitles the UTK President, and

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\(^3\) Consolidated text: Journal of Laws 2007 No. 16, item 94, as amended.

\(^4\) Journal of Laws 2009 No. 214, item 1658.
those he/she so authorises, to enter side-tracks, railway zones, rooms connected with railway traffic management and railway vehicles including a right to travel by a train or a railway vehicle. The UTK President was also made responsible for the assessment of passenger complaints concerning infringements of the provisions of this EU Regulation. These complaints are settled by way of an administrative decision which may affirm an infringement (defining its scope and the removal deadline) or state its absence (Article 14a(6)). The newly added Article 47(8) PK requires additionally that railway undertakings take up an insurance cover that extends also over their liability under Regulation 1371/2007 as required by its Article 12. Finally, the newly added Article 66(1) point 4 PK allows the UTK President to impose a fine on anyone subject to the aforementioned obligations if they were to fail to fulfil them.

It is crucial to stress here however that Poland has used the possibility to introduce exemption periods resulting from Article 2(4–6) of Regulation 1371/2007. The Regulation states that Article 9 (Availability of tickets, through tickets and reservations), Article 11 (Liability for passengers and luggage, not including Chapter II of Annex I introducing liability in cases of failures to keep to the timetable), Article 12 (Insurance), Article 19 (Right to transport), Article 20(1) (Information to disabled persons and those with reduced mobility) and Article 26 (Personal security of passengers) shall apply to all rail passenger services throughout the EU from the moment of the entry into force of this Regulation. Article 3a PK added by the Act of 25 June 2009 introduced however into Polish law the exemption contained in Article 2(5) of the Regulation that concerns the application of some of its provisions to urban, suburban and regional rail passenger services. The amending act introduced also the exemption permitted by Article 2(4 and 6) of the Regulation whereby the application of some of its provisions is excluded in domestic rail passenger services and in relation to rail passenger services provided by connections including stations outside the European Union. This latter exemption was granted for the period of around one and a half year starting from the entrance into force of Regulation 1371/2007.

At the same time, the Amendment Act introduced a procedure for the renewal of the two aforementioned types of exemptions (i.e. domestic rail passenger services and connections with stations outside the European Union). A general exemption for all such services is granted until 30 June 2011. Afterwards, it may be granted on request of an interested entity by the Minister of Infrastructure for a maximum period of 5 years after the entry into force of Regulation 1371/2007 – until 3 December 2014. It may then be prolonged twice for a maximum period of five years each, as permitted by the Regulation. Renewal applications should be submitted by 31 May 2014 and 31 May 2019 respectively. The Amendment Act equally allows those operators
that will enter the market after 31 May 2014 or 31 May 2019 to file a motion for each of the two exemption periods. Requests submitted to the Ministry of Transport should specify the scope of the requested exemption and the timetable of the adjustment to the Regulation.

The above notwithstanding, Poland has decided that some of the provisions of Regulation 1371/2007, from which the aforementioned services could be exempt, will in fact apply to these types of rail passenger transport. These provisions concern: Article 4 (conclusion and performance of transport contracts, the provision of information and tickets), Article 5 (enabling passengers to bring bicycles on to the train), Article 8(1) (travel information), Article 16 (reimbursement and re-routing in case of expected delays longer than 60 minutes in the arrival at the final destination), Article 21(2) and Articles 22 - 24 (access to transport and assistance for disabled persons and those with reduced mobility), Article 27 (passenger complaints), Article 29 (information to passengers about their rights), Article 28 (service quality standards and quality management system).

It is worth noting that these exemptions had to be introduced first by way of a Communication of the Ministry of Infrastructure issued on 25 November 2009 on the non-application of some of the provisions of EU law concerning rail passengers’ rights and obligations5 before the Amendment Act of 25 July actually entered into force. This solution was caused by a motion filed with the Constitutional Tribunal by the Polish President as to the compatibility of the Amending Act with the Polish Constitution. Questioned were, among others, some of its provisions connected with Regulation No 1371/2007. The President asked the Tribunal to examine whether Article 14a(2) PK, added by the Amending Act of 25 July, did not actually infringe the principle of the definiteness of the law. It also concerned the opening of the market for rail passenger services, namely the compatibility of Article 29a(1) PK with the rule of equal treatment and non-discrimination contained in Article 32 of the Constitution. The motion was settled by the Tribunal exactly on the date of the entry into force of Regulation 1371/2007. The Constitutional Tribunal ruled6 that the abovementioned provisions are in compliance with the Polish Constitutional Act.

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5 Komunikat Ministra Infrastruktury z dnia 25 listopada 2009 r. w sprawie niestosowania niektórych przepisów Unii Europejskiej dotyczących praw i obowiązków pasażerów w ruchu kolejowym [Communication of the Minister of Infrastructure of 25 November 2009 on non-application of some EU provisions regarding rights and duties of passengers in rail transport], Journal of Laws 2009 No. 77, item 961.

2. Certification of train drivers operating locomotives and trains

The Amending Act of 25 June 2009 transposed also Directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the Community. However, full implementation will only be ensured after the issuance of additional acts of secondary legislation. The Directive introduced two types of documents required for drivers operating locomotives and trains in the EU: licences and certificates. In line with the Directive, the Amending Act has excluded metro drivers from this licensing and certification system. According to new wording of Article 22 PK, the UTK President issues, prolongs, suspends and withdraws such licences. The regulatory authority updates also the related data and issues duplicates. The Directive specifies the minimum conditions to be fulfilled by a candidate as regards medical requirements, basic education and general professional skills. A driver who acquired a licence may apply for a certificate. Certificates are issued by railway operators and infrastructure managers. The procedures of issuing certificates are regulated by railway operators and railway managers (Article 22b PK). One driver may hold one or more certificates. Each of them shall indicate both the rolling stock which the holder is authorised to drive and the infrastructures on which he/she is authorised to drive. The UTK President runs a license record, a list of entities entitled to train and examine the applicants for licenses and certificates and a list of entities authorized to conduct medical examinations required for obtaining and ensuring the validity of licenses or certificates. Article 22c PK includes now special rules on training costs incurred by an operator or infrastructure manager in cases where the employment contract, or of any other form of cooperation, is dissolved pre-term on the account of the driver. This provision implements Article 24 of the Directive, which obliges Member States to ‘ensure that the necessary measures are taken in order to ensure that investments made by a railway undertaking or an infrastructure manager for the training of a driver do not unduly benefit another railway undertaking or infrastructure manager in the case where that driver voluntarily leaves the former for the latter railway undertaking or infrastructure manager’. Taking into account how high the training costs for train and locomotive drivers are, this rule may be of a significant importance.

The provisions concerning train drivers and the system of their licensing and certification shall enter into force on 4 December 2010 that being the transposition deadline for Directive 2007/59/EC. Finally, the Amendment Act limits the validity of licensing documents issued on the basis of previous provisions until 1 January 2017 and thus, from that moment on, drivers will

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be obliged to have new licences and certificates issued in line with Directive 2007/59/EC.

3. **Right of access to infrastructure for EU/EFTA railway operators providing international passenger services**

The second most awaited amendment of rail transport law in 2009 was the further opening of railway services, this time, with respect to international passenger travel. The amendment was forced by 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. The Directive was enacted as a reaction to the difficulties experienced by long-distance rail services in Europe and the competitive pressure of low-cost airlines. Its transposition consisted of the introduction of provisions on the right of access to infrastructure for rail carriers from other Member States operating in the international passenger services field.

The amended Article 29a(1) PK contains now the right of access to infrastructure in order to provide international passenger services by railway undertakings established in other Member States of the EU and Member States of EFTA - parties to the EEA Agreement. It concerns undertakings authorized to provide rail transport services according to the law of the Member State of their establishment. The previous wording of Article 29(1) PK acknowledged their right of access only with respect to international goods transport. Article 29 (4-11) were added by the Amendment Act of 25 July 2009. They set out a procedure for operators established in other Member States providing international rail passenger services to apply for the allocation of railway lines in Poland. These applications are necessary to enable an infrastructure manager to plan its railway timetable. The application is to be filed at latest six months before the day when a new timetable is to be introduced. The Polish railway timetable is fixed once a year; it changes at

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8 This results from the fact that Council Directive of 29 July 1991 on the development of the Community's railways (91/440/EEC) applies to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State (Article 2(1). According to Article 4(1) of Directive 91/440/EEC, a railway undertaking shall be entitled to apply for a licence in the Member State in which it is established.

9 Article 30 PK regulates the procedure for the composition of the rail timetable; it contains special provisions concerning rail passenger services introduced by the Amendment Act of 6 December 2008 – adding paragraphs 2 a) – 2 c) to this Article, which aims to adjust the timetable to better answer the needs of passengers.
midnight on the second Saturday of December; it may also be exceptionally changed at midnight on the second Saturday of June in particular because of changes in regional timetables of passenger trains (Article 30 PK).

The UTK President was charged with ensuring equal infrastructure access for those railway operators who provide international passenger services including those established in other EU/EFTA Member States (Article 13(2)(2) PK).

The right of access to a railway line may be limited on request of an operator or a competent authority fulfilling a public service contract. This limitation may be based on two reasons. First, a limitation may be justified if most services provided by the applicant are to be provided within the Polish territory. Second, a limitation may be justified by the fact that a planned connection would injure the economic equilibrium of services which are provided on the basis of public service contracts (the motion for such examination may also be filed by an infrastructure manager). The possibilities of access limitation result from Article 10(3a -3b) Directive 91/440/EEC (added by Directive 2007/58/EC). If it is established that a connection would threaten the economic equilibrium of public services, the limitation may concern the stations at which an operator plans its train stops or the frequency of services (compatible with Article 10(3b) Directive 91/440/EWG). Its addressees may file a motion for the reconsideration of its case and than a complaint to an administrative court against a renewed decision.

The details of the access granting procedure to railway undertakings established in other Member States are contained in the Regulation of the Minister of Infrastructure of 30 December 2009 on Access to Railway Infrastructure for Railway Operators Established in Another Member State of the EU or Member State of EFTA – Party to the EEA Agreement10. Paragraph 2 of the Regulation specifies what information must be provided to the UTK President and the infrastructure manage by an external operator 90 days before filing an application for the allocation of lines. For the timetable 2009/2010, the Amending Act of 25 July 2009 set this time limit for 2 months starting from the entry into force of this act (it entered into force 14 days after its publication that took place on 16 December 2009). Information provided by an applicant shall include: proposed the train route and stations on this route – both within and outside of Poland; a draft timetable; methods of ticket distribution; a draft tariff offer; predicted number of passengers differentiating the number of passengers transported within the Polish territory; predicted number of passengers getting on and off at each station in Poland; predicted income, indicating income expected from the services provided within the Polish territory; numbers and types of seats offered

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and train’s commercial speed. As annexes to the application, the Regulation requires a declaration on the fulfilment of specified technical requirements and attested copies of license and safety certificate issued for the operator by competent authorities. Information contained in the application is delivered to the authorities awarding public service contracts on this route and to railway operators using it (as required by Article 13(4) added to Directive 2001/14/EC by Directive 2007/58/EC).

Paragraph 3 of the Regulation lists what type of information must be provided in a request for checking the principal purpose of a service and for examining the economic equilibrium of a public service contract. The list is similar to that contained in the application for rail routes. It additionally covers: the timetable and tariffs on the line concerned; predicted income from the public service and its predicted decrease by the services of the applicant as well as; the number of passengers getting on and off at stations where the applicant plans its train stops. The UTK President should also receive an excerpt of the public service contract.

Last important issue that is regulated in paragraph 4 of the Regulation, are the evaluation criteria to be used by the UTK President. The first group contains criteria of assessing the international character of the service: proportion of the train route, number of stops and income (all these elements should show the difference between passenger transport within and outside of Poland) and the number of trains running within a 24 hour slot. The second group lists criteria of appraisal whether the connection would infringe the economic equilibrium of public service contracts. The latter include not only tariffs, predicted incomes on the route within Poland, planned number of stops within and outside of Poland, numbers and categories of seats, train’s commercial speed, timetable including the times of stops and trains frequency, but also profitability of the public service concerned and the amount of compensation paid by the authority that awarded the public service contract.

It is hard to evaluate the effects of the opening of rail passenger transport. It is to be expected that the entrance of foreign operators will occur gradually primarily due to high entry costs. Press releases of January 2010 stated that no EU/EFTA railway operator was using this right at that time but that the German operator DB Bahn has indeed filed an access request. At the same


time, starting with the timetable for 2009/2010, passenger connections were reorganized and many cancelled. In May 2007, the UTK President launched clarification proceedings to check the functioning of the right of access for railway passenger transport during the use of the 2009/2010 timetable in order to ensure the proper functioning of the railway transport market\textsuperscript{12}. An explanatory proceeding was also launched by the President of the Polish Office for Competition and Consumer Protection (in Polish: \textit{Urz\...Konkurencji i Konsumentów}, hereafter UOKiK) in order to check the realisation of passenger carriages, the provision of infrastructure access by their managers and potential violations of consumer rights connected with the lack of accurate information on cancelled and changed railway connections\textsuperscript{13}.

\textbf{4. Duration of framework agreements}

Changes resulting from Directive 2007/58/EC (as it amended Directive 2001/14/EC) concerned also the duration of framework agreements between railway operators and infrastructure managers on the basis of which the former use the allocated routes. According to Article 31(2–4a) PK, these agreements will be now concluded, on principle, for a period of maximum five years with possible renewals. In exceptional circumstances, justified by necessary investments, framework agreements might be concluded for a duration of 15 years or longer. These two possibilities should facilitate investments in specialized infrastructure.

The provisions on access granted to passenger railway operators from other Member States and on the duration of framework agreements entered into force on 1 January 2010, as required by respective provisions of Directive 2007/58/EC.

\textbf{III. Licensing of undertakings providing railway transport of passengers or goods or in traction services}

The railway market was also affected by the Regulation of the Minister of Infrastructure issued on 5 June 2009 on the Procedure of Submission and Appraisal of Applications for Licenses which Authorize an Undertaking to


Perform the Economic Activity that Consists of the Provision of Railway Transport of Passengers or Goods or Providing Traction Services and on License Patterns\textsuperscript{14}. This Regulation implements the pre-accession Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings\textsuperscript{15}. According to the new act, applications may be filed either by post or directly at UTK headquarters. In cases of unfinished or incorrect documentation, the applicant is summoned by the UTK President to complete it. After the examination, the procedure finishes with a decision of the UTK President granting or refusing to grant a license. The Regulation contains two license patterns. The first authorizes an undertaking to perform the economic activity of providing rail transport of passengers or goods (Annex 1) while the other authorizes an undertaking to perform the economic activity of providing traction services (Annex 2). Both license patterns include information on the holder, on the type of license and its validity as well as on the conditions of its use.

IV. Access to infrastructure and scarcity charges

The Minister of Infrastructure issued also a new Regulation on 27 February 2009 concerning the Conditions for Access to and the Use of Railway Infrastructure\textsuperscript{16} that repealed the previous Regulation of the Minister of Transport on the Conditions for Access to and the Use of Railway Infrastructure of 30 May 2006\textsuperscript{17}. The changes introduced by the new act were a continuation of the amendments made 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 on Rail Transport\textsuperscript{18}. The new Regulation was intended, among other things, to ensure full compliance in this respect with Directive 2001/14/EC. It also introduced many editorial changes improving the comprehensibility of the act.

Rules on congested infrastructure were among the key changes from the point of view of market regulation. Previously, when the capacity of a line or its fragment was insufficient to satisfy the requests of all operators, the infrastructure manager negotiated the price with interested operators

\textsuperscript{14} Journal of Laws 2009 No. 94, item 775. The Act was analyzed by the author in: ‘Legislative Developments in Rail Transport in 2008’ (2009) 2(2) YARS with respect to scarcity charges.
\textsuperscript{15} Official Journal L 143, 27.6.1995, p. 70.
\textsuperscript{16} Journal of Laws 2009 No. 35, item 274.
\textsuperscript{17} Journal of Laws 2006 No. 107 item 737, as amended.
\textsuperscript{18} Journal of Laws 2008 No. 206, item 1289.
until the capacity and the demand for transport in a given time period were balanced (the manager had to consider the rules on route allocation with the priority of passenger services and public service obligations, the allocation of routes which were used by the same operator in the preceding timetable and framework agreements, regulated in paragraph 3(13) of the previous regulation). According to paragraph 3(8) of the new Regulation, unallocated capacity will now have to be put on auction by the infrastructure manager under the supervision of the UTK President. The auction will lead to the establishment of the level of the basic charge increase for this infrastructure. On the basis of paragraph 19(3) of the Regulation, the manager is obliged to publish every year a regulation specifying the procedure to be followed in case of an auction concerning congested infrastructure. Unlike the earlier solution, the new procedure should no longer raise doubts from the point of view of Article 30(3) Directive 2001/14/EC seeing as it provides for direct supervision of the procedure by UTK President. Indeed, Article 30(3) of the Directive allows negotiations between applicants and an infrastructure manager on the level of infrastructure charges only under the supervision of an appropriate regulatory body, requiring it to intervene if negotiations are likely to contravene the Directive.

The new Regulation shortens the time in which the manager should draw up a draft timetable and deliver it to the operator for consultation; the operator is now obliged to do this not later than three months after the expiration of the deadline for the submission of applications for route allocation. An operator is entitled to submit observations and to propose changes to the draft if it does not satisfy its requests. After receiving such observations and proposals, the manager should inform the operator within seven days if it is unable to make the proposed changes. In this case, the manager shall consult with the operator within fourteen days from receiving the proposed changes. On the basis of such draft, the manager formulates a binding timetable and delivers it to the operator in the form of a notification of the allocated routes. This notification constitutes a confirmation for the reservation of access to the infrastructure required (all this procedure is described in paragraph 4 of the Regulation). Paragraph 5 enumerates the reasons that may justify a refusal of route allocation by the manager.

Paragraphs 6-18 of the new Regulation concern charges. Many provisions have undergone editorial changes; in general, the new act is clearer and more accurate than the previous one; for instance, paragraph 6 specifies now in more detail what elements are taken into account while establishing the rate of the basic charge for a given category of railway lines. The new regulation unifies the charges and makes the system simpler and more comprehensible overall. It reduces the number of train categories which are subjected to
different rates of the basic charge – four categories (paragraph 8(1) of the previous regulation) were reduced up to only two categories, namely passenger and goods trains.

The Regulation eliminated separate rates for trains in intermodal transport and for separated railway vehicles. This eliminated situations when a railway operator, irrespective of whether it uses intermodal carriages or not, co-finances such carriages and bears the costs generated by other market participants. This situation was caused by the fact that the older provisions had established lower rates for intermodal carriages, what created benefits for those operators who provided such services (intermodal carriages). Moreover, the elimination of a lower rate for separated railway vehicles should encourage operators to eliminate unnecessary runs of such vehicles. It will also cut out the paradox when the operators that less often used separated railway vehicles had been financing the costs created by those operators that used such vehicles more frequently.

The costs taken into account for the calculation of rates are also defined in more details now. Paragraph 8(1) of the Regulation issued on 27 February 2009 states that rates are calculated for the infrastructure access to which is been planned. Furthermore, paragraph 8 point 3 clearly stipulates that rates for lines of the same category and the same total gross weight should be identical. The rules on discounts have also been changed. The previous provision (paragraph 10(2) of the old regulation) stated that the discount, meant to increase the use of lines with a high level of untapped capacity, could not have been higher than: the sum of variable costs, costs of credit-service maintenance as well as maintenance and repair costs sued for the calculation of the rate. The new paragraph 9 point 2 limits the discount to that part of the charge which results from indirect costs only that include costs related to contracts regulating access to infrastructure – these may be e.g. costs of management, costs of ensuring safe and hygienic work, property insurance, costs of the supervision of construction etc. As a result, the qualification of costs as indirect should be made on a case by case basis. The new Regulation no longer differentiates between constant and variable costs. Its paragraph 10 introduced a sharp limitation for the minimum rate of the basic charge - it may not be lower than 75% of the rate for a given category of railway lines and the total gross weight of a train. Paragraph 18 point 2 of the Regulation clearly states that in cases where an operator resigns from the run of a train at least 30 days before its planned date, the manager will not collect reservation charges. Moreover, point 1 of paragraph 18 specifies that the reservation charge is calculated separately for each route that has been reserved.

The new Regulation does not allow the manager to apply indicators (defined by the manager himself) that decrease the rates of the basic charge and
correspond to the decreased costs in some situations. Previously, it happened e.g. when an operator applied for the allocation of a significant percentage of the capacity or when it was the only operator providing carriages on a given line. Even if the possibility to decrease the rates in this way was limited to situations when the decreasing indicators concerned equally all the operators, the change in this scope should improve the clarity and competitiveness. On the contrary, the regulation upholds some of the situations when the manager may apply the indicators increasing the rates.

The new act obliges also the manager to deliver to the UTK President (nine months before the introduction of a new timetable, it used to be eleven months) draft rates of scarcity charges (for both basic charge and charges for additional services) together with the list of managed railway lines, rates for passenger and goods trains on these lines with the indicators increasing them and the rules on discounts. An operator is also entitled to demand the presentation of the draft and of the aforementioned list [paragraph 16(1-3)]. This should guarantee greater procedural transparency.

The rates of the charges as well as their increases and discounts should be calculated so as to ensure protection against unjustified increase of the previous and the actual level of the rates [paragraph 16(4)]. Thus, the UTK President should ensure that a manager does not make use of its monopolistic position and does not collect excessive charges (paragraph 17 point 1 together with paragraph 16(4) of the draft) in the course of the procedure that finishes with the acceptance of the rates. When doubts arise as to the increase of the rates established by an operator, the UTK President may consult with auditors or independent experts.

Despite all these changes meant to ensure full compliance with Directive 2001/14/EC, the European Commission decided in June 2010 to refer Poland (among thirteen other MS) to the Court of Justice for failing to correctly implement Directives 91/440/EEC, as amended, and Directive 2001/14/EC\(^\text{19}\).

It can be concluded on the basis of the above analysis that the recent changes in Polish rail transport law are surely going towards an increase in competition and competitiveness. The important and strenuous goal of restructuring and modernizing Polish railways clearly remains. The year 2010 is full of plans to restructure the PKP holding and in particular, ensuring full legal and functional independence of PKP PLK (the main infrastructure manager in Poland) from railway operators. There are also drafts of laws intended to

enable railway companies to be declared insolvent. Time will show whether EU legislation and the constant vigilance of the European Commission, will manage to speed up this process. Important EU directive are to be transposed into the Polish legal systems in 2010 including, for instance, Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community.\footnote{OJ [2008] L 191/1.}
Legislative Developments in the Aviation Sector in 2009

by

Filip Czernicki*

The Polish Aviation Law (in Polish: Prawo Lotnicze; hereinafter, PL) of 3 July 2002 was amended three times in 2009 and accompanied by eight new acts of secondary legislations (executive orders) issued by the Minister of Infrastructure.

The first set of amendments was introduced by the Act on the amendment of the freedom of trading activity act of 19 December 2008\(^1\) which entered into force on 19 January 2009. On its basis, Article 27 PL has been included into the scope of the authority of the employees of the Polish Civil Aviation Office (in Polish: Urząd Lotnictwa Cywilnego; hereinafter, ULC). The new rules provide ULC employees with the authority to control all civil aviation companies, civil aviation employees and airport managing companies.

The second set of amendments was implemented by the Act on civil servants of 21 November 2008\(^2\) that entered into force on 24 March 2009. On its basis, the entirety of Article 20 PL has been changed by the introduction of a new, transparent and competitive procedure for the selection and appointment of the ULC President. According to the new rules, the recruitment advertisement must be published at ULC Headquarters as well as in the Public Information Bulletin. The amendment sets out what information must be provided in the advertisement as well as the fact that the advertisement must contain the detailed schedule of the recruitment procedure. The new provisions list also a number of requirements applicable to those who wish to run for the President or Vice President of ULC. Finally, the new rules oblige the selection committee to narrow down the list of candidates to 3 individuals to be presented to...

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1 Journal of Laws No. 18, item 97.
2 Journal of Laws No. 227, item 1505.
the Minister of Transportation who then ultimately selects the President and publishes such information.

The third set of amendments was introduced by the Act on special procedures on the preparation and leading investments in civil airports of 12 February 2009\(^3\). On its basis, Articles 55, 56, and 57 PL were slightly modified with respect to administrative procedure in order to achieve compliance with the new rules on the creation and investments in civil airports. These amendments entered into force on 17 April 2009.

Eight acts of secondary legislation (executive orders) concerning the aviation sector were issued by the Minister of Infrastructure in 2009.

First, the order of 7 January 2009 sets out the rules on the inspection of foreign aircrafts\(^4\). On its basis, an inspection is lead accordingly to the plan approved by the ULC President with respect to the procedural rules adopted by the European security check program of foreign aircrafts (SAFA).

Second, the executive order of 13 March 2009 introduces ICAO requirements concerning the use of abbreviations and codes maintained in civil aviation (ICAO Abbreviations and Codes (Doc 8400)), under the name PANS-ABC\(^5\).

The third and fourth executive orders dated 26 March 2009 contains detailed rules of the functioning of aviation telecommunication\(^6\) and aeronautical information services\(^7\). The first refers to the conditions and methods of aviation telecommunication rules that were adopted by chapters I-V of Appendix 10 to the convention on international civil aviation signed in Chicago on 7 December 1944. The second act refers to the organization of aeronautical information services adopted by Appendix 15 of the same convention.

Fifth, the executive order of 7 April 2009 introduces the requirements necessary for the application of EUROCONTROL route charges system regulations\(^8\). The order states the conditions of the system of route charges and payment as well as the rules for the determination of the cost base for route charges and the calculation of unit rates. The ULC President will publish all of the aforementioned detailed rules.

The sixth executive order dated 25 May 2009 on ground handling at airports\(^9\) specifies: a detailed list of service types in the various categories of ground handling services; specific conditions and procedures for the authorization to

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\(^3\) Journal of Laws No. 161, item 1281.
\(^4\) Journal of Laws No. 5, item 23.
\(^5\) Journal of Laws No. 53, item 438.
\(^6\) Journal of Laws No. 58, item 479.
\(^7\) Journal of Laws No. 58, item 478.
\(^8\) Journal of Laws No. 61, item 500.
\(^9\) Journal of Laws No. 83, item 695.
carry out ground handling, the documents and information to be presented when applying for a permit and the conditions to be met by the applicant; specific conditions used for the introduction of the restrictions referred to in Article 179(1) and Article 181(2) PL, in particular with respect to the categories of ground handling services and the quantities served annually for passengers and cargo and the available space or the airport’s capacity; detailed terms and methods of the organization and conduct of tenders referred to in Article 179(2) and Article 181(3) PL; detailed arrangements for the provision and use of airport infrastructure, the setting and charging for access to equipment, facilities and fees for the use of centralised infrastructure; the specific requirements relating to access to ground handling market.

The seventh executive order dated 24 June 2009 on the amendment of the executive order on licensing of aviation personnel introduces a number of changes to licensing procedures\(^\text{10}\).

Eighth, the order of 17 July 2009 on the National Training Program for Aviation Security\(^\text{11}\) sets out how to organize and conduct training programs on safeguarding civil aviation from acts of unlawful interference, in particular:

1) the organization and functioning of the training system in civil aviation security;
2) the methodology for training in the field of civil aviation security;
3) the criteria and method of selection, qualification, certification and motivation of staff in the field of civil aviation security.

\(^{10}\) Journal of Laws No. 113, item 942.

\(^{11}\) Journal of Laws No. 122, item 1011.
Possible objective justification of a network monopoly’s refusal to conclude an agreement on an interconnected market.

Case comment to the judgement of the Supreme Court of 14 January 2009 – Rychwał Commune
(Ref. No. III SK 24/08)

Facts

In the decision RPZ-18/2006 issued on 5 July 2006, the President of the Office of Competition and Consumer Protection (hereafter, UOKiK) stated that the practices of the Rychwał Commune constituted an abuse of its dominant position held on the local market for liquid waste services. The practice consisted of the refusal to conclude an agreement with an entrepreneur for the receiving of liquid waste from the residents of the Commune. Rychwał refused to conclude the contract on technical grounds stating that the amount of liquid waste that could be received by their refinery was limited by the amount inflowing through their sanitary sewage system. The Commune invoked also the refinery’s exploitation manual and stressed that the facility’s limits were filled by those entities that were already providing such services in its territory, seeing as the Commune has previously signed several of such contracts with other entities.

According to the UOKiK President, Rychwał’s conduct violated Article 8(1) and (2)(5) of the Act of 15 December 2000 on competition and consumer protection, replaced by the Act of 16 February 2007 on competition and consumer protection, since it precluded the creation of conditions necessary for the emergence or development of competition on the local market of no-outflow emptying tanks and the transport of liquid waste. In the opinion of the UOKiK President, the conduct of the Commune was meant to eliminate a potential competitor on an interconnected market establishing an entry barrier that was impossible to overcome, hence illegal. Such conduct was not directed towards rising service standards or lowering prices and resulted in a restriction of competition. In consequence, the entrepreneur has been forced to use less convenient facilities making its business less prosperous than the Commune and other competitors that managed to sign similar contracts with the Commune.

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1 Consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended.
2 Journal of Laws 2007 No. 50, item 331, as amended.
Rychwal appealed the UOKiK decision to the Court of Competition and Consumer Protection (SOKiK). SOKiK rendered its judgment on 11 May 2007 (XVII Ama 96/06) changing the original decision. According to the Court, the refusal to conclude the contract was objectively justified in this case by the lack of technical facilities for receiving a larger amount of waste. SOKiK’s judgment was appealed by the UOKiK President but the Court of Appeals rejected it on 22 February 2008 (VI ACa 985/07) confirming SOKiK’s ruling and stating that the refusal was justified by the lack of available facilities. The UOKiK President filed a cassation request as a result of which, the Supreme Court quashed the judgment of the Court of Appeals and referred the matter back for trial.

The Supreme Court confirmed that the refusal by a network monopolist to conclude an agreement with a partner, which acts as its competitor on an interconnected market, may sometimes be justified by technical considerations. According to the Supreme Court, the lack of technical facilities to receive a larger amount of waste, exceeding its nominal values, can be treated as an example of such justification. In this case however, the Court stated that the amount of liquid waste that may be delivered in a certain period of time is not dependent on the number of entities active on the market – the total of liquid waste produced and delivered on the local market is constant irrespective of the number of entities active on this market. Therefore, the contractual determination of the amount of liquid waste to be delivered does not have to result in an increase of the total received by the tank. It could lead however to a different allocation of deliveries.

Still, the Supreme Court stated also that in order to establish a restriction of competition, the anticompetitive effects of the scrutinized practice would have to be analyzed. In the Court’s opinion, the mere constraint by a monopolist of another’s freedom of business activity may not be sufficient to accept that such conduct limits competition. For that reason, the impact of the refusal to contract with a particular partner would have to be compared to its position and the position of other contractors, in order to evaluate the alleged anti-competitiveness of the given practice. Moreover, it is vital to determine here whether such refusal concerned an essential facility. The first and second instance judgments were thus overruled by the Supreme Court because they did not contain such an evaluation.

After the re-examination of the case, the Court of Appeals issued a judgment on 23 June 2009 (VI ACa 580/09) quashing the first instance judgment and referring the matter back for trial. After the renewal of the proceedings, SOKiK ruled on 9 June 2010 (XVII Ama 152/09) to reject Rychwal’s appeal. Unlike in its original judgment, SOKiK found here that the actions of the Commune did indeed constitute a violation of Article 8(2)(5) of the Competition Act because they prevented a competitor from commencing and conducting business on the local market for waste disposal. Such conduct was treated as a limitation of competition. During the re-trial, the technical justification invoked by Rychwal in order to legitimize its refusal to conclude the contested agreement appeared to be false. Contrary to its claims, it was found that the Commune did not abide by the quantitative limits it invoked and concluded contracts with other entities which exceeded them.
Key legal problems of the case and key findings of the Court

In its judgment, the Supreme Court raised several important questions of substance and procedure. First, Article 9(2)(5) of the Competition Act 2007 (replacing Article 8(2)(5) of the Competition Act 2000) imposes a duty on dominant undertakings to behave in a way that will not create barriers limiting the ability of others to effectively compete on the free market. The Supreme Court confirmed that for a proper application of Article 8(2)(5) of the Competition Act 2000 (now Article 9(2)(5) of the Competition Act 2007), a network monopolist should have the opportunity to invoke an objective justification for its conduct, which would normally constitute an abuse.

The concept of an objective justification has its roots in the decisions of the European Commission and the jurisprudence of the European Court of Justice (ECJ). Notwithstanding the general abuse prohibition, both the Commission and ECJ have started in the 1970ties to use the so-called ‘rule of reason’ in order to incorporate this concept into the European competition law regime. Both institutions agreed that an objective justification should be treated as a factor taken into consideration when the actions of a dominant entity do not amount to a practice limiting competition due to objective, external reasons. Some sources stress that beside the use of an objective justification in order to preclude the finding of an abuse, entrepreneurs can also rely on the competition meeting defence or efficiency concept. In consequence, the disputed conduct would not violate the basic values of the rules on competition protection. The concept of an objective justification can be perceived as a negation of the over formalistic per se evaluation of the abuse of dominance. This new approach pays less attention to the objective evaluation of the conduct and more to the factual circumstances, including market conditions, of the particular case.

Nonetheless, the concept of an objective justification has not always been accepted by the Commission and the ECJ. Although it has been adopted by the ECJ in United Brands v Commission, Centre Belge d’études de marché – Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), Hilti v Commission, Tetra Park International v Commission or British Airways,

7 Case 311/84 [1985] ECR 3261, at para. 27.
10 Case C-95/04 P [2007] ECR I-2331, at para. 69 and 86.
the Court of First Instance (currently the General Court) stated in *Metropolie Television* that the rejection of the *per se* evaluation of the market conduct of dominant undertakings is not tantamount to the acceptance of the rule of reason in the domain of community competition law.\(^{11}\) It seems that the notion of an objective justification has now been accepted as part of the EU competition law regime. It was indeed confirmed in point III(D) of the Communication of the Commission: Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty (currently Article 102 of the Treaty on the Functioning of the European Union – JJ) to abusive exclusionary conduct by dominant undertakings\(^{12}\). The Commission explicitly stated in this act that a dominant undertaking can invoke an objective necessity or an increase in efficiency, provided that such a justification is applied proportionally. An increase of efficiency can be raised before EU institutions under the following conditions: the efficiencies have been or are likely to be realized as a result of the conduct; there must be no less anti-competitive alternatives to the conduct capable of producing the same efficiencies; the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

The Polish Supreme Court has accepted the institution of an objective justification in competition law cases. Its general applicability was confirmed in the judgment of 20 June 2006 (III SK 8/06\(^{13}\)) even though the Court found in that case that justifications based on the need to fight media piracy were insufficient for the preclusion of the anticompetitive practices (an additional requirement to paste holograms on phonographs). In later practice, an objective justification was rejected in the judgment of 6 December 2007 (III SK 16/07\(^{14}\)) due to the lack of sufficient evidence but accepted in the judgment of 15 July 2009 (III SK 34/08\(^{15}\)) with respect to the refusal to provide transfer services due to the necessity to protect the local energy sector. Importantly, the Court affirmed in the latter case that an entrepreneur can effectively invoke the necessity to protect its own economic interests in order to defend itself from abuse charges. A similarly affirmation can be found in the judgment of 16 October 2008 (III SK 2/08\(^{16}\)).

The same line of reasoning has been adopted recently by the UOKiK President. For instance, in the decision issued on 31 December 2009 (RBG–24/2009), the refusal to conclude a contract was not found to be abusive due to the existence of an economic justification for such market practice. Previously, in the decision issued on 26 August 2009 (RBG–11/2009), the UOKiK President stated that the conduct of a dominant

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\(^{13}\) (2007) 13-14 OSNP 208.
\(^{15}\) Not yet reported.
\(^{16}\) Not reported.
company cannot be treated as a practice limiting competition on the basis of the ‘meeting competition defence’.

The possibility to preclude the wrongfulness of conduct which would normally constitute a competition limiting practice was unequivocally confirmed in the Rychwal judgment. The argument that the disputed amount of liquid waste was over the technically acceptable limit of the facility was said to be applicable as an objective justification for the refusal to conclude a contract.

The issue of the evaluation of the anticompetitive effects of a scrutinized market practice was also considered by the Supreme Court in the Rychwal case. As a result of the notion of an objective justification, the Court stressed the duty of the competition protection organ to prove a practice’s actual and tangible impact on competition. The Supreme Court rightly pointed out that in order to establish anticompetitive effects of a refusal to conclude a contract, it would be necessary to determine to what an extent could such a refusal affect the competitiveness of the entrepreneur’s offer in comparison to the situation of those that were able to secure such contracts. In the opinion of the judges, an assumption that a larger number of entities having access to the tank belonging to the Commune would improve the functioning of the market is not sufficient. In other words, the Supreme Court seemed to support the effect based approach. Such reasoning can be perceived as another example of the use of the economic approach\(^\text{17}\) by the Supreme Court. Based on its judgment, it is possible to accept that in cases of exclusionary practices, it is not enough to apply the presumption of a negative impact on competition. Now, an economic evaluation would also be required.

Moreover, the Supreme Court rightly admitted the relevance of the essential facilities factor. Ownership rights must be taken into consideration in evaluating the character of the refusal of access to an essential facility. However, the courts should be able to force the owner of an essential facility to allow access to its competitors. EU jurisprudence\(^\text{18}\) as well as national courts\(^\text{19}\) developed the following criteria for the evaluation of access refusal to essential facilities. The courts impose a duty to grant access to additional facilities, firstly, when there is no alternative facility and secondly, when there is a risk that a refusal would result in the entrepreneur’s exclusion from the market. Such a situation requires also the analysis of the applicable objective justifications. This kind of analysis was not conducted by any of the courts which considered the Rychwal case. Considering that the Commune administers the only waste refinery in the region and consequently, that it is a local network monopoly with

\(^{17}\) Economic approach is visible in case T-203/01 Manufacture francaise des pneumatiques Michelin v Commission [2003] ECR II-4071.


\(^{19}\) Judgement of SOKiK of 7 December 2006, XVII Ama 11/06, not reported.
respect to liquid waste, the refusal to conclude the disputed contract is tantamount to a refusal to grant access to an essential facility.

It is worth noting in conclusion that the Supreme Court raised also in this case some civil procedure issues that may impact competition law cases. The Supreme Court followed here the more liberal interpretation of Article 3983 of the Polish Code of Civil Procedure whereby its prohibition (concerning the limitation of the arguments in cassation cases that can be raised at this stage of the proceedings) only concerns arguments based on either the statement of facts or the evaluation of the evidence made by the second instance court, rather than the very essence of the findings which are necessary for the proper application of the norm of substantive law. Accordingly, this prohibition should be interpreted strictly.

Final remarks

The commented judgment can be perceived as a continuation of Polish jurisprudence on the subject of an objective justification or essential facilities.

The approach adopted by the Supreme Court deserves approbation. The Court perceived the evaluation of the legality of exclusionary practices through the lens of the effects-based approach. The Rychwał judgment exemplifies therefore the rejection by the Supreme Court of the per se qualification of competition limiting practices, which are mentioned in Article 9 of the Competition Act 2007 and a move further towards the use of the economic approach to antitrust. An economic analysis requires the consideration of the conditions present on the relevant market and, in that sense, follows the line of reasoning adopted by EU competition protection organs with regard to the current Article 102 TFEU.

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Is the forcing of services on suppliers an abuse of a dominant position?  
Case comment to the judgment of the Supreme Court of 19 February 2009 – DROP  
(Ref. No. III SK 31/08)

Facts

In the decision RPZ 21/2005 issued on 21 July 2005, the UOKiK President established an infringement of Article 8(2)(5) and (1) of the Act of 15 December 2000 on Competition and Consumer Protection1 (hereafter, Competition Act 2000) by the poultry producer DROP S.A. (hereafter, DROP). DROP was found to have abused its dominant position in the purchase markets of duck hatching eggs and goose hatching eggs. The competition authority identified abuses in the form of:

− counteracting the formation of conditions necessary for the emergence or development of competition (in this case – in the veterinary services market), and
− the imposition of unfair trading conditions.

The same forms of abuse are now listed in Article 9(2)(5) and (1) of the Act of 16 February 2007 on Competition and Consumer Protection2 (hereafter, Competition Act 2007). The UOKiK President analysed the agreements between DROP and its suppliers of duck hatching eggs and goose hatching eggs. According to UOKiK’s analysis, DROP had imposed an unfair contractual provision requiring its suppliers to only use veterinary prevention treatments (in particular vaccinations) performed by SSW, a veterinary surgeon appointed by DROP.

The decision was appealed to the Court of Competition and Consumer Protection (hereafter, SOKiK) but the appeal was dismissed in its entirety as groundless. The judgment of SOKiK, upholding the decision in all its aspects, was appealed to the Court of Appeals in Warsaw by DROP, which sustained its original charges. The Court of Appeals agreed with SOKiK that the UOKiK decision was correct.

Subsequently, DROP filed a cassation appeal to the Polish Supreme Court claiming that the judgment of the Court of Appeals violated procedural as well as material laws such as Article 8(2)(5), Article 8(2)(1) and Article 1 of the Competition Act 2000. The Supreme Court in its judgment of 19 February 2009 settled the dispute in

1 Consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended.  
2 Journal of Laws 2007 No. 50, item 331, as amended.
favour of DROP and quashed both earlier judgments as well as the original decision issued by the UOKiK President. While the Supreme Court found that the allegation of an infringement of Article 8(2)(5) and Article 8(2)(1) was justified under the circumstances of the case, it rejected DROP’s argument that procedural laws and Article 1 of the Competition Act 2000 were infringed.

**Key legal problems of the case and key findings of the Supreme Court**

**Foreclosure of the veterinary services market**

The Supreme Court stated that DROP’s conduct in the purchase markets of duck hatching eggs and goose hatching eggs had not counteracted the formation of the conditions necessary for the emergence or development of competition in the veterinary services market. In particular, DROP’s conduct was not seen as foreclosing the veterinary services market to the competitors of SSW. Market foreclosure effects can occur in the market where the dominant firm acts (and where it holds a dominant position) or on a derivative or linked market called by Polish jurisprudence a related/neighbouring market. The latter type of foreclosing practices is known as the ‘transfer of dominance’ or ‘leveraging’.

Transfer of dominance is an issue that received some attention in the judgment considered here. In the opinion of the Supreme Court, to classify a practice as a transfer of dominance, it must be shown that the dominant firm has an economic interest (incentive) in the foreclosure of the related market. Such an economic interest may exist in circumstances where the dominant firm is engaged in leveraging practices (affecting a related market) in order to:

− protect its dominant position in the primary market,
− strengthen (enhance) its pre-existing position in the related market,
− extend its activities to the related market.

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3 See e.g. the judgments of SOKiK: of 4 March 2008, XVII Ama 70/07, not reported; of 4 January 2008, XVII Ama 72/07, not reported (‘the related market’); the judgment of the Antimonopoly Court of 11 December 2000, XVII Ama 45/00, LEX no. 56103 (‘the neighbouring market’); the judgment of SOKiK of 4 August 2008, XVII Ama 4/08, not reported (‘the derivative market’); the judgment of SOKiK of 9 November 2006, XVII Ama 114/05, not reported (‘the linked market’).


Is the forcing of services on suppliers an abuse of a dominant position?

and/or
− organise the related market and in particular, to set up the rules for its functioning,
− make firms that operate in the related market dependent on the dominant company, that is, compel them to cooperate with it as a condition of their acting in the related market.

The Supreme Court seemed to be of the opinion that the lower instance courts and the UOKiK President failed to sufficiently prove the leveraging of dominance held on one market (purchase market of duck hatching eggs and/or purchase market of goose hatching eggs) onto another market (market for veterinary services). It should be noted first of all – respecting the general conclusion of the judgment – that DROP was not present on the market for veterinary services and did not show any intention to extend its activities onto that market, to organise that market and/or to make veterinary surgeons dependent on DROP. There was certainly no proven motive in this case that ultimately linked DROP’s conduct to the protection of DROP’s dominant position in the purchase markets for duck hatching eggs and goose hatching eggs.

The infringement of Article 8(2)(5) of the Competition Act 2000 has therefore not been seen as substantiated by the competition authority and lower instance courts. Moreover, as shown in the commented judgment, counteracting the formation of conditions necessary for the emergence or development of competition is reflected by the creation of entry barriers that are of fundamental importance for those concerned (‘conditions necessary for...’). Agreeing with the conclusions reached by the Supreme Court, it is truly surprising that no attempt has been made by the UOKiK President to determine which conditions, necessary for the emergence or development of competition in the veterinary services market, could not have emerged due to DROP’s conduct in the purchase markets of duck hatching eggs and goose hatching eggs.

Relevant markets

According to the UOKiK decision, the abuse of a dominant position by DROP in the purchase markets of duck hatching eggs and goose hatching eggs took the form of, inter alia, counteracting the formation of the conditions necessary for the emergence or development of competition in the veterinary services market. Consequently, the case concerns various markets with different characteristics.

The Supreme Court believed that the veterinary services market was not directly related to the purchase markets of duck hatching eggs and goose hatching eggs seeing as none of these two markets involved goods used in the same manufacturing cycle (raw materials – semi-finished goods – finished goods). The Court did not identify any ‘common denominators’ between them. Whether this reasoning is correct or not, the decision of the UOKiK President had a serious defect – while the authority identified

6 See the judgment of SOKiK of 4 August 2008, XVII Ama 4/08, not reported.
7 See the judgments of SOKiK: of 3 March 2008, XVII Ama 43/07, not reported; of 13 June 2006, XVII Ama 59/05, not reported.
some anticompetitive effects in the veterinary services market, it failed at the same time to substantiate them properly. The UOKiK President should have performed a prior analysis of all relevant markets within the meaning of Article 4(8) of the Competition Act 2000 (currently Article 4(9) of the Competition Act 2007), considering both their product and geographic terms. Instead, the justification of the final decision did not consider the veterinary services market as a relevant market at all.

The UOKiK President failed also to define, for the purposes of this case, the geographic extent of the scrutinised veterinary services as national, regional or local (in particular, as a market with the same geographical scope as the purchase markets of duck hatching eggs and goose hatching eggs). Traditionally, the competition authority and courts used to show a willingness to define narrow product markets. By contrast, the related market was defined here very broadly (in product terms) including all veterinary services (not only those limited to prevention treatments) provided for all species (not limited to ducks and/or geese).

Thus, the Supreme Court expressed the opinion that ‘warding off’ suppliers of hatching eggs from veterinary prevention treatments performed by entities other than SSW could not have an appreciable effect on competition in such broadly defined market of veterinary services. It should be mention here that according to their agreements with DROP, its suppliers were indeed allowed to purchase veterinary services from SSW’s competitors, as long as they were not prevention treatments. At the same time, suppliers not bound by the scrutinised agreements were free to purchase all their veterinary services from the competitors of SWW.

To pursue this thought a little further, DROP operated in a competitive environment. It had a dominant market share but it did not hold a monopolistic position and so its suppliers could choose freely from among several purchasers of hatching eggs. However, it is impossible to properly analyse the competitiveness of this market due to the scarcity of the available data. The UOKiK President did not reveal the respective market shares of the relevant market participants in the published decision of 21 July 2005. Regardless, DROP’s suppliers were able to choose a purchaser that was not necessarily interested in forcing them to use the veterinary services of SSW.

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8 See e.g. decision RWR 28/2009 issued on 2 November 2009, or decision in the commented case.


Imposition of unfair trading terms

The second question that the Supreme Court had to address was whether DROP, which held a dominant position in the relevant markets, was imposing unfair trading conditions on its suppliers. The Court had to decide whether trading conditions regarding veterinary prevention treatments were unfair and whether they had been imposed on the suppliers of DROP.

It was noted in the concluding remarks of the commented judgment that the behaviour in question was not the practice referred to in Article 8(2)(1) of the Competition Act 2000. Even if the scrutinised contractual provisions could be seen as unfair, the Court did not believe that it was proven that they were imposed by DROP on its suppliers. The concept of ‘imposition’ means the elimination of another’s choice as the result of the market power of a dominant firm. To assess whether unfair trading terms had been indeed imposed, the UOKiK President should have considered whether a reasonable contractor would have enter into such an agreement (obliging it to only use SSW’s veterinary prevention treatments). In the opinion of the Supreme Court, the competition authority failed to prove that DROP’s suppliers were not involved in the decision making process in that regard or that they were unable to exercise their choice in the process of contract negotiations. The absence of contract negotiation may be an expression of the lack of choice available to contractors and, consequently, of the imposition of trading terms. It must be emphasised however, that the following behaviours do not appear to show the absence of choice:

- where a contractor does not make any attempt to negotiate trading terms,
- where a contractor forms irrational expectations concerning trading terms,
- where a contractor does not answer a dominant firm’s proposal to put forth a draft contract and a dominant firm prepares its own draft.

The Supreme Court’s analysis of Article 8(2)(1) of the Competition Act 2000 posed also an important additional question. Under this provision, the abuse of a dominant position may consist, in particular, of the direct or indirect imposition of unfair prices, including exorbitant prices or excessively low prices, far-off payment dates or other trading conditions. The lower instance courts concluded that a mere imposition of trading conditions other than unfair prices might be sufficient to constitute an infringement of Article 8(2)(1) of the Competition Act 2000. Thus, the imposition by a dominant firm of not just unfair trading conditions but in fact any trading conditions at all was deemed to be contrary to Article 8(2)(1). The Supreme Court did not refer directly to the approach taken by the lower instance courts but even so, two types of objections should be raised in this respect.

Considering the wording of Article 2(1) of the Competition Act 2000, it is certainly true that the adjective ‘unfair’ is placed directly in front of the noun ‘prices’. However, the imposition of unfair trading terms should be raised in this respect.

11 See the judgment of the Court of Appeals in Warsaw of 6 September 2006, VI Ca 196/06, not reported.
12 See the judgment of the Antimonopoly Court of 6 November 2000, XVII Ama 3/00, (2002) 6 Wokanda 51.
it is not necessary to repeat it in the later part of the sentence to extend its applicability to the term ‘other trading conditions’. A differentiation of classes of trading conditions referred to in Article 8(2)(1) would not be justified in light of the objectives of competition law nor in the context of the jurisprudential construction of the notion of an abuse of a dominant position. In principle, an imposition of fair trading conditions on a contracting party is not an abuse of a dominant position. It makes no sense to apply here an out-of-context literal interpretation of Article 8(2)(1) and by doing so, to limit the application of the adjective ‘unfair’ to price considerations only.

Secondly, the wording of the Polish provision is closely modelled, even though not identical, on Article 102(a) of the Treaty on the Functioning of the European Union. According to this rule, an abuse of a dominant position may consist, in particular, of ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’. The European legislature was ‘industrious’ in this respect and attached the adjective ‘unfair’ to both prices as well as other trading conditions. Notwithstanding the fact that European competition law was not applicable to the market practices of DROP, it is clear that Polish courts use it as guidance when determining domestic cases.

**Unfairness of trading terms**

The UOKiK President regarded the contractual terms in question as unfair, that is, breaking binding or conventional norms. However, in the opinion of the Supreme Court, both legal and economic criteria must be used to assess unfairness. One has to look at the entirety of the circumstances in which an agreement was concluded. An unfair term is, without a doubt, the imposition of behaviour contrary to the law, a problem that has not arisen in this case.

The UOKiK President compared the agreements between DROP and its suppliers to contracts concluded between other entities of the same trade. Seeing as similar provisions were not found in other contracts, the competition authority concluded that DROP’s terms had been unfair. The Supreme Court could not agree with this reasoning and contradicted it by the following considerations. A contractual term is not unfair simply because it is not applied in the relevant market or in trading relations of a given sort.

On the other hand, an unfair term is one shifting costs from a dominant firm to its contractors. Contrary to the conclusions of the UOKiK President, this did not occur

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13 See also K. Kohutek, ‘Zarzut nadużywia pozycji…’, p. 107-108.

14 In its judgments of 6 December 2007, III SK 16/07, (2009) 1-2 OSNP 31, and of 9 August 2006, III SK 6/06, (2008) 1-2 OSNP 25, the Supreme Court dealt with the relationship between the European and Polish competition laws. The court, invoking also the Regulation 1/2003, has explained that where the current Articles 101 and 102 of the Treaty on the Functioning of the European Union are inapplicable in a given case (e.g. because of a lack of impact on the trade between the Member States), the Polish courts should obviously apply the national law. However, in such situations the European competition rules may be a ‘source of intellectual inspiration’.
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in this case. It seems necessary to warn those who might be apt to forget here that the costs of veterinary prevention treatments are customarily borne by the suppliers of hatching eggs (as owners of ducks and geese which ‘produce’ those eggs) and not by their purchasers.

An unfair term is also one that increases the costs of running a business by a contractor, one that prevents contractors from decreasing their costs or an imposed term that is not exacted by a dominant firm from itself nor from its associates15. However, a simple limitation of a contractor’s freedom to act is not sufficient to prove ‘unfairness’ – the actual or potential impact on competition in that market must be identified at the same time. Not only did the UOKiK President fail to identify such impact in this case, the authority did not even prove that the obligation to only use SSW treatments has in fact increased the supplier’s operating costs.

Final remarks

The DROP case concerned a number of complex legal issues relating to some of the market practices prohibited by the current Article 9(2)(5) and (1) of the Competition Act 2007. The judgment of the Supreme Court addressed several important legal questions on relevant market foreclosure as well as on the imposition of unfair trading terms. It is also likely to provide useful guidance for entrepreneurs on some important commercial issues that are only rarely subject to juridical scrutiny.

In conclusion, the Supreme Court ruled that the abuse charges concerning DROP had not been sufficiently substantiated by the UOKiK President. The decision failed to show that DROP had any economic interest in the foreclosure of the related market for veterinary services nor was it proven that it had actually imposed the said trading terms on its suppliers. The Supreme Court was right to state that a contractual term is not unfair simply because it is not applied in the relevant market or in trading relations of a given sort. The Court stated also that the imposition of trading terms which were not unfair did not infringe the current Article 9(2)(1) of the Competition Act 2007. Taking any other approach would not be consistent with the objectives of competition law and the jurisprudential construction of the notion of an abuse of a dominant position. It might have been worth considering whether the scrutinised conduct could not have been treated as an abuse of DROP’s dominance by virtue of tying16 but this objection is more formal than substantial because the UOKiK President did not introduce the prohibition of tying into the legal basis of its decision.

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15 See the judgment of SOKiK of 18 December 2007, XVII Ama 11/07, not reported.
16 Tying is generally regarded as a separate form bundling; see J. P. Choi, Antitrust Analysis of Tying Arrangements [in:] J. P. Choi (ed.), Recent developments in antitrust: theory and evidence, Cambridge (Massachusetts) 2007, p. 61.
Wide scope of administrative discretion justified by features of telecommunications market.

Case comment to the judgment of the Polish Supreme Court of 2 April 2009 – Telekomunikacja Polska SA v the President of the Electronic Communications Office
(Ref. No. III SK 28/08)

Facts

On 2 April 2009, the Polish Supreme Court (hereafter, Supreme Court or Court) delivered a judgment on the scope of power of the President of the Electronic Communications Office (hereafter, UKE) to impose obligations upon telecommunications operators in respect to particular markets under the Polish Telecommunications Law of 16 July 2004 (hereafter, TL)\(^1\), and Directive 2002/21/EC (hereafter, Framework Directive)\(^2\). The Supreme Court rejected all claims of the plaintiff, Telekomunikacja Polska SA (hereafter, TP SA), against the UKE President decision (hereafter, Decision). In her Decision the UKE President stated that no effective competition exists on the national market for call origination services in the fixed line public telephone network. Hence, the plaintiff was defined as an undertaking having significant market power (SMP) on the national market for provision of call origination services on a fixed line public telephone network. Consequently, the UKE President imposed several regulatory duties upon the plaintiff such as:

1. Obligation to accept justified applications by other telecom undertakings to provide them telecommunications access, including the use of network elements and associated facilities aimed at access and call origination provision on a fixed line public telephone network by:
   a) ensuring the possibility of service management for end-users by entitled telecoms undertakings service provision on their behalf;
   b) ensuring specific elements of telecommunications networks, including lines and connections;

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Wide scope of administrative discretion justified by features of telecommunications...

c) offering of services on a wholesale basis for their resale by another undertaking;
d) granting access to interfaces, protocols or other key technologies necessary for network inter-operability, including virtual networks;
e) ensuring telecommunications infrastructure, collocation and other forms of common usage of buildings;
f) ensuring the functioning of networks necessary for full service inter-operability, including service provision in intelligence networks;
g) ensuring systems that support operational activity or other software systems indispensable for effective competition, including price lists, billing systems and debt collection;
h) ensuring network connections, telecom appliances and associated facilities;
i) conducted negotiations on telecommunication access in good faith and maintaining previously established access to specific telecom networks, appliances and associated facilities, as well as through every other form of assured usage of telecom appliances and associated facilities provided in the form of minutes or capacity for the provision of access and call origination service on a fixed line public telephone network (Article 34 TL).

2. Obligation to treat telecom undertakings equally in respect to telecommunications access for the provision of access and call origination on a fixed line public telephone network, in particular, by offering equal conditions in comparable situations as well as by offering services and disclosing information on conditions not worse than those applied within its own enterprise or in relations with dependent entities (Article 36 of TL).

3. Obligation to publish information on telecommunications access and information on technical networks and appliance specifications, network features, terms and conditions of service provision and usage of a network and fees (Article 37 of TL).

4. Obligation to conduct regulatory accounting in a manner allowing identification of internal transfers linked to telecommunications access activity (Article 49–54 of TL).

5. Obligation to calculate the justified cost of telecommunications access according to a method of future orientated long-term incremental costs that accords with a description of cost calculation accepted by the UKE President; application of telecommunications fees that account for recovery of justified operator costs (Article 39 TL).

6. Obligation to set access fees on the basis of costs incurred until posting of the cost calculation together with an auditor's opinion on the accuracy of such calculation (Article 40 TL).

7. Obligation to prepare and present a framework offer on access that meets all obligations set forth in Annex no. 1 to the Decision within three months from the Decision date. The number and location of access spots must consider justified applications of all telecom operators who wish to connect to the plaintiff’s
network. The plaintiff shall propose at least existing spots of inter-network connections (Article 42 TL).

In its claim, TP SA submitted various infringements such as: abuse of powers by the UKE President who failed to respect requirements of proportionality and adequacy of obligation imposed upon an identified aim (Article 25(4) TL). Secondly, according to the plaintiff, the imposition of a regulatory obligation aimed at solving competition problems on the retail market was not legally grounded since the powers vested in the UKE President only apply toward the wholesale market. Thirdly, TP SA submitted that the UKE President infringed art. 40 TL by imposing different methods than the comparative method indicated in Article 40(3) TL.

Another TP SA claim concerned infringement by the UKE President of art. 42(4) TL in connection with § 3 of the regulation on the framework offer through his erroneous application of these provisions such that the scope of the framework offer does not correspond to requirements set forth in the Regulation. TP SA additionally claimed that the UKE President wrongly applied Article 22(1) and Article 21(1) TL in connection with Article 7 of the Constitution and Article 6 and 9 of the Administrative Procedure Code, as well as violated powers vested in him by the Minister of Communication. Finally, the claimant submitted that the District Court – the Competition and Consumer Protection Court infringed Article 47957(1) of the Civil Procedure Code by not overruling the decision on grounds of procedural invalidities.

Key legal problems of the case

As to the obligation of proportionality and adequacy

The first issue raised by TP SA in respect to the decision was abuse of power by the UKE President in not respecting requirements of proportionality and adequacy of an obligation imposed toward an identified aim (Article 25(4) TL). The Supreme Court recalled the origin of this provision, art. 8 of the Framework Directive. The judges found that the obligation of adequacy means that a regulatory instrument applied by a regulator by imposing specific obligations should be used to overcome or minimise existing barriers to competition on a particular market, whereas the condition of proportionality means selecting from among efficient means that could achieve a regulatory aim. This should signify minimum interference in the manner that business is conducted as well the commercial interests of an undertaking.

The Supreme Court found that in order to meet requirements of proportionality, a decision to impose a regulatory obligation must be as precise as toward the imposed obligation itself. Yet, the obligation as formulated in the decision of ‘assuring every other form of use of telecom appliances and associated facilities...’ is prima facie overly general since it cannot be interpreted broadly and independently from other obligations imposed on the plaintiff. The aim of this obligation is to avoid a situation in which the plaintiff blocks alternative telecommunication access to operators by refusing to provide them ancillary services.
Imposition of regulatory obligations on the retail market

Another issue raised by the plaintiff concerned the imposition of a regulatory obligation aimed at solving problems concerning competition on the retail market. The reasoning presented by the judges states that the retail market remains directly linked to the wholesale market because the possibility of action on the latter is conditioned by suppression of specific competition barriers on the retail market, whereas the plaintiff’s market position on the wholesale market is directly linked to his domination of the retail one. Therefore, regulation of the wholesale market should result in the development of competition on the retail market.

Costs calculation

Pursuant to the Article 40(1) TL, the UKE President can impose an obligation upon an operator with a significant market share to set access fees on the basis of incurred costs. According to para. 3 of this disposition, this should consider fee levels on comparable competitive markets. The plaintiff alleged that the UKE President cannot verify the fee for telecommunications access determined on the basis of methods other than the comparative method, as specified in Article 40(3) TL. Although the Court shared this argument, it found that the fact that the UKE President indicated the calculation method erroneously in the justification to the Decision does not mean that Article 40 TL was infringed. According to the Court, only after presenting the operator a fee together with its justification can the UKE President verify its accuracy through separate administrative proceedings. This would result in a decision issued on the basis of Article 40(4) TL. Only in such proceedings can the argument of erroneous method applied toward fee calculation be submitted.

The scope of a framework offer

TP SA also claimed that the UKE President erroneously applied the Regulation concerning a framework offer, because of the procedures of clearance for provision or non-provision of all services (not only as specified in the Regulation of telecommunication ones). The Court found that arrangement of an offer must be treated as specification of its scope provided that it falls within the scope indicated by the Regulation. The Court pointed out that the Regulation is very general, but differentiates separate elements of a framework offer.

Infringement of authority

According to the plaintiff, the UKE President violated exclusive authority of the Minister of Communication (hereafter, Minister) by dealing with specifications of the product side of the market in question. The Court disagreed with this argument by upholding the Appeals Court’s view that the Minister indicated relevant markets
under the Regulation, thus setting out the scope within which the UKE President can describe products and services included in a particular relevant market by checking the substitutability of demand and supply after a due analysis.

**Infringement of procedural rules**

The plaintiff submitted that the District Court – the Competition and Consumer Protection Court infringed Article 479\(^5\)7(1) of the Civil Procedure Code by not overruling the decision. However, the Court found that no substantial basis for such a decision arose.

**Significance of the judgment**

The Decision was one of the first issued following the nomination of Ms. Anna Streżyńska as UKE President, thus marking a significant change of approach in regulator policy. It must be evaluated in light of the new UKE President’s policy intended to break absolute dominance of the incumbent on the Polish telecoms market as well as boost competition in a relatively short term. Hence, the policy of defining the incumbent as the SMP on practically every market where possible as well as issuing framework offers on numerous services such as data (bit stream access), voice (LLU, WLR).

At the same time as the decision was issued the Regulator also delivered a decision granting the first alternative operator (Tele2 Poland) wholesale line rental (WLR). Although WLR was defined as one the obligations imposed in the decision, particular WLR decisions issued for each of the numerous alternative operators (up to eleven now) had different legal basis (transitional obligations).

A detailed analysis of the decision demonstrates that its scope is quite broad as well as vague. A first impression may be that it is incorrect, since, as TP SA claimed, legal obligations should be precise and detailed while taking into account the proportionality principle. Still, the Court’s solution claiming that the Regulator may draft a decision in general terms while leaving technical implementation to concerned parties must be appreciated positively in my opinion. The telecoms industry is complex and one year is an age due to technical and economical progress. Yet, since the Regulator has been given very strong and powerful tools, as the Court emphasised, it must use them within the scope of legal powers conferred upon it and according to the proportionality principle.

The later aspect of the Decision must also be welcomed since it provides precision as to its interpretation in light of the aim of imposed obligations. There is always a plethora of detail and issues that must be settled whenever operators connect their networks in one way or another. A Regulator is practically unable to foresee and describe them all in detail in his decision and it must be welcomed that the Court noticed this fact. However, WLR is only the first rung on the investment ladder. Its aim is to give alternative operators some market strength so that they can invest in their own infrastructure in order to offer more complex services (ultimately LLU).
is crucial that the Regulator sets the right prices for services – the gap between WLR on the one side and LLU on the other should be left broad enough in order to push alternative operators to build their own infrastructure.

Unfortunately, this was not the case in Poland. The Regulator used different methods in setting prices of services (retail minus in case of WLR, bottom-up in case of BSA, benchmark in case of LLU) which resulted in certain inconsistencies. LLU did not work in practice in Poland until 2009. Therefore, the question remains whether the Court was right in approving the fact that the Regulator in practice granted himself broad discretion in choosing the method of defining prices of fixed call origination.

Nevertheless, for the first time, alternative operators were given a real tool for their retail offers that are similar to the incumbent (including unlimited call plans, due to PSI, also an obligation imposed in the decision). The market shares of other operators such as Netia SA and Telefonia Dialog SA is slowly growing\(^3\) although the competitive situation in the fixed market remained generally unchanged (the incumbent’s market share kept essentially stable at 66.6\% in terms of revenue in December 2008) which represented a decline of one percentage point\(^4\). It was no surprise that the approach of the new Regulator was not welcomed by the incumbent. Virtually all decisions delivered by the UKE President have been questioned by TP SA and at a certain point in time there were many court proceedings between the UKE President and the claimant. This only ceased at the end of 2009 when the Charter of Equivalence\(^5\) (an agreement between the Regulator, TP SA and alternative operators) was signed. This was a consequence of the threat of imposed functional separation upon TP SA. Due to the time necessary to conduct court proceedings, judicial appreciation of TP SA arguments in these decisions are delivered recently\(^6\).

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\(^5\) Among others, as part of the agreement, the incumbent committed to withdraw appeals relating to WLR decisions, resulting in such decisions becoming binding.

\(^6\) This issue was included in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Progress Report on the single European electronic communications market 2008 (14TH Report) /COM/2009/0140 final / where it was pointed out in respect to Poland that ‘systematic appeals and lengthy procedures continue to undermine legal certainty and effective implementation of the framework (…)’.
Does an undertaking’s reputation affect its market power on the relevant market?

Case comment to the judgment of the Supreme Court of 2 April 2009 – PPKS
(Ref. No. III SK 30/08)

Facts

In a decision (RDG 46/2005) issued on 30 December 2005, the President of the Office of Competition and Consumer Protection (UOKiK) established an infringement of Article 8(2)(1) of the Act of 15 December 2000 on Competition and Consumer Protection\(^1\) by the state-owned Motor Transportation Enterprise (PPKS) in Slupsk\(^2\). According to this rule, an abuse of a dominant position may consist of a direct or indirect imposition of unfair prices, including predatory or glaringly low prices, delayed payment terms or other trading conditions. In the discussed case, the practice involved the indirect imposition of unfair travel fares by way of a ‘major fare reductions’ scheme as of November 2004 in order to eliminate a given Competitor. According to UOKiK, PPKS abused its dominating position as a commuter bus line operator with bookings based on one-off and monthly tickets. The relevant market was specified as the bus commuter route between the ‘S’ and ‘G’ municipalities.

The decision stated that PPKS abused its dominant position on the relevant market in order to impose ‘unfair’ prices on the competitor. The UOKiK President fined PPKS and decided that the challenged practice had ceased as of 1 July 2005. According to the UOKiK President, the ‘unfairness’ of the prices consisted of their ‘gross understatement’. The fares were imposed indirectly, as a result of the following sequence of events: 1) in October 2004, the said Competitor was licensed to provide commuter services between the two municipalities ‘S’ and ‘G’ (the relevant market); 2) the Competitor charged ‘promotional’ fares lower than those charged by PPKS; 3) PPKS introduced a new timetable with 34 new services and intended to continue reducing its fares in spite of increasing fuel prices and the financial problems it was experiencing at that time; 4) the Competitor reduced its activity on the relevant market.

\(^1\) Journal of Laws 2005 No. 244, item 2080, as amended.
\(^2\) The same forms of abuse are currently listed in Article 9 of the new Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws 2007 No. 50, item 331, as amended).
PPKS appealed the decision to the Court of Protection of Competition and Consumers (SOKiK). The operator argued that commissioning additional commuter lines was meant to provide regular, inexpensive, fast, easily accessible and cost-effective public service. PPKS claimed that the promotional fares were intentionally introduced for the autumn-spring seasons that are particularly inconvenient to local communities. The continuation of the promotion to cover the summer of 2005 was targeted at the great number of tourists visiting the area of PPKS’s operations. The fares were ‘within the tariff limits’, not substantially different from those charged by others. PPKS stated that its tariffs were never of a dumping nature. Notwithstanding the arguments of PPKS, SOKiK dismissed the appeal. The operator appealed SOKiK’s ruling to the Court of Appeals resulting however in another dismissal. PPKS petitioned finally the Supreme Court for the reversal of the initial UOKiK decision but the submission was also dismissed.

**Key legal problems of the case**

**Recognizing the market position of the undertaking as a dominant position**

UOKiK’s first charge was based on the alleged breach of section 4(9) of the Competition Act 2000 (currently Article 4(10) of Competition Act 2007). According to the UOKiK President, PPKS abused its dominant position by indirectly imposing ‘inconvenient’ fares. According to Polish competition law, a ‘dominant position’ means a position which allows an undertaking to prevent effective competition within a relevant market thus enabling it to act to a significant degree independently of its competitors, contracting parties and consumers. An at least 40% market share is presumed to provide such position. Still, the addition of this legal presumption (iuris tantum)\(^3\) to the definition of dominance is being challenged by doctrine\(^4\). Issuing an injunction order against an abuse depends on the establishment of a dominance position. Thus, a unilateral behaviour of an undertaking can be recognized as a banned practice only when it is proven that the company holds a dominating position\(^5\).

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PPKS operates more than 100 bus lines including 3 that partly overlap with the routes of the Competitor. According to the Supreme Court, the realization of PPKS’s dominance of the relevant market is crucial for the resolution of the dispute. The fares charged by PPKS on the scrutinized lines before the market entry of the Competitor were much higher than those set in the aforementioned promotion. As a consequence, the Competitor was compelled to reduce its offer provided on the relevant market because its services would become unprofitable if it was to compete with the lower fares ‘imposed’ by PPKS.

PPKS claimed in its petition to the Supreme Court that it did not hold a dominating position on the local market. It stated that dominance cannot be established based on its over 40% share in the local market consisting of a number of bus routes not served by its competitors. Moreover, although PPKS had indeed a significant market share, its position could not be described as dominant because it did not control the issuing of transport licenses and thus anybody could enter the market. In addition, PPKS claimed the weight of the market share criterion for the establishment of its dominance should be reduced as the population of the relevant market favoured PPKS for its reputation owed to more than 50 years of service provision.

The Supreme Court challenged PPKS stating that its ‘reputation’ arguments reaffirm rather than defeat the statutory presumption of dominance. The ruling is correct in its finding that the popularity of the state-owned carrier, as highlighted in the petition, is unlikely to diminish PPKS’s influence on the market. That is true even more so considering that PPKS unquestionably holds a major share of the market. Moreover, according to the Supreme Court, the fact that the issuing of transport licenses is beyond PPKS’s control or that any business can enter the market, does not undermine the findings of the UOKiK President. PPKS admitted that because of its economic strength, it can operate without any control from its business partners or consumers for a prolonged period of time.

The Supreme Court stressed therefore that the statutory presumption of dominance did indeed apply to PPKS. However, the presumption is challengeable and so PPKS could overturn it by proving that its dominance was in fact ‘nominal’ rather than ‘actual’. In this case however, the ability to affect the market was a manifestation of dominance. This finding re-affirms existing jurisprudence and the ‘patrimony of the doctrine’. As pointed out by T. Skoczny, the burden of overturning the presumption of dominance of a company holding a market share above 40% lies with the entity itself, rather than the authorities. Since the presumption is based on market shares (quantitative measure), such proof must be based on other quantitative measures of market power⁶. Finally, the Supreme Court shared the view of the UOKiK President that PPKS responded to the market entry of the Competitor with an aggressive pricing policy. Aware that the Competitor could not follow its fare reductions, PPKS challenged it with its grossly understated fares at the expense of its assets.

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Protection of public interest

PPKS claimed that the pursuit of this case was not in the public interest because, first, the fare reduction was temporary and second, PPKS added services at more convenient times. The argument that PPKS acted to the benefit of commuters did not convince the Supreme Court which rightly recognized it as biased. According to the Court, protecting the public interest – so important for the interpretation of antitrust law – involves the protection of not only consumers but also business organizations. The benefit from the temporary fare reduction and additional services was apparent but their ultimate result was the elimination of competitive bus services. This stance of the Supreme Court should be regarded as fully correct. With respect to restrictive practices, competition law states that there is no point in protecting the public against practices that have no significant effect on competition. According to Article 1(1) Competition Act 2000 (even Competition Act 2007), the Act determines the conditions for the development and protection of competition as well as the rules on the protection of interests of undertakings and consumers, undertaken in the public interest.

The deliberated judgment re-affirms the increasing number of court rulings that associate the notion of public interest with the suppression of competition or with the causing of (potentially or actually) adverse effects on the market. According to the judgment of the Supreme Court of 5 June 2008, every market practice aimed at the mechanism of competition is harming the public as defined in Article 1 of the Competition Act 2000. For the above reasons, the mechanism of competition should be understood as the controlling mechanism of market behaviours. This approach is correct in assuming that public interest can be harmed if the challenged practice affects, and disrupts, the very phenomenon of competition. That is so even if the negative effect is a consequence of the activities aimed at a single competitor or their small number.

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Shall selective, above-cost price cutting in the newspaper market be qualified as anticompetitive exclusion?
Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska (Ref. No. III SK 5/09)

Facts

The selective, limited to the territory of the Silesia province only, application by Marquard Media Polska of very low retail prices for its sports newspaper entitled ‘Przegląd Sportowy’ (1 zloty) was found as anticompetitive by the President of the Polish Office of Competition and Consumer Protection (hereafter, UOKiK) in a decision of 2 June 2006 (RKT-35/2006). Such conduct constituted in the opinion of UOKiK an abuse of a dominant position in the form of: the imposition of unfair prices, counteracting the creation of conditions necessary for the emergence or development of competition and market sharing (Article 8(2)(1) and (5) and (7) of the Act of 15 December 2000 on Competition and Consumer Protection2); the same forms of abuses are listed under the current Act of 16 July 2007 on Competition and Consumer Protection3. Marquard Media was ordered to refrain from the said practice and was fined a total of 1 972 600 zloty (approx. 500 000 euro).

Marquard Media (plaintiff) appealed the UOKiK decision to the Court of Competition and Consumer Protection (SOKiK) but the decision was upheld. The plaintiff appealed the first instance judgment to the Court of Appeals in Warsaw; the appeal was dismissed. As a result, Marquard Media submitted a cassation request to the Supreme Court which accepted it, even though not all of its objections were considered justified. The Supreme Court ultimately quashed the ruling of the Court of Appeals and remanded the case for re-examination. The judgement was annulled because of infringements of both substantial (erroneous definition of the relevant market) and procedural (incorrect formulation of the conclusion of the UOKiK President’s decision) provisions.

1 In other regions the prices of that newspaper as much higher reaching 1,80-2,20 zloty.
2 Journal of Laws 2005 No. 244, item 2080.
3 Journal of Laws 2007 No. 50, item 337; see Article 9(2)(5) and (7) of the Competition Act.
Key legal problems of the case and key findings of the Supreme Court

Above-cost price cutting

Among the main objections raised by UOKiK against the conduct of Marquard Media was the selective use of glaringly low prices of ‘Przegląd Sportowy’ in a single Polish geographic region. The Supreme Court found those prices to be ‘unfair’ even though they were above-costs. However, according to EU jurisprudence, prices can be treated as unfair (see Article 102a TFEU) and thus predatory, when they are below costs. Similar statements can be found in recent Polish jurisprudence and decisions of the UOKiK President.

Public intervention in above-cost price cutting has its justification solely under very specific market circumstances that have not occurred in this case. The rules of competition law should be constructed and interpreted so as to realize its ultimate goal – enhancing consumer welfare. Consumer welfare is usually safeguarded when the most efficient firms are operating on the market. The imposition of public restrictions on such undertakings, limiting their ability to fully benefit from their efficiencies, may be thus in conflict with the proper realization of the consumer welfare objective. Speaking for the rule of principled legality of above-cost price cutting are also other reasons such as the prevention of ‘cherry-picking’

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5 See e.g. judgment of the Supreme Court of 18 February 2010, III SK 28/09 (not yet reported) where it was stated, that unless the price reduction is not below costs, it does not restrict competition.

6 See e.g. decision of the UOKiK President of 26 August 2009 (RBG-411-10/06/BD) where it was pointed out that ‘under the Competition Act, it is in principle permissible to reduce the price of the product or services as an element of the ‘competitive fight’ unless such price is below costs’.

by business rivals\textsuperscript{8} or the lack of necessity to regulate prices by the competition authority\textsuperscript{9}.

Having considered the aforementioned arguments, it should be postulated that all legal solutions (including juridical ones) that depart from that principled legality rule should be thoroughly examined and should appropriately substantiate their own correctness in the given circumstances, explaining why such solution has no (or very little) risk of false positives that result in other negative consequences of over-deterrence. Serious objections can be expressed therefore with respect to the very brief and somewhat casual (accepted by that Court without any further justification) statement issued in this case by the Supreme Court stating that the scrutinized price was unfair (and thus illegal) even though it was set above the cost level. While it is true that the Supreme Court did not establish a violation of Article 9(2)(1) of the Competition Act by Marquard Media, its came to that conclusion for reasons different to the treatment of above-cost prices as unfair – the lack of an infringement was ultimately based on the non-fulfilment of the ‘imposition condition’. In this respect, the Supreme Court rightly assumed that the unfair price (glaringly low) cannot be ‘imposed’ on the competitor, operating on the same market level that the dominant firm: horizontal relation – by reducing the prices by the latter\textsuperscript{10} (competitor – at least formally – is still free to fix the prices of his products).

**Selective nature of price cutting**

The selective nature of the price cut was seen by the Supreme Court as the main argument speaking for the qualification of the conduct of Marquard Media as an abuse of its dominant position. The Court saw it as an illegal price discrimination tactic that led to market sharing (Article 9(2)(7) of the Competition Act\textsuperscript{11}). At the beginning of its argumentation, the Supreme Court correctly noted that price differentiation \textit{per se} does not in itself constitute an anticompetitive practice, even when undertaken by a dominant company. Such conduct may be economically justified for instance due to cost variations (e.g. different publishing or transport costs). In its further exposition, the Court came to a controversial conclusion stating that: ‘price differentiation based on the wealth level of users raises objections because it constitutes a form of price discrimination (buyers of the same product pay different prices depending on the place of purchase)’. This is a questionable stance, in particular from an economic point of

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\textsuperscript{8} Entering by the dominant firm’s competitors solely those markets (or solely the selected segments of those markets) where that firm applies highest prices. Such practices are aimed at compensating high fixed-costs of the given activity on the whole market or on all other markets where the dominant firm is operating.

\textsuperscript{9} Fixing the permissible ‘price floor’ which is binding on the dominant undertaking; see E. Elhauge, ‘Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power’ (2003) 112(4) \textit{Yale Law Journal} 688.


\textsuperscript{11} Pursuant to this provision, abuse may also consist of ‘market sharing according to territorial, product, or entity-related criteria’.
Shall selective, above-cost price cutting in the newspaper market be qualified as...

view. In business relations, especially in sectors characterized by great disparity between fixed and variable costs (such as newspaper markets\(^{12}\)), undertakings frequently attempt to reduce (‘cover’) their high fixed costs by striving to maximize their efficiency and thus profitability\(^{13}\). This is often achieved by price differentiation of the same or substitutive products based on variations in the level of demand for given goods or services in a certain geographic region or, indeed, from a certain category of users (consumers)\(^{14}\). Therefore, the scrutinized practice makes economic sense\(^{15}\) whether or not rivals are foreclosed from the market\(^{16}\). Prohibiting selective price-cuts, also when undertaken by a dominant firm (as its ‘response to competition’), though beneficial for its competitors is usually ambivalent to the economic interests of consumers\(^{17}\).

**Evaluation of an anticompetitive intent**

The Supreme Court discerned an anticompetitive intent of Marquard Media’s pricing policy on the basis of, in particular, the fact that the price differentiation took place in the region where the plaintiff was meeting especially strong competition from its business rival (‘Sport’), to which that region was of particular importance. The Court emphasized in particular that the price differentiation occurred not immediately after the competing ‘Sport’ newspaper became ‘independent’\(^ {18}\), but instead in the

\(^{12}\) Cost of producing and selling of another copy of a newspaper is relatively low in comparison with high fixed costs characteristic for press markets (editorial and author’s costs, printing, distribution etc.). The plaintiff argued also that differentiating newspaper prices is a common practice in the press industry resulting from factors such as: reading inclinations and the wealth level of actual or potential readers. Those arguments have not been taken into account by the Supreme Court.

\(^{13}\) See E. Elhauge, ‘Why Above-Cost Price Cuts ...’, p. 687.


\(^{16}\) It is worth noting, that the plaintiff submitted data indicating that the application of price reductions of ‘Przegląd Sportowy’ increased the number of its readers, having simultaneously little effect on the sales of the competing ‘Sport’. Assuming the correctness of this data, it seems rather obvious that consumers benefited from the price cuts.


\(^{18}\) It occurred by terminating the licence agreement to publish ‘Sport’. Such agreement was concluded by Marquard Media with its competitor (Katowickie Towarzystwo Kapitalowe SPORT Sp. z o.o.) on 31 August 2000.
period generally most significant for the publishers of sporting news, that is, before the beginning of the new football season.

Considering the aforementioned circumstances, Marquard Media seems to have taken appropriate business measures that constituted a rather ‘normal market reaction’ to the emergence of a new rival or a situation where an already existing competitor makes its own products more attractive. Even a dominant undertaking is entitled to improve the attractiveness of its own products also by way of a price cut (in particular when they are above costs) – such practices reflect the very essence of desirable market rivalry. Indeed, recent jurisprudence of the Supreme Court\(^\text{19}\) recognizes the use of the ‘meeting competition defence’ by dominant firms. Moreover, the circumstances of the case at hand indicated that Marquard Media applied its price cuts not directly after the emergence of a competitor\(^\text{20}\) but approximately 5 months later\(^\text{21}\). That fact seems also relevant to the evaluation of that plaintiff’s intent.

When is an antitrust intervention into selective, above-cost price cutting justified?

Antitrust interventions into above-cost price cuts may find its support under the consumer-welfare standard although only in exceptional circumstances conditioned upon specific market features such as: the existence of network effects\(^\text{22}\), very high sunk costs of market entry, the incumbent benefiting from extensive experience in the industry and in particular, thanks to the so-called ‘learning-by-doing’ effects\(^\text{23}\). None of these features occurred in the scrutinized case. First of all, press markets do not suffer from network effects – the value of a given newspaper to a consumer (which influences her/his purchasing decision) is not dependant on the overall number of its readers\(^\text{24}\). Second, the plaintiff’s competitor has been operating on the same market for a long time\(^\text{25}\) (both

\(^{19}\) See the judgment of the Supreme Court of 18 February 2010, III SK 28/09 (not yet reported) where it was emphasized that an undertaking: ‘even if possessing a dominant position, is entitled to make its offer more attractive to its actual or potential customers or to adjust it to changed situation on the market’.

\(^{20}\) On 11 March 2005, the date of the termination of the license agreement, the plaintiff’s competitor began to publish ‘Sport’ by himself.

\(^{21}\) The price of ‘Przegląd Sportowy’ was reduced before the beginning of the football season (usually in the second half of August).

\(^{22}\) See e.g. G.J. Werden, ‘Network Effects and Conditions of Entry: Lessons from the Microsoft Case’ (2001) 69(4) Antitrust Law Journal 87. The Commission sets out an exception from the principle according to which Article 102 TFUE shall be applied to protect solely as efficient competitors as the dominant undertaking (see points 23 and 27 of Guidance). The application of that exception shall be limited in particular to markets characterised by network or learning effects (point 24 of Guidance).


\(^{24}\) The consumer’s purchasing decision is usually influenced by such factors as: the content of given newspaper, its price, its form and publishing frequency.

\(^{25}\) The newspaper ‘Sport’ was issued since 1945; pursuant to the license agreement, the plaintiff acquired the exclusive right to issue that paper and to its trade mark while Katowickie
Shall selective, above-cost price cutting in the newspaper market be qualified as...

‘Przegląd Sportowy’ and ‘Sport’ were issued in parallel for dozens of years); therefore the competitor was not exposed to high entry costs (sunk costs). Third, considering the start date of the price cut, it is doubtful whether it can be qualified as ‘reactive’/‘defensive’. The prices of ‘Przegląd Sportowy’ were reduced some months after ‘Sport’ became ‘independent’. This fact points to a more ‘offensive’ nature of the scrutinized conduct, which is usually indicative of a desirable increase of competitive pressure rather than of anticompetitive practices.

Final remarks

The pricing conduct of Marquard Media and the circumstances of the case at hand have not justified the application of an exception from ‘as efficient competitor standard’ and extending antitrust protection to a less efficient rival of that undertaking. Despite the fact that the conclusion of the judgment was favorable to the plaintiff, the Supreme Court’s statements concerning the antitrust evaluation of its conduct remains controversial. It is worth noting that the Supreme Court further developed in this case a general approach to exclusionary conduct under the Polish Competition Act. That jurisprudence may however also raise some substantial objections.

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Towarzystwo Kapitałowe SPORT Sp. z o.o (the competitor of Marquard Media) was still vested in the totality of its publishing rights and obligations. In such circumstances, it is unjustified to claim that the former company should be treated as a ‘new’ rival without proper ‘experience in the industry’.

26 The Supreme Court, stressing the fact that the prices of ‘Przegląd Sportowy’ were cut in a pivotal period to sport season, found that fact as indicating an anticompetitive intent of the plaintiff. Such position is debatable. The period of increased interest of the sport press and thus increased demand for such papers, is beneficial for each undertaking operating in that market. Therefore each of them, being aware of that fact, has an equal opportunity to properly prepare itself (in particular by making its offer more attractive to its readers) before that period comes.

27 See also A.S. Edlin, ‘Stopping Above-cost...’, p. 951, 952.

28 See K. Kohutek, ‘Impact of the new approach to Article 102 TFEU on the enforcement of the Polish prohibition of dominant position abuse’ (2010) 3(3) YARS strona do wstawienia na końcu prac

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The control of Polish courts over the infringements of procedural rules by the national competition authority.

Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska
(Ref. No. III SK 5/09)

Facts

The President of the Office of Competition and Consumers Protection (hereafter, UOKiK) issued a decision on 2 June 2006 (RKT-35/2006) finding that Marquard Media Polska has abused its dominant position (breach of Article 8(2)(1), (5) and 7 of the Act of 15 December 2000 on Competition and Consumers Protection) by imposing unfair prices, counteracting the formation of conditions necessary for the emergence or development of competition and market sharing. Marquard Media was ordered to refrain from the said conduct and fined 1,972,600 zloty (approx. 500,000 euro).

Marquard Media appealed the UOKiK decision to the Court of Competition and Consumers Protection (hereafter, SOKiK) as the court of first instance and then again appealed the SOKiK judgement to the Court of Appeals in Warsaw. In its appeal, Marquard Media claimed that the UOKiK President has committed a number of alleged breaches of procedural rules. The plaintiff argued that these procedural violations should be controlled by the court and result in the revocation of the UOKiK decision. The appeal claimed: (1) the lack of verification of the correctness of the antitrust proceedings by SOKiK in a situation where the court bases its judgment exclusively on the evidence collected during these proceedings; (2) non-annulment of the UOKiK decision despite it being imprecise; (3) arbitrary evidence assessment by SOKiK especially when it comes to the evidence collected by UOKiK and the evidence presented by Marquard Media in juridical proceedings. The plaintiff argued also that in a situation where new evidence presented in

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1 The case comment is limited to the procedural issues of the judgment. For the question whether selective, above-cost price cutting in the newspaper market shall be qualified as an anticompetitive exclusion see below the case comment by Konrad Kohutek.

2 Journal of Laws 2005 No. 244, item 2080. The same forms of abuses are also listed under the new Act of 16 July 2007 on Competition and Consumers Protection (Journal of Laws 2007 No. 50, item 337; hereinafter, Competition Act); see Article 9(2)(5) and Article 7 of Competition Act.

3 The judgment of 24 July 2007, No. XVII Ama 48/06, not reported.
court cannot remedy all of the procedural irregularities of the administrative proceedings, the UOKiK decision shall be quashed (annulled\(^4\)) by the court. Marquard Media argued also that the court should scrutinize all of the alleged procedural irregularities and thus exercise full control over the administrative proceedings. Despite the arguments raised by the plaintiff, both SOKiK and the Court of Appeals in Warsaw upheld the UOKiK decision dismissing all of its procedural objections\(^5\). In consequence, Marquard Media filed a cassation request to the Supreme Court quoting the aforementioned procedural arguments (concerning especially the extent of control exercised by the Courts over the UOKiK proceedings). In its judgment, the Supreme Court quashed the ruling of the Court of Appeals and remanded the case for re-examination.

### The Supreme Court judgement

The Supreme Court dismissed most of the procedural objections raised by Marquard Media. Accepted was only the argument that procedural provisions were violated when it comes to the wrongful formulation of the conclusion of the original decision and when it comes to the lack of proper justification of the imposition of the rigor of its execution.

The judgment of the Supreme Court on the crucial procedural issues was not in favor of the plaintiff. The judges described first the position and the role of SOKiK. According to the Court, the task of SOKiK is to decide on the merits of a dispute between the UOKiK President and the appealing undertaking in order to establish if the provisions of the Competition Act were breached, to legally qualify the infringement and to decide on sanctions. SOKiK shall assess the arguments and evidence presented by the parties and decide, whether the measures applied by the UOKiK President were legal and proportional. However, the Supreme Court did not specify which administrative measures shall be assessed. Taking into account its further statements, it seems that those undertaken by the UOKiK President during the proceedings (such as inspections) are not included. In its judgement, SOKiK is entitled both to change the original decision and to quash it. For that reason, it should not limit itself to finding the defectiveness of a UOKiK decision. Instead, it should repair (‘heal’) the irregularities of the administrative decision as long as that is possible in the circumstances of the case and the evidence collected.

In the opinion of the Supreme Court, UOKiK decisions can be quashed only exceptionally when their irregularities cannot be repaired in the given case. The Supreme Court stated therefore that SOKiK is not obliged to refer in detail to the procedural objections raised in the appeal especially, if the submitted irregularities are not likely to be of a kind that influences the UOKiK decision on its merits.

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\(^4\) Article 479\(^3\)a § 3 of the Code of Civil Procedure states that if the appeal is accepted, the UOKiK decision can be changed or quashed (revoked) by SOKiK whereby the revocation has the same effect as an annulment.

\(^5\) The judgment of 24 July 2008, VI ACa 12/08, UOKiK Official Journal 2008 No. 4, item 41.
The Supreme Court specified further that procedural irregularities concerning evidence (it did not specify however how it understands the notion of evidence) should not lead to the revocation of a UOKiK decision provided, that it is in line with the provisions of substantial law. The Court accepted that evidence collected in administrative proceedings can be used in court but that evidence collected by the UOKiK President in violation of the law should be disregard by SOKiK. Moreover, the revocation of a UOKiK decision is possible only if it was delivered without proper legal basis, in violation of substantial law provision, if it was addressed to an entity that was not a party to the original proceedings or, when the issue had already been decided in another decision. Annulment can also take place in a situation when there is a need to determine (in administrative proceedings) all issues indispensable to decide on the case.

The Supreme Court rejected the opinion of Marquard Media that the UOKiK proceedings were out of any judicial control. The judges stated that any objections against the proceedings and decision of the UOKiK President, provided that they are admissible and well-founded, can result firstly in the change of the original decision and secondly, in its revocation.

The notion of ‘full jurisdiction’ under Article 6 of the European Convention on Human Rights

The jurisprudence of the European Court of Human Rights (the ECtHR) states that decisions taken by administrative authorities which do not satisfy the requirements of Article 6(1) of the European Convention on Human Rights Convention (the Convention)⁶ must be subject to subsequent control by a ‘judicial body that has full jurisdiction’ over questions of facts and law⁷. Full jurisdiction means that the court should be entitled, and actually examine, all the relevant facts⁸ as well as have the power to quash the administrative decision⁹ in all its aspects (facts and law). When it comes to the assessment of their legality, the ECtHR expects the judiciary to not be limited to assess whether the impugned decision is compatible with substantive

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⁶ Under Article 6(1) of the Convention in the determination of civil rights and obligations or of any criminal charge, everyone is entitled to a hearing by an independent and impartial tribunal established by law.


⁸ Schmautzer v Austria, para. 35.

⁹ Schmautzer v Austria, para. 36; Janosevic v Sweden, para. 81
law\textsuperscript{10}. Courts shall also be empowered to set aside an administrative decision in its entirety or in part, if it is established that procedural requirements of fairness were not met in the proceedings which led to its adoption\textsuperscript{11}.

EU law generally accepts this approach. European courts pointed out that the decision of the Commission shall be subject to judicial control not only from the point of view of its legality but also when it comes to the correctness and importance of the facts established by the Commission\textsuperscript{12}. Traditionally however, European courts focus on whether the Commission has infringed essential procedural requirements – if a violation is established, the decision of the Commission is annulled. This happened, for example, when the Commission relied on the interpretation of a number of documents upon which parties had no chance to comment on\textsuperscript{13}; when the Commission failed to properly explain charges contained in a statement of objections\textsuperscript{14}; or where its decision lacked proper justification\textsuperscript{15}.

The assessment of the Supreme Court’s judgement

The judgment of the Supreme Court raises serious doubts from the point of view of the requirements of ‘full jurisdiction’. It seems in particular that SOKiK does not exercise full jurisdiction with respect to procedural infringements over the proceedings before and the decisions of the UOKiK President.

The judgment confirmed that SOKiK is a first instant court the role of which is not limited to the assessment of the legality of the appealed decision\textsuperscript{16} but rather, to decide the case on its merits\textsuperscript{17}. This realisation is certainly true. One has to disagree however with the opinion of the Supreme Court that in consequence, SOKiK shall not concentrate on

\begin{itemize}
\item \textsuperscript{10} ECtHR judgment in case Potocka and others v Poland of 4 October 2001, no. 33776/96, para. 55, 58.
\item \textsuperscript{11} Ibidem.
\item \textsuperscript{13} CFI judgment of 29 June 1995 in case T-30/91 Solvay v Commission [1995] ECR II-1775, para. 81.
\item \textsuperscript{17} See also Supreme Court judgment of 18 September 2003, No. I CK 81/02, LEX no. 359427 and the Court of Appeal in Warsaw judgment of 20 December 2006, VI ACa 620/06, not reported.
\end{itemize}
the possible infringements of procedural rules\textsuperscript{18}. The Polish ‘hybrid’ procedure\textsuperscript{19} whereby SOKiK is dealing with the case \textit{ab initio} and is formally considered as the first instance court, cannot mean that full judicial control over administrative proceedings does not exist in practice. The Supreme Court seems instead to accept such a situation stating directly that SOKiK is not obliged to refer in its judgment to the procedural objections raised by the plaintiff against the UOKiK proceedings. As a result, control over possible procedural infringements is becoming an exception rather than a rule. This would be acceptable only if UOKiK proceedings and decisions were not to have any importance for the judicial proceedings. In practice however, they are of great importance.

The Supreme Court was right stating that not every procedural error committed by the UOKiK President should lead to its decision being quashed. It is also correct to say that SOKiK should repair, if possible, such errors especially by introducing and hearing new evidence. If an undertaking claims, for example, that a witness was heard during the administrative proceedings in violation of procedural requirements, SOKiK can disqualify such evidence and hear the witness again. This means however, that SOKiK has to first check if such requirements were actually followed.

However, the Supreme Court noted that there are some procedural errors that cannot be ‘healed’ by the judiciary. It must be argued that a UOKiK decision should indeed be quashed if it infringes essential procedural requirements. Generally speaking, this should refer to a situation when the values of procedural fairness were not respected before the UOKiK President. The violation of the right to be heard, right to defence or right to privacy during administrative proceedings must be seen as a reason for annulling a decision in its entirety. In cases of such violations, the possibility of SOKiK to disqualify the evidence collected in breach of these rights cannot be seen as a sufficient guarantee especially because SOKiK does not scrutinize UOKiK proceedings from their procedural point of view.

It must also be borne in mind in this context that a predominant part of the evidence upon which SOKiK’s judgments are based is collected during the administrative proceedings. It is clear that the court, as opposed to the UOKiK President, is not entitled to inspect the premises of an undertaking or send an information requests to other market participants. Breaches with respect of procedural rules of substantial character, such as the violation of the privilege against self incrimination or a disproportional character of inspection when it comes to the violation of privacy, should thus result in the annulment of the decision. It seems however, in the view of the judgment of the Supreme Court, that it is not possible for SOKiK to quash the decision in such situations\textsuperscript{20} because procedural irregularities concerning evidence do not lead to the revocation of the decision, provided it is in line with the provisions of substantial law.

\textsuperscript{18} In this respect see also SOKiK judgments of 24 July 2007, No. XVII Ama 84/06, not reported and of 22 June 2005, No. XVII Ama 55/04, UOKiK Official Journal 2005 No. 3, item 42.
\textsuperscript{20} This is the opinion of the Court of Appeal in Warsaw – see the judgment of 17 June 2008, VI Aca 1162/07, not reported.
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The judgement of the Supreme Court lacks clarity when it comes to the statement that SOKiK is not obliged to refer in detail to the procedural objections raised in the appeal especially, when it is not proven that the irregularities are of a kind that influences the decision on its merits. Moreover, the word ‘especially’ suggests that SOKiK is not obliged to refer to such objections also in other situations. It seems however, that according to the Supreme Court, when the undertaking has not proven that the irregularities influence the UOKiK decision on its merits, they are outside of judicial control. One cannot agree with this approach – infringements of procedural fairness should be examined by the courts per se irrespective of their influence on the final outcome. Thus a breach of the right to be heard, for instance by denying access to certain pieces of evidence, should result in the revocation of the decision even if the undertaking has not enough arguments to discredit the evidence it was not given access to.

The list of situations when the decisions can be quashed is to narrow as it is lacking direct indication of substantial breaches of procedural requirements. When opportunity presents itself in the future, the Supreme Court should clarify its approach in order to allow the revocation of administrative decisions in cases of serious procedural infringements (1) even if it is not proven that the violations have a direct effect on the outcome of the decision, (2) even if the decision is in accordance with the provisions of substantive law and (3) also with respect to breaches in matters of evidence. The Supreme Court should also stress that SOKiK has to pay attention to the objections of procedural character raised by the undertakings.

When it comes to the violation of procedural rules concerning evidence, SOKiK should disregard such evidence and, in cases where not enough evidence is left to prove a violation of the Competition Act, it should change the UOKiK decision by not establishing an infringement. Such an approach seems to be in accordance with the commented Supreme Court judgment. SOKiK should be ready to quash an UOKiK decision in cases when it is established that the undertaking was deprived of the opportunity to defend itself during the administrative proceedings (per analogiam Article 379(5) of the Code of Civil Procedure), that is, in a situation of a violation of a requirement that is indispensable for the validity of proceedings.

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21 SOKiK judgment of 20 February 2007, XVII Ama 95/05, not reported.
22 This opinion was expressed directly in the judgement of the Court of Appeal in Warsaw of 24 July 2008, VI ACa 12/08. See also the Supreme Court decision of 29 April 2009, III SK 8/09, not reported.
24 Supreme Court in the ruling of 29 April 2009, III SK 8/09, suggested that the violation of the requirements that are indispensable for the validity of the proceedings can be the ground for the revocation of the UOKiK President decision.
The publication of the European Commission’s guidelines in an official language of a new Member State as a condition for their application

Case comment to the order of the Polish Supreme Court of 3 September 2009 (Ref. No. III SK 16/09) to refer a preliminary question to the Court of Justice of the European Union

(C-410/99 Polska Telefonia Cyfrowa sp. z o.o. v President of the Electronic Communications Office)

Facts

The President of the Polish Office of Electronic Communication (hereafter, UKE) established by a decision issued on 17 July 2006 that the relevant service market for call termination in mobile telecommunications was not subject to effective competition. The operator Polska Telefonia Cyfrowa (hereafter, PTC) was declared to be an undertaking possessing significant market power on that market and thus subjected to regulatory obligations in order for PTC to provide services to other telecoms undertakings in that market.

PTC appealed the decision to the Court of Competition and Consumer Protection (hereafter, SOKiK) claiming that the UKE President infringed: Articles 2 and 88(1) of the Polish Constitution, Article 6 of the Code of Administrative Procedure, Article 58 of the Accession Act together with Article 6 of the Treaty establishing the European Union and Article 254 of the Treaty establishing the European Community.


2 Article 2 of the 1997 Constitution states: ‘The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice’. Article 88(2) of the 1997 Constitution states: ‘The principles of and procedures for promulgation of normative acts shall be specified by statute’.


4 OJ [2003] L 236/33. Article 58 states: ‘The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present eleven languages.'
(currently Article 297 TFEU), Article 2 of the Polish Telecommunication Law of 16 July 2004 (PT 2004). The infringement alleged by PTC consisted of the fact that the UKE decision was based on the European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services. The said act was issued under Article 15(2) of the 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). The key issue to be stressed here is that the scrutinised Guidelines were not published in the Polish language in the Official Journal of the EU.

SOKiK upheld the UKE decision as no infringement was found. PTC appealed the first instance ruling to the Court of Appeals in Warsaw but the appeal was dismissed. PTC filed then a cassation request to the Supreme Court which decided to stay the proceedings and to refer to the Court of Justice the following question: ‘Does Article 58 of the Act of Accession allow reliance to be placed against individuals in a Member State upon European Commission guidelines of which, under Article 16(1) of 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), the national regulatory authority should take the utmost account when carrying out an analysis of the relevant markets, where those guidelines have not been published in the Official Journal of the European Union in the language of that State and that language is an official language of the European Union?’

Key legal problems of the case

The character of the Commission guidelines on market analysis

One of the key points of the referral lies in the clarification of the legal character of guidelines issued by the European Commission. They are generally believed to belong to the so-called ‘soft law’ category of EU acts (either named in the founding Treaties or not) that are not formally binding upon their addressees. They are issued in order to induce interested parties to follow certain proposed and preferred behaviours. They shall be published in the Official Journal of the European Union if the texts in the present languages were so published.

5 Journal of Laws 2004 No. 171, item 1800, as amended. Article 23(2) provides: ‘An analysis of the relevant markets should be done with respect to the European Commission guidelines on market analysis and the assessment of significant market power’.

8 Judgment of 10 July 2007, XVII AmT 26/06, not reported.
9 Judgment of 17 October 2008, VI ACa 315/08, not reported.
10 A. Kalisz, Wykładnia i stosowanie prawa wspólnotowego [Interpretation and application of Community law], Warszawa 2007, p. 85; K. Wellens. G. Borchardt, ‘Soft Law in European
without imposing any formal mechanisms of constraint. For national judicial and administrative bodies, they are a source of inspiration concerning the interpretation of EU legal rules (they indicate how the applicable provisions should/could be interpreted and applied). Nonetheless, they bind their issuer as they are perceived as a form of self-obligation of that body to follow its own declarations. As one commentator stated, soft law ‘can produce a large array of legal effects such as, among others, to create legitimate expectations for the individuals, to clarify the content of certain hard law provisions, or to structure the discretion of certain institutions’.

Guidelines are most often issued by the Commission and primarily in the field of European Competition law. Their character has been object of the interpretation of EU courts: ‘[Guidelines] may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice [in French it is formulated in a broader way: règle de conduite indicative de la pratique à suivre] from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment’. Indeed, the ECJ included guidelines into the body of EU law sensu largo stating that ‘having particular regard to their legal effects and to their general application [...] such rules of conduct come, in principle, within the principle of ‘law’ for the purposes of Article 7(1) of Community Law’.

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11 As a matter of principle, they are not binding. However, examples can be found of EU soft law that are binding for the addressees also from the formal point of view: cf Article 126 TFUE (ex. Article 104.7 TEC).

12 C-322/88 Grimaldi [1989] ECR 440, para. 18: ‘national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions’.


The publication of the European Commission’s guidelines in an official language…

The publication of the European Commission’s guidelines in an official language…

However, guidelines issued in the framework of EU Competition law are not identical with the particular Guidelines to which the preliminary question refers to. The former are binding on the Commission but not on national authorities. By contrast, the Guidelines on market analysis constitute the obligatory basis for market assessment undertaken by national regulatory authorities (NRAs) as stated in Articles 15 and 16 of the Framework Directive. More specifically, Article 15 (2) declares that: ‘The Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (…) which shall be in accordance with the principles of competition law’. In its Article 15 (3), it states that ‘National regulatory authorities shall, taking the utmost account of (…) the guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law’. Article 16 (1) of the Framework Directive clarifies further that: ‘(…) national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines’ (the same expression is used in Article 16 (5) concerning transnational markets).

According to the reasoning of the order of the Supreme Court, the discretion of NRAs is therefore greatly reduced as far as the definition and analysis of relevant markets is concerned. NRAs are obliged to apply common standards stemming from these Guidelines, which should therefore be perceived as binding upon NRAs even if they form part of EU soft law. The Polish Supreme Court stressed however that some ECJ jurisprudence suggests that the binding power of guidelines issued under the Framework Directive can be questioned. In case C-274/07 Commission v Lithuania, the ECJ stated that the guidelines issued under this Directive are not binding upon Member States and they are not obliged to follow them strictly. It is worth noting as a matter of digression that the Supreme Court has ruled on the character of similar guidelines issued by the President of the Polish Office of Competition and Consumer Protection (UOKiK) judging them as not binding upon Polish courts.


17 Cf for instance, OJ [2004] C 101 containing seven important Commission notices neither of which is available in any of the new official languages.

18 Reasoning of the decision to refer the preliminary question; cf cited there: C-311/94 Ijssel-Vliet Combinatie [1996] ECR I-5023.


According to the wording of the Framework Directive, the Guidelines on market analysis have formal grounds to be binding on Member States and can be perceived as creating some legitimate expectations for individuals in the territory of those Member States. However, the present ECJ jurisprudence gives a different interpretation of their character. The resulting uncertainty should be resolved by the answer to the question submitted by the Polish Supreme Court in this case. Referring to the content of the Guidelines themselves (26 pages, 156 points), their addressees are identified already the opening words of point 1. They ‘(…) set out the principles for use by national regulatory authorities (NRAs) in the analysis of markets and effective competition under the new regulatory framework for electronic communications networks and services’. The Guidelines contain therefore very precise and broadly described obligations on the part of NRAs mostly based on the provisions of the Framework Directive.

**Scope of obligation to publish in EU official languages**

Article 297 (1) TFEU (ex 254 TEC) provides in its last sentence: ‘Legislative acts shall be published in the Official Journal of the European Union (…)’ whereby the notion of ‘legislative acts’ is defined in Article 289 TFEU as ‘legal acts adopted by legislative procedure’. Thus the only criterion to treat an act as ‘legislative’ is formal: it is an act adopted by EU institutions (normally jointly by the European Parliament and the Council) on the basis of Treaty procedures (either ordinary or special legislative procedures). Some ‘non-legislative’ acts must also be published according to Article 297(2) TFUE namely: ‘regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed’. Selective (i.e. in some official languages only) or partial publication (missing integral elements e.g. annexes) of the acts so listed is perceived as a breach of the Treaty. However, while the publication obligation discussed by the ECJ concerns acts published in the Series L (Legislation) of the Official Journal, publications in its other Series (Series C...

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The publication of the European Commission’s guidelines in an official language (Series C and S) is not obligatory. All the guidelines ever to be published in the Official Journal were included in Series C.

The Treaty does not provide for an obligation to publish such acts as guidelines. Such an obligation stems however from the Framework Directive as far as the Guidelines on market analysis are concerned. The Directive does not define if the publication should be translated into all official languages of the EU within the meaning of the present Article 55 TEU. The said Guidelines were published in 2002 in all eleven languages that were official at that time. Like most acts published in Series C of the Official Journal issued before the last two accessions, they were never translated into any of the new official languages.

On the other hand, Article 58 of the Accession Act provides that ‘the texts of the acts of the institutions (...) adopted before accession’ if translated into any of the new languages, should be as authentic as the acts published in the old official languages. The last sentence of Article 58 states that ‘[the texts] shall be published in the Official Journal of the European Union if the texts in the present languages were so published’. The Accession Act clearly excludes therefore any ‘discrimination’ between the old and the new official languages and does not distinguish between different Series of the Official Journal or different types of texts that might have been published therein. Thus, literally speaking, all texts that had ever been published in any of the Series of the Official Journal of the European Union (before 1 February 2003 in the Official Journal of the European Communities) should be translated into all new official languages if that was the case for all old official languages. Unfortunately, that rule is not followed by the EU institutions in practice. The only acts that were (sometimes with major delays) translated in their entirety are the formally binding acts from the

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24 The Official Journal consists of two related series (L for legislation and C for information and notices) and a supplement (S for public procurement). There is also an electronic section to the C series known as the OJ C E which is the sole source for documents it contains, cf: http://publications.europa.eu/official/index_en.htm, last visited 20 August 2010.


previous Article 249 TEC (at present, Article 288 TFEU), thus only those published in Series L of the Official Journal.

Publication of acts creating ‘negative’ effects for individuals

In the motifs of its decision to refer a preliminary question to the ECJ, the Polish Supreme Court stressed the distinction between publication of acts creating negative effects for individuals and those that do not have such effects. The distinction is important because the former cannot be effectively applied (enforced) unless they have been formally published in the Official Journal. However, the ECJ’s jurisprudence on this issue relates so far only to acts that are, by definition, binding in nature. The ECJ has not yet analysed the eventual obligation to publish guidelines that create negative effects for individuals. This point constitutes one of the main problems of the Polish request for a preliminary ruling.

In its request, the Supreme Court referred to Skoma-Lux 28 and Balbiino 29 where the principles of equivalent treatment and legal certainty were invoked to reason the obligation of EU institutions to publish acts that might have negative effects for individuals. According to the Supreme Court, those two principles are infringed if the Commission’ guidelines are not published in Polish even though they are published in other official languages. That fact alone places domestic telecoms undertakings in a worse position than entrepreneurs from other EU Member States. It is worth recalling the ECJ’s view that the two principles of EU law are applicable if a non-published act of EU institution places obligations on individuals. The ECJ noted in Skoma-Lux that Article 58 of the Accession Act ‘precludes the obligations contained in Community legislation which has not been published in the Official Journal of the European Union from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means’ (paragraph 51). Still, the cited fragment refers clearly to ‘legislation’ while it is unlikely that guidelines, even based on the Framework Directive, can be perceived as part of EU legislation. An acceptance of such an ‘informal’ way of producing ‘legislation’ would contradict the principle of legal certainty and the idea of the European Union being an entity based on the law.

of new Member States and its observance in Polish administration courts’) (2009) 2 Europejski Przegląd Sądowy.


30 The solution taken by the ECJ corresponds to the French Constitutional tradition, rather than the German or common law approach, described in: M. Bobek, ‘Case C-345/06, Gottfried Heinrich…’, p. 2084-2087. In French tradition such an act is imposable but valid, whereas in German or Polish law such acts would be void.
By contrast, the Supreme Court noted that the Heinrich\textsuperscript{31} judgment presents arguments in favour of interpreting the Skoma-Lux rule in a broader manner that encompasses also Commission guidelines. Point 43 of the Heinrich ruling suggests that it is the ‘negative effect for individuals’ criterion, rather than the nature of the act itself, that represents the main criterion to consider while analyzing the scope of the obligation to publish the Guidelines on market analysis in all EU official languages. The judgment states: ‘an act adopted by a Community institution cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the Official Journal of the European Union’, without distinguishing between different acts adopted by EU institutions. Although the Heinrich case concerned regulations, the Polish Supreme Court perceives this statement as encompassing all acts issued by the EU institutions.

The Polish Supreme Court referred also to ROM-projecten\textsuperscript{32} noting on its basis that obligations stemming from a given act do not have to be imposed directly on the individuals by that very act. It is sufficient that it places an obligation on Member States to undertake specific actions towards individuals in that country. ROM-projecten concerned an unpublished decision of the Commission imposing an obligation on a Member State upon which an authority of the Member State based its own decision addressed to an individual. Thus, the ECJ went further than the Article 254 TEC which did not impose an obligation to publish such decisions (neither does the present Article 297 TFEU). Perhaps this wide approach to the obligation to publish EU acts could be further broadened to include soft law acts that may create negative effects for individuals but there is no textual legal basis for such an interpretation. Just like the Polish Supreme Court, one can only refer to general EU law principles.

The considerations for the possible ECJ’s answer

In practice, hardly any acts published before the last two accessions in the Official Journal Serie C have ever been translated into the new official languages of the EU. It might thus be simple pragmatism that stops the ECJ from questioning the lack of publication of all Commission guidelines in all of the new official languages. There are also formal reasons against undermining the existing practice – the Treaties do not contain such an obligation and the scope of Article 58 of the Accession Act is ambiguous with respect to the meaning of ‘texts of institutions’. Moreover, since the publication obligation contained in Article 297 TFEU does not relate to non-binding acts defined in Article 288 TFEU (recommendations and opinions), a comprehensive publication of guidelines is also not necessary. Indeed, if the provisions of TFEU were considered in conjunction to Article 58 of the Accession Act only, their lack of publication would not constitute a breach of EU law. The situation is different for the Guidelines on market analysis because they are subject to a special publication duty

\textsuperscript{31} C-345/06 Heinrich [2009] ECR I-1659.
\textsuperscript{32} C-158/06 ROM-projecten [2007] ECR I-5103.
contained in the Framework Directive. Formally speaking, these particular Guidelines must be published even if they do not bear any negative consequences for individuals. Otherwise, an obligation directed to the European Commission to publish them, specifically provided for in the Directive, would be void.

In this case, if the ECJ’s answer does not state that the obligation to publish the said Guidelines exists, or that the lack of such publication does not cause any consequences as far as their application is concerned (even if it violates the Directive), such a position might lead to the denial of the equivalent treatment rule of both Member States and their undertakings. It would create a division between those with access to all EU texts in their official languages and those that lack access to some of them without, however, that fact resulting in any consequences. Even if one could find arguments supporting such a division in legal terms, with respect to texts with no formal legal value issued before the accessions, an explicit ECJ’s statement of this kind would not be politically correct and would infringe one of the most basic ideas of EU law – namely the principle of non-discrimination.

If the act in question, or indeed any other guidelines, is causing legal consequences for anyone beside the Commission despite its soft law nature, its publication is indispensable in order to ensure legal certainty. Lack of publication should cause the ‘non-application’ of the Guidelines by NRAs that are theoretically bound to follow them. Any reproaches from the Commission concerning the ‘not following’ of their rules should thus be perceived as unfounded. If a NRA applies them despite the lack of their publication, the negative consequences of their use should be undermined by anyone negatively influenced by the Guidelines because their application would be based on an improper legal basis (or lack thereof).

If the European Commission wants the guidelines to have any legal consequences, either for Member States or individuals, it should certainly introduce a comprehensive and transparent publication practice. Otherwise, Guidelines cannot be perceived as creating any form of effects for anyone other than the Commission, regardless of the reference made to them in the Framework Directive. If they are to bear any legal consequences, they should also be published in the Official Journal of Series L (Legislation) rather than Series C in order to clearly show their factual legal status. If not, the principle of legal certainty would be constantly infringed, according to which both the bodies that apply the law and the individuals affected by it are able to get properly acquainted with its content. The new Treaty provisions ensuring the openness of EU actions (Article 15(1) TFEU) and the transparency of its legislative process (Article 15(2) TFEU) also stress the need to change of existing practice. Last but not least, Article 296 TFUE in its last sentence clearly states that “When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question”. The same should become a part of the European Commission code of good practise.
Final remarks

Regardless of the answer ultimately given by the ECJ, the presented case clearly shows that the European Union needs to redefine its practice of issuing and (not) publishing acts of ‘undefined legal value’ in order of it, to be perceived as a democratic and law-abiding international organisation. Two possible solutions to the current problem can be identified: a stronger and a weaker one. First, in order to truly respect the rule of law principle, the Commission should change its current practice of issuing acts that are formally of no legal value but practically create effects for individual because these acts de facto oblige national authorities to follow certain behavioural practices towards those individuals. Instead, the Commission should stick to the catalogue of binding acts provided for in Article 288 TFEU preferably issuing ‘implementing decisions’ as defined in Article 291 TFEU. It should also analyze more carefully the possible consequences of its own soft law acts and where there is any possibility that the act would influence the legal situation of individuals, it should stick to the Treaty catalogue. Second, in a softer approach, even if the Commission does not change its current practice of issuing guidelines, it should publish them in all official languages of the European Union where there is any chance that they bear any consequences for individuals. Otherwise, it will find itself subject to much more widespread reproach alleging that it has breached the principles of legal certainty and equality. It remains to be seen whether such acts in the circumstances described above should only be unenforceable or rather null and void as if they never existed?33

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33 The question asked in the context of non-publication of annexes to Regulations in the Heinrich case by: M. Bobek, ‘Case C-345/06, Gottfried Heinrich…’, p. 2077 and 2089.

In the face of continuing and increasing globalisation and the proliferation of national and regional competition laws, international competition law and policy has become over the last two decades one of the hottest and most widely discussed topics in the area of antitrust. As a result, extensive scholarly literature has accumulated on this subject.

Dr. Bartosz Michalski of the University of Wrocław (Institute of International Relations) has given his readers a very approachable book, which may not be a novelty to the cognoscenti, familiar with the extensive foreign writings on international competition law and policy, but which still manages to make a major contribution to the rather scarce Polish literature on this topic1.

According to the Author, the main aim of this book is to explore the issue of international co-ordination of competition policy and to find out whether it has the potential to build a common competition order in the world economy (p. 14). Though the Author is an economist, his ambition was to also consider non-economic factors, in particular political and historical considerations. His book fulfils that task to a substantial degree.

Following an introductory section, the book is organised into five chapters and a summary. The first chapter provides a brief overview of the origins of competition policy, its functions and goals. This part explains and sets out the basics of competition policy. It also contains a thorough analysis of the effects of competition policy on competitiveness.

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The following four chapters examine the development of international co-operation in competition law and policy undertaken in the framework of the World Trade Organisation (WTO), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference of Trade and Development (UNCTAD) and the International Competition Network (ICN). The Author argues (p. 15) that out of all the international initiatives that have global governance ambitions and wish to influence the international co-ordination of competition policy, only those four focus on this issue in a comprehensive manner. He intentionally does not consider the efforts of the European Community (now the European Union), because of its regional organisation status. Michalski acknowledges however the EU’s significant influence on global developments.

The second chapter describes the activities of the WTO. After presenting the genesis of multilateral co-operation in the field of competition law and policy, starting from the Havana Charter of 1948, it surveys the most important proposals concerning international competition law and policy made and discussed in the WTO. The chapter opens with some historic considerations concerning the Singapore, Geneva, Seattle, Doha and Cancún WTO Ministerial Conferences. It continues with a more detailed discussion of several particularly significant problems negotiated within the WTO Working Group on the Interaction between Trade and Competition Policy: the interconnections between trade and competition policy in fostering economic development and growth; the impact of anti-competitive practices on the development of international trade; the relationship between competition policy and foreign direct investments; the exchange of information and technical assistance in capacity building to developing countries and, finally; WTO’s failed efforts to achieve global consensus and to complete a formal agreement on competition policy matters. The positions of Poland and the EU, approving those efforts and promoting the idea of an international competition agreement within the WTO, are duly presented.

The third chapter is dedicated to the co-ordination of competition policy among the members of the OECD. After some remarks concerning the genesis and specific attributes of its co-operation, the Author describes the series of non-binding recommendations issued by the OECD concerning ‘best practices’ with respect to cartels, mergers and co-operation. He also explores competition policy challenges typical for developed countries with well established competition law systems, i.e. the abuse of dominant position, cartels, anticompetitive mergers and sectors regulated by the state. Emphasis is placed here also on the need to set free the ‘invisible hand of market’ from the bureaucratic burden. This part of the discussion may serve as a brief but solid explanation of the practical problems of competition policy enforcement and the deepening of international co-operation in this field.

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2 The earliest recorded proposals for regulating international anti-competitive conduct actually date back as far as a World Economic Forum hosted by the League of Nations in 1927; see D. J. Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus, Oxford 2003, pp. 159-161; W. L. Runciman, ‘The World Economic Conference at Geneva’ (1927) 37(147) The Economic Journal 468.
The forth chapter highlights the contribution of UNCTAD to the emergence of an international competition order and the specifics of the approach pursued by this body. The legal and organisational aspects of its co-operation are among the issues covered. Particular attention is paid to one of its most remarkable achievements – the 1980 Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which remains the only universally applicable instrument in the area of antitrust, though it has no binding force and little effect in practical terms. Another important effort of UNCTAD discussed here in greater detail is the model law on competition, conceived as a manual for developing countries implementing competition law. Considering UNCTAD’s aim to assist the latter in the promotion of their economies and integrating them into the world economy, it is quite natural that the Author specifically explores the idea of competition law and policy as the factor which stimulates economic growth and progress of developing countries.

The fifth chapter is devoted to the emerging role of the ICN. This is a relatively new form of international co-operation which, due to its dynamics, proves to be quite successful especially in relation to the transfer of knowledge and expertise, which in turn spreads competition culture amongst antitrust agencies all over the world. The ICN is an informal network of competition authorities from developed as well as developing countries which has the form of a virtual organisation. Its purpose is to facilitate coordination by maintaining regular contacts between national competition authorities and addressing practical competition concerns. The ICN is meant to complement and to fill the gaps in the work of other international forums such as the WTO, the OECD and UNCTAD rather than to duplicate their efforts. It focuses on issues essential from the perspective of the world economy (multijurisdictional mergers, cartel agreements, technical assistance related to competition policy implementation as well as regulated and state owned sectors).

On the basis of the research carried out in this monograph, Michalski concludes in the summary that the efforts put into the formalisation and reinforcement of international co-operation in competition policy have been induced by the successful trade liberalisation (p. 231). As he points out, it somewhat resembles the phenomenon of progression in the process of economic integration which starts with simple and progresses to more complex stages. Increasingly, international organisations take actions in order to protect the benefits of trade liberalisation from anticompetitive practices of international business. Such activities are usually resisted by countries the economic systems of which (because of ‘the heritage of the past’) are not yet prepared for the potential challenges of the new reality. Michalski aptly observes that a level of scepticism persists concerning the principles of the world’s economic order adopted or negotiated nowadays, because they condemn the activities recently used and appreciated by the advanced economies as stimulating economic growth and development (pp. 231–232). The Author puts it bluntly that the theory stands in stark opposition to the declarations and suggested reforms (p. 232).

Michalski is realistic in his assertion that ‘soft’ co-operation is the most effective method of building supranational competition governance. A formal (legally binding) agreement would certainly reduce the perceived freedom and sovereignty of many
states, the prospect of which attracts their strong opposition (p. 232). Nevertheless, he is fairly critical of the soft approach to international competition policy, which offers many advantages but could also result in a threat that only second or even third-best solutions are put into practice.

Michalski suggests that it is UNCTAD and the ICN that have the strongest potential to influence the legal and policy reform on the international level. He rightly notes that both the WTO and the OECD are still regarded as clubs dominated by the rich. This fact limits their credibility as far as offering solutions to improve the conditions of social and economic progress of developing countries. However, similar objections can be raised in relation to the UNCTAD forum, which is often perceived as unduly favouring the interests of developing nations. Michalski rightly observes that the effectiveness of the WTO is limited inter alia by the single undertaking principle (‘nothing is agreed until everything is agreed’). Nevertheless, its potential for building an international competition order (especially by providing the institutional vehicle for a plurilateral competition agreement) is somewhat underestimated.

In his closing remarks Michalski strongly approves of the primacy of competition policy within the context of economic policy overall, both national and international (p. 233). One cannot agree more.

The book under review here is well researched and very informative. It offers articulate and thought-provoking narration on timely and important topic, contributing to the ongoing debate on the current trends of competition policy. The sources consulted by the Author are numerous including exceptionally rich documentation deriving from the aforementioned international institutions. Only legal writings on international antitrust are somewhat lacking.

Michalski prefers hard realism in considering the economic aspects of contemporary international relations as well as positive economic analysis, which is based on ‘what is’ in the economy rather than on what ‘ought to be’. Such methodological attitude deserves respect.

This book, as any human enterprise, is not without shortcomings. It is by necessity selective in its coverage. Hence, some important topics are underrepresented or at all missing. The title aspires to portray international co-ordination in the realm of competition policy. However, the actual scope of the book is narrower – it is essentially a book on competition policy on multilateral or at least plurilateral level. Bilateral

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3 See M. Taylor, *International Competition Law. A new Dimension for the WTO?*, Cambridge 2006, p. 426; see also D. D. Sokol, ‘Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age’ (2007) 4(1) *Berkeley Business Law Journal* 103-104 (noting that ‘in many ways, the UNCTAD is the mirror image of the OECD, except that it pushes a developing-world agenda rather than a developed-world agenda’, and further ‘even as the UNCTAD may offer greater legitimacy in representing the perceived needs of developing-world countries, it is for this very reason that the UNCTAD is less effective as a participatory vehicle for international antitrust harmonization and implementation’).

and regional co-operation are left out almost completely, in spite of the fact that this type of co-operation is most prevalent in international antitrust today. Nevertheless, the principle of positive comity, typical for advanced bilateral antitrust co-operation agreements, has been covered to some extent. Unfortunately, that is not the case as far as the first comprehensive proposal for an international code of competition law is concerned presented to GATT/WTO and the OECD in 1993 by the so called Munich Group of antitrust scholars. Despite its failure, the Draft International Antitrust Code deserves at least some mention because of its reputation as the most ambitious project of international antitrust agreement undertaken so far5.

To sum up, the book under review here is a very good monograph written by a scholar with a strong sense of economics and international relations. It will provide a source of useful reference for its readers, academic scientists and students in particular, interested in the difficult and challenging problem of international co-ordination of competition policy.

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The notion of an ‘undertaking’ (used by Community competition law) or ‘entrepreneur’ (used by Polish antitrust law) is one of the most fundamental concepts of every competition law system because it defines the personal scope of its application. In other words, the understanding of this term determines the addressees of the material and procedural provisions included in specific competition law rules. Community competition law does not contain a legal definition of the notion of an ‘undertaking’ and thus the term must be reconstructed from the jurisprudence of the ECJ. The core of the definition was formulated in case C-41/90 Höfner i Elser v Macrotron where the ECJ ruled that the notion of an ‘undertaking’ encompass every entity engaged in an economic activity, regardless of their legal status and the way in which they are financed. Since the original definition was clearly of a general nature, the Court was frequently required to develop it further determining whether and under what conditions can the status of an undertaking be attributed to a specific type of entity (e.g. those engaged in some form of social activities, individual agents or employees, institutions exercising public authority).

In contrast to EU law, Article 4(1) of the Polish Act of 16 February 2007 on Competition and Consumers Protection (hereafter, Competition Act) contains an applicable legal definition which is similar but not identical to EU law. However, Member States are entitled to enact and apply their own national competition laws and their contents do not have to fully reflect Articles 101 and 102 TFEU. That is the case both in the field of practices that may, and in the field of practices that may not affect intra Community trade (contrary to what may seem at first glance, this conclusion is nether excluded by Article 3 Regulation 1/2003 nor by Article 3 TFEU).

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2 Journal Laws 2007 No. 50, item 331, as amended.
3 The fact whether the given agreement (decision by associations of undertakings or concerted practice) restricts competition within the meaning of Article 101(1) TFEU should be assessed in accordance with an economic approach i.e. the main focus is on the assessment whether the agreement is likely to have an appreciable adverse impact on the parameters of competition on the market such as price, output, product quality, product variety and innovation (Commission Guidelines on the Application of Article 81(3) of the Treaty, par. 16); see also A.
This fact is of great importance here as the content and scope of the definition of an ‘entrepreneur’ is a tool associated with a particular competition policy carried out at a given time and in a specific place. It influences the way in which the aims of that competition law system are accomplished and determines how uniformly and effectively will they be achieved. A definition that is too narrow can hamper the effectiveness of the law. In turn, a definition which is too broad can allow its aims to be achieved more effectively. However, it can also cause many grave consequences such as hindering the realization of social policy, infrastructure and regional development or other social aims.

The aforementioned issues are the main basis of the book by Grzegorz Materna entitled *The notion of an entrepreneur in Polish and European competition law*. The publication is divided into four chapters which logically organize the content presented therein. The first chapter covers the basics of the modern competition law model by describing its rational and *modus operandi*. Chapter 2, which is the core of the publication, examines the term ‘entrepreneur’ as used in the Polish Competition Act and compares it to the notion of an ‘undertaking’ under Article 101 and 102 TFEU. The discussion covers both Polish and EU concepts involving a range of subjects such as associations of undertakings and public law concepts such as self-government bodies, municipal units and public utility services’ providers. Readers interested in the status of public buyers will be disappointed however as no reference is made to this very current topic. The third chapter is devoted to the examination of the relationship between Polish and EU competition law as far as the notion of an ‘entrepreneur’ is concerned. He describes the way in which Polish law was adapted to Community competition law and explains the way in which EU law principles should be applied (such as supremacy and direct effect). The most interesting problem mentioned here is the scope of the definition of an ‘entrepreneur’ under national law. Clues are given at this point to the question whether national law can see the notion of an ‘undertaking’ in a narrower or wider sense than the EU. In the last chapter, Materna sums up his previous considerations and formulates several *de lege ferenda* recommendations. The book raises a number of important issues – the most interesting considerations are presented below.

The first issue to note here is the question whether the notion of an ‘undertaking’ as understood by national law is allowed to be, in the light of EU law principles, broader than the definition used by Community competition law. According to Materna, a narrower scope under national law would go against the principle of loyalty as it would mean, in practice, that Member States would legalize agreements or practices forbidden by Community competition law (p. 203). The same principle stipulates that the ruling of a national court issued under domestic law should, as far as possible, interpret national provisions with conformity to the aims and content of EU law. Does

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this mean however that the Polish notion of an ‘entrepreneur’ must also not go beyond the definition established in the EU? The answer to this question, even though not given expressly or definitely by the Author, has to be negative. This view is justified on the basis of Article 3 Regulation 1/2003 which governs the relationship between national legal systems and EU law in the competition field (on the strength of TFEU). It represents a concretization of the general principle of supremacy of EU law over national legislation in the field of competition. It does not go as far as to exclude the existence or the application of national competition laws nor does it require a full substantive or verbal unification of national provisions with Article 101 TFEU, even with regard to agreements capable of affecting trade between Member States. Thus, the supremacy of Community competition law over national legal systems has its clear and unequivocal limits set in Article 3 Regulation 1/2003.

Another interesting issue analyzed by Materna concerns the inclusion into the Polish definition of an ‘entrepreneur’ of public authorities exercising their legislative, regulatory and administrative powers (so called imperium). It is commonly accepted that Article 101 and 102 TFEU are concerned solely with the activities undertaken in the sphere of dominium and economy, leaving the imperium sphere unregulated (p. 151). In other words, EU rules place those pursuing social aims only outside their scope. However, Member States are indeed allowed to shape the personal scope of the notion of an ‘undertaking’ under their own national competition laws in a manner wider than Community competition law. Moreover, there are many convincing reasons why the legislative and regulatory actions of Member States should be subject to an antitrust analysis, although not necessarily at EU level. For example, many national rules have, at least in part, corporatist features in that they are aimed at the protection of one category of competitors against another, e.g. small competitors against large ones or vice versa etc. Measures of an identical content should not be assessed differently depending on the fact whether they are implemented by undertakings (on the one hand) or by public bodies (on the other hand). Since these types of actions undertaken by Member States cannot be questioned on the ground of Community competition law (as they belong to the imperium sphere), it would be reasonable to subject them to national antitrust control. The broadening of the notion of an ‘entrepreneur’ (or an ‘undertaking’) seems to be the most obvious way to achieve this goal.

An interesting issue should be made at this point concerning public bodies such as healthcare and pension funds. EU case law has systematically emphasized the social nature of the aims pursued by such entities making it often hard to distinguish between ‘social aims’ and the ‘principle of solidarity’. As a result, an increasing blurring of the differences between economic and social activities is taking place, which can be particularly observed when the activities of public entities lie in the grey zone between economic and social activities or, probably more often, when public entities undertake both economic and social activities at the same time. Still, the ECJ has ruled that healthcare bodies and pension funds should not fall under the scope of the notion of an ‘undertaking’ provided that they meet the following criteria: they merely apply the law and cannot influence the amount of their contribution, the use of assets
or the fixing of the level of benefits provided to participants; their activity, based on
the principle of national solidarity, is entirely not-for-profit and the benefits paid are
statutory benefits bearing no relation to the amount of the contribution and; the given
fund is based on a system of compulsory affiliation (p. 157).

However, the Polish Supreme Court has ruled that the National Health Fund (in
Polish: Narodowy Fundusz Zdrowia; hereafter, NFZ) can distort competition due to its
market power as a provider of public utility services and therefore it should be given
the status of an entrepreneur. This approach has a negative influence on the interests
of those insured in an obligatory manner (consumers) since subjecting the NFZ to the
same competition law constraints as normal undertakings does not necessary have to
be of benefit to individuals. Admittedly, including the NFZ into the Polish definition
of an ‘undertaking’ may also be treated as an instrument meant to protect public
finances. The funds paid out by that entity under the supervision of competition
law (that aims, after all, to ensure the optimum allocation of resources) can then
be used in the most cost-effective way, taking into account the essential interests of
those affiliated with it and the scarcity of the available funds. On the other hand, it
is controversial whether such an approach is proper when fundamental values such
as life and health are at stake. It also results in a different treatment of EU citizens
within the internal market based on whether a Member State recognizes healthcare
bodies and pension funds as undertakings or not.

It must be stressed however that the presumed extension of the notion of an
‘undertaking’ under national competition law is always dependent on domestic
interests and specific values protected by various Member States. Competition law
analysis forces parties subject to an antitrust scrutiny to become more economically
effective, but efficiency as such is not always sufficient from the point of view of social
aims that are pursued by those in question. A uniform definition of an ‘undertaking’
established at the EU level and the exclusion of the possibility of its broadening by
individual Member States would be highly undesirable. It would infringe the principle
of subsidiarity and strongly interfere with legitimate national interests.

The analysis of the concept of an ‘entrepreneur’ would have been even deeper if
the Author had considered the status of public buyers. The CFI and the ECJ have
recently developed a formalistic and restrictive approach towards the analysis of
public procurement activities from a competition law perspective. It was ruled in
Fenin (T-319/996 and C-205/03 P7) and Selex (C-113/07 P8) that the nature of the
purchasing activity must be determined according to whether or not the subsequent

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4 Judgment of the Supreme Court of 20 November 2008, III SK/08, not reported.
5 Not all consumers are equals on the market because their market power is determined
by existing distribution of wealth. This radically unequal power of different market actors
(inequality in distribution of resources) determines the ability of consumers to satisfy their
preferences in a market system – T. Prosser, The Limits of Competition Law. Markets and Public
Services, Oxford 2005, p. 29
6 [2003] ECR II-357.
use of the purchased goods amounts to an economic activity, which does not exempt just activities of social nature based on principle of solidarity from its scope, as the exclusions need broader interpretation. In practice therefore, public procurement activities will frequently stay outside the scope of antitrust scrutiny.

Polish competition law is more specific in relation to its approach to public buyers. Article 6(1) of the Competition Act (equivalent to Article 101(1) TFEU) bans arrangements among entrepreneurs that compete with each other in a public procurement procedure or between them and the entrepreneur that organizes it. Still, the notion of an entrepreneur organizing public procurement remains unclear. Most believe that private entities can also use this procedure and thus this provision will be definitely applicable to them, it is uncertain however whether its scope includes other entities that are obliged to use public procurement, especially in the light of the Fenin case.

Regardless, Materna’s book deserves special attention. His approach to the analysis of the concept of an ‘entrepreneur’ is both comprehensive and detailed. The book is organized in a logical and transparent manner that allows its reader to quickly find the required information. As a result, they gain a publication that not only identifies many important scientific problems concerning the notion of an ‘undertaking’ but also presents several thoroughly justified answers to the many questions posed therein. The Author is not afraid to criticize the views expressed by both the doctrine as well as courts but does so with a very high level of substantive argumentation. It could be argued that the book fills the niche on one of the key elements of competition law. It was a great pleasure to read Materna’s book; the publication deserves recommendation not only to the doctrine and judiciary but also to everyone interested in competition law both at the national and European level.

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The last twenty years can be described as a period of development of the so-called information society, i.e. a type of society characterized by a new shape of social and economic relationships. The information society has emerged as a result of ongoing technological progress accompanied by a global crisis of the welfare state theory. The opportunities accompanying technical progress, globalization and the growing costs of the direct provision of public services, covered by states with increasing effort only, caused the beginning of the demonopolization and privatization of infrastructure sectors (state monopoly domain) in Europe at the end of the 1980ties. Services provided by network sectors used to be called public services. They were traditionally provided by public administration or through an agency of companies closely connected to public administration. As a result of the abandonment of the support policy for state monopolies in sectors important to them, it was necessary to create a new regulatory system adequate to the occurring changes. In addition, fundamental modifications of the state regulatory authorities were needed. The liberalization process created the danger of market dominance by former monopolies as well as a risk that the market itself would not have been able to open a way to free competition. It was agreed that removing trade barriers required the creation and enforcement of clear competition rules. In the initial stage of liberalization, state intervention was needed for an optimal allocation of resources, which would have been impossible considering the strong position held by incumbents and the relicense on market forces only. It was also clear that the liberalization of network services markets could not proceed without some degree of control exercised by public authorities responsible for the provision of access to basic network services.

The introduction of competition into infrastructure markets was connected with a transitional period characterized by a strong position of incumbents with market shares initially hindering free competition. The method and scope of state intervention into the market had to be regulated by law in that period\(^1\). Liberalization

\(^1\) See on the subject: F. Kamiński, ‘Rola państwa w rozwoju telekomunikacji – doświadczenie historyczne’ ['A role of a state in a development of telecommunications – historical experiences']
was accompanied by sector deregulating mechanisms to enable market entry by new companies (operators), the elimination of administrative constraints connected with access to the provision of services and the derogation of laws hindering the functioning of free competition in a sector\(^2\). Doctrine defines state activities undertaken within that scope as ‘state self-regulation’\(^3\) or ‘state re-regulation’\(^4\). Both terms express a necessity to allow the economy to work in accordance with market mechanisms with corrective state actions where necessary (taken only when they do not distort the economy).

State intervention into the economy is dictated by the need to continue social policy based on state responsibility for the provision of basic public services to consumers. Even where the state stops providing them directly as a result of privatization, it remains responsible for ensuring access to a given set of services. It must also ensure their appropriate quality even if they are delivered by the market itself. The state must therefore apply effective intervention mechanisms in order to guarantee the continuity, affordability and adequate quality of services. Thus, it goes without saying that a modern state has to apply adequate regulatory mechanisms in the new demonopolized socio-economic reality.

However, regulation as an autonomous mechanism of state intervention into the economy is not mentioned in any of the best textbooks on public or administrative economic law neither in Poland nor Europe. It is also no use looking for such terms as ‘regulatory administration’ or ‘regulatory body’ because they are not included in the descriptions of legal branches or in the typology of administrative tasks or instruments listed in textbooks\(^5\).

German literature presents a slightly different picture. It contains a broad concept of the term ‘regulation’ which refers to all instruments used by the state to control


\(^3\) See e.g.: T. Skoczny, ‘Współnotowe prawo regulacji…’, p. 234.


\(^5\) See e.g.: T. Skoczny, ‘Stan i tendencje rozwojowe administracji regulacyjnej’ [‘State and development tendencies of regulatory administration’] [in:] *Ius Publicum Europeum…*, p. 161.
and supervise the economy. This means that in the literature of the subject the term ‘regulation’ encompasses all instruments used by the state as intervention in the economy. With reference to the legislation of EU Member States, the term appears primarily in the context of the laws governing infrastructure sectors.

That is why, the book by Rafał Stasikowski The regulatory function of public administration. A study of the science of administrative law and the science of administration is worthy of interest. The Author presents a thorough and comprehensive analysis of the new tasks of public administration that appear in a changed, privatized model of public tasks fulfilment. He assesses the tasks and functions of administration from a historical and legislative perspective considering the influence of non-regulatory elements on the developments in the last two centuries. The book contains also a thorough regulatory analysis. Its focus is placed on functional modifications of public administration as an element of broader socio-economic and technological changes. The evolution of the tasks and the structure of public administration is assessed on the basis of traditional research instruments, which leads the Author to the conclusion about the evolutionary character of the changes in academic research in the subject matter of administration and about the beginning of the so-called new academic research on administrative law.

The book is divided into three parts. They focus, respectively, on basic legal instruments and definitions (Part 1), classic functions of public administration (Part 2) and the regulatory function of public administration (Part 3). The first part starts with methodological reflection. The Author refers to classical research methods associated with administrative law and the science of administration and proposes the use of a new research instrument – the concept of ‘steering’, defined as an intentional activity of a system. The aim of the introduction of the steering system into the methodology of the science of administration is a comprehensive and interdisciplinary analysis of the interrelationships between the activities undertaken by different administrative bodies.

The Author presents a very mature vision of new administrative law science stressing however that it requires developing still. Emphasised first is the need to expand the applicable research perspective and to analyse, aside of the law, other relevant elements such as the market, personnel and organisation. The Author states that new administration law science should focus no less on the process of law formulation than on the process of its application and interpretation. The Author proposes therefore a quite significant change in the science of administration concerning the shift in emphasis towards the formulation of the law (the stage preceding its application).

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7 In the Polish law one can find them e.g. in article 1(1)(5) of the Act of 16 July 2004 – Telecommunications Law, as well as, in article 25 of the act, titled ‘Regulatory decisions’ in part II, titled ‘Telecommunications market regulation’ (Journal of Laws 2004 No. 171, item 1800), and article 3(15) of the Act of 10 April 1997 – Energy Law (Journal of Laws 2006 No. 89, item 625, as amended).
The second and the third chapters of Part 1 present a set of definitions which acts as the basis for further assessment.

The second part of the book concerns the classical functions of public administration and is divided into four chapters. The first chapter presents its policing-regulatory function, the second focuses on administrative supervision, the third concerns the provision of services by administration and the fourth deals with the planning function of public administration. All of these chapters open with a historical analysis of the conditions influencing a given function and close with a description of the legal relationships appearing as a result of the fulfilment of a given function by administration bodies. Interestingly, Stasikowski presents here also the privatization of legal relationships whereby individuals purchase now specific public services on the basis of administrative relations as well as on the basis of civil law – the Author seems particularly interested in this very change. The attempt to determine the legal position of entities placed in the new reality of privatized public tasks becomes a fundamental aim of his assessment.

Part 3 of Stasikowski’s book is entitled ‘The regulatory function of public administration’. The first of its six chapters concerns the concept and essence of the regulatory function of administration covering its historical conditions and the views of the doctrine. His analysis regarding the definition of regulation is highly interesting and original. According to the Author, the term ‘regulatory function’ refers to those activities of public administration which take the form of continuous activities meant to achieve the common good – they guarantee the continuity, universality and quality of services ensured by law but provided by private entities fulfilling privatized public tasks. The definition refers explicitly to the concept of public services characterized by continuity, affordability and appropriate quality. In the opinion of reviewer, the reference made to the theory of Adam Chełmoński concerning continuity is not sufficiently convincing. It seems that it is not the element which is solely characteristic of the regulatory function, but of other functions of public administration with the reglamentory function at the top.

The next chapters focus on highlighting the legal basis of the regulatory function of administration and on the connotations of the term ‘regulation’ as well as other related terms. The fourth chapter of the third part is interesting since it concerns the subjective structure of a regulatory steering system. The Author divides the structure into regulatory bodies sensu stricto and other regulatory bodies which are dispersed at all levels of public administration such as the UOKiK President or given ministers. The fifth chapter concerns regulatory instruments. Stasikowski proposes the extension of the classical theory of legal forms of the activities of public administration and to consider it as a part of the conception based on the acts of will and the acts of knowledge of public administration. The concept of ‘a sequence of regulation activities’ is also presented here which proves that regulatory instruments are connected and interact with each other.

The last chapter contains an analysis of the legal position of an entity in the era of regulation. The Author rightly claims that, taking entity protection into consideration, it is vital to specify the scope of the accountability of public administration with
respect to the provision of specific services. It is also important to determine the legal relationship between those receiving them and their providers. The analysis concerning the legal relationships on which service purchases are based is extremely interesting. Indeed, the concept of “legal relationships” is very complex in itself. On the one hand, it is a civil law relationship concluded with a private entrepreneur. On the other hand, the relationship is preceded by an administrative act (a regulatory element) which shapes the legal position of an entity at the same time.

The quality of Stasikowski’s book manifests itself in the comprehensive, non-regulatory analysis of the factors shaping the structure and mechanisms of administrative activity. He correctly emphasizes the significance of economic and technological progress as the most important factor influencing current developments. Indeed, the present is primarily associated with a high speed of the spread of new communication techniques especially considering that over 200,000 years have passed between the appearance of speech and the invention of writing and another 10,000 years until Gutenberg and the publication of the very first book. After that however, the telegraph, telephone and finally wireless communication were invented in a few hundred years only. New communication technologies are now appearing every few years with the number of people using the internet doubling every four years. Knowledge-based economy (even if the Author does not mention the term, it seems that his book concerns this kind of economy) is a basic source of impulses for modern changes. The role of administration is in the new knowledge-based society primarily to create new socio-economic relations. According to the Author, this creation takes place in a regulatory steering system based on the cooperation of regulatory administration bodies (steering entities) with private entities fulfilling privatized public tasks (steered entities). This new relationship is created in order to shape the new legal position of entities receiving the services so as to ensure their appropriate protection in light of the fact that the state stopped providing them directly. The attempt to outline the legal position of an entity in its new relationship with a private provider of public services seems to be the fundamental aim of Stasikowski’s book. Furthermore, it is worth mentioning that the Author prefers a definition of regulation which does not refer to infrastructure sectors only but which also encompasses state influences on different socio-economic processes.

The book under review covers the most interesting trends in the science of administrative law. First, it refers to highly relevant challenges to the structure of administration posed by the development of new communication technologies in the information society. Second, issues connected with the new concept of public governance, which are essential for its regulatory function, lay in the background of the entire analysis. Third, in the face of a strong trend to extend the range of entity rights in relation to administrative bodies, it seems correct to place the issues of an entity’s legal position in the center of the discussion on the new function of public administration. Presenting its regulatory function against the backdrop of the topical

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(on the global scale) problems of administrative law is commendable. It acts as the ideal lens through which the concept of new administration law science, proposed by the Author, can see specific phenomena, evaluate them and create new instruments, institutions and rules.

The book is not free from small errors, such as the divergences in the title of a subchapter in the list of contents and in the book itself (p. 133), but this does not lower its overall quality. The book reflects a mature and well-thought-out vision of the new function of regulatory administration.

It is worth mentioning that treating regulatory law as a transitional phenomenon can be found in the literature on the subject matter at hand. In accordance with the principles of regulatory legislation, regulatory administration should be introduced in absence of effective competition. However, once that is achieved, regulation should be abolished and regulators should cancel any regulatory obligations previously imposed on specific companies. It seems that the book by Stasikowski makes a considerable contribution to refuting a thesis of a short-term and transitional character of regulatory law.

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I. Introduction

The Global Competition Law Centre (GCLC), a research centre of the College of Europe, held on 13 March 2009 in Warsaw its first Natolin competition law conference entitled ‘New Tendencies, New Tools and New Enforcement Methods from an EC and Polish Perspective’.

The conference was opened by Professor Paul Demaret, the Rector of the College of Europe, who started his speech by introducing GCLC and explaining the objective of its activities. He clarified that GCLC is dedicated to the promotion of rigorous legal and economic analysis of competition policy reforms both in the EU and globally. He stressed also that GCLC is mean to provide a discussion forum for academics, practitioners and enforcement officers in the antitrust field. After some preliminary remarks, the conference and its programme were presented by Jacques Bourgeois, the President of GCLC and a professor at the College of Europe and Massimo Merola, a member of GCLC's Executive Committee and a professor at the College of Europe.

Prof. Bourgeois acted as the chair of the first session welcoming its first speakers, Małgorzata Krasnodębska-Tomkiel, the President of the Polish Office of Competition and Consumer Protection (UOKiK) as well as Anthony Whelan, the head of the cabinet of Ms. Kroes, the European Commissioner in charge of Competition Policy.

The introductory remarks made by Mrs Krasnodębska-Tomkiel concerned the effectiveness of competition law. She started by recalling its origins and objectives because in her view, an assessment of the effectiveness of antitrust law requires the understanding of its philosophical background and aims. She continued to explain that the market can only then be effectively protected from the negative consequences of anti-competitive practices if the law is interpreted coherently and uniformly and if the legal system is organised in a way that allows its competition authority to carry out effective enforcement. Mrs Krasnodębska-Tomkiel mentioned among the instruments allowing UOKiK to carry out such enforcement: the sanction system, the right to conduct unannounced inspections and the possibility of issuing commitment decisions and ordering interim measures. In her opinion, the procedural powers of the Polish competition authority, which give it sole discretion in deciding which cases to pursue, give
it a chance to increase the effectiveness of competition law enforcement. On this basis, UOKiK is able to focus its limited resources on top priority issues. Mrs Krasnodębska-Tomkiewicz concluded that even an ideally designed legal system is insufficient, the determination of those appointed to enforce the law is equally important.

In his keynote speech, Anthony Whelan talked about the general trends of antitrust enforcement by the European Commission.

The conference was attended by academics, representatives of private legal practice, UOKiK officials and judges from the Polish competition courts.

II. First session

The first part of the conference was chaired by Professor Tadeusz Skoczny (Centre of Antitrust and Regulatory Studies, University of Warsaw) with the participation of: Paul Csiszár (DG Competition, European Commission), Dr. Dawid Miąsik (Polish Academy of Science; Bureau of Studies and Analyses of the Supreme Court), Katarzyna Racka and Anna Sekinda (the Competition Protection Department, UOKiK) and José Rivas, Professor at the Natolin Campus of the College of Europe and a Partner at the law firm Bird & Bird.

Paul Csiszár gave a presentation on actions for damages for the breach of EU antitrust rules. He explained the context and objectives of the 2008 White Paper where, following the judgment of the Court of Justice in Courage & Manfredi, the Commission suggested specific policy options and measures that would help give victims of EU antitrust infringements access to effective redress in order to gain compensation for the harm suffered. Mr Csiszár presented selected issues addressed in the White Paper which were in his opinion of primary importance for the system to be effective such as standing and collective redress, evidence access and the binding effect of decisions by competition authorities. He then briefly summarised the outcome of the public consultation with its 175 submissions filed by national governments, NCA’s, judges, businesses, consumer associations, law firms, academics and individuals. He noted that the participants generally agreed on the existence of obstacles to compensation and the need to have balanced and genuinely European measures. At the same time, divergent views were expressed on the particular measures proposed in the White Paper. Mr Csiszár concluded by explaining that the issue of whether the next step would be an EU legislative proposal is still being debated. In particular, the questions remain open whether, when and what the content of such a proposal would be.

Dr. Dawid Miąsik spoke of the approach to private enforcement of antitrust rules before Polish courts. He presented the varying types of private enforcement distinguishing offensive (i.e. on the victim’s initiative) and defensive cases (i.e. in response to claims brought by an infringer) as well as follow-up proceedings (i.e. after the NCA’s decision is issued) and those without the intervention of the NCA. Dr. Miąsik stressed that follow-up cases were always allowed before Polish courts whereas the private enforcement in stand-alone proceedings was until 2006 subject to contradictory judgments of the Polish Supreme Court. He continued to point out that according to the Supreme Court, a Polish court is allowed to apply competition
law where no proceedings have been instituted before the NCA (case files No. I CSK 454/06 and I CSK 83/05). That ability applies also to cases where such proceedings were instituted but resulted in a decision other than requiring an infringement to be ceased (case file No. I CSK 83/05) or finding that an infringement occurred. In follow-up cases, a [common] court is in principle bound by UOKiK’s decision when an appeal against the decision has been filed because courts not only examine the legality of the decision of UOKiK but also rule on the merits of the case. Dr. Miąsik stressed the uncertainty as to whether a UOKiK decision to close proceedings without delivering a ruling on the merits is binding. Commenting on the scope and effects of the binding force of UOKiK decisions, he explained that [common] courts cannot examine whether the conduct under investigation violates competition rules and cannot reach conclusions (factual or legal) contrary to the findings made by UOKiK.

Assessing the prospects for actions for damages in Poland, Dr. Miąsik said in conclusion that the existing legal basis is adequate but the practice is not. There is still a need for further developments of domestic jurisprudence concerning substantive rules covering the notion of damages and that of a causal link. A radical change of current practice with respect to procedural rules, especially rules of evidence, is also required for example when it comes to evidence types, more recourse to factual presumptions and discretionary powers in setting the amount of damages to be awarded.

Katarzyna Racka and Anna Sekinda discussed next the influence of UOKiK’s enforcement practice on new Polish leniency rules and the fining policy of the authority. They focused on the three Polish decisions where leniency applications were so far filed: Decision of 18 September 2006, DOK-107/06 (the Polifarb case); Decision of 31 December 2007, RKT-79/2007 (the Tikkurila case) and; Decision of 7 April 2008, DOK-1/08 (the ICI case). In Polifarb, the leniency application was submitted by Castorama Polska after a dawn raid and the opening of antitrust proceedings. A substantial reduction of the fine was awarded here for providing UOKiK with a range of documents which helped to explain the specific facts of the case. Relevant were in particular the statements submitted by the employees of Castorama listing the circumstances surrounding the conclusion of the agreement, which were recognised as evidence facilitating the conclusion of the case. Noted was also the fact that Castorama actively cooperated with UOKiK in the course of the entire proceedings, promptly providing all the requested information. In Tikkurila, the leniency application was filed by Tikkurila Polska in the course of explanatory proceedings. UOKiK recognised that Tikkurila admitted to having participated in the restrictive agreement since 2003. To prove its existence, the company provided copies of all the distribution agreements concerning its products sold under the Polifarb Dębica, Beckers and Tikkurila brands for 2003–2006. Data provided by the leniency applicant allowed UOKiK to establish that the agreement also covered products sold under the Tikkurila brand. By contrast in the ICI decision, the UOKiK refused for the first time to grant the leniency applicant (Castorama) either immunity or even a fine reduction because Castorama did not cease its participation in the agreement. According to UOKiK, the contested retail prices fixed by the supplier and Castorama were used by the retailer at least up to the date when the decision was issued. Mrs Racka and Sekinda also explained the new rules on
The leniency introduced on 24 February 2009 by the Regulation of the Council of Ministers of 26 January 2009 as well as UOKiK guidelines on the leniency programme.

The last presentation of the first part of the conference was delivered by Jose Rivas who presented the view of an EU law practitioner on leniency, settlements and fines in proceedings before the Commission. Professor Rivas started by pointing out the importance of the leniency programme for the enforcement of EU antitrust rules as illustrated by statistical data according to which 60% of all cartel decisions adopted by the Commission since 1 January 2003 are based on leniency applications. He explained further the EU rules stemming from the 2006 Leniency Policy, the 2006 Fining Guidelines and the EU settlement procedure. Professor Rivas concluded with respect to the 2006 Fining Guidelines that the following key issues are worth monitoring: the determination of the percentage of the value of sales and the entry fee; whether an increase for recidivism of up to 100% will apply for each infringement and; how will the multiplier factor be applied for deterrence. Professor Rivas continued to point out that the new settlement policy requires more transparent fining. He predicted that the success or failure of the new rules on settlements will depend on whether the disclosure of the essential elements of the infringement will be sufficient to understand its facts and accusation. It will also be extremely important for companies to fully understand fines. Professor Rivas stressed finally that it is worth observing whether a 10% fine reduction will prove a sufficient incentive for companies to submit a settlement proposal in cartel proceedings.

The first part of the conference ended with a panel discussion moderated by Mrs Małgorzata Szwaj of Linklaters and Mrs Dorothy Hansberry-Bieguńska of Wardyński & Partners. Mrs Szwaj welcomed the transparency in UOKiK’s fining policy stemming from its new guidelines which she briefly applied to the facts of the Polifarb case concluding that a substantial part of the fine must have been attributed to deterrence. Mrs Hansberry-Bieguńska discussed the issue of whether leniency is rightly applied in cases of vertical agreements.

III. Second session

The second part of the conference was chaired by Professor Stanisław Soltysiński (Soltysiński Kawecki & Szłęzek) with the participation of: Dr. Agata Jurkowska (Centre of Antitrust and Regulatory Studies, University of Warsaw), Dr. Konrad Kohutek (Polish-German Centre for Banking Law at the Jagiellonian University), Professor Richard Wish (Kings College, London) and Mr. Alexander Kopke (DG Competition, European Commission).

Dr. Agata Jurkowska spoke of the implementation of an economic approach to the assessment of vertical restraints in Poland. She commenced with an explanation of the construction and use of exemptions in vertical relations. Vertical price fixing was analysed next in the context of the Hand Prod case where the Warsaw Court of Appeals stated that in order to assess the anti-competitive character of a vertical agreement, UOKiK could not only rely on the literal wording of the agreement, but should also consider the economic conditions existing on the relevant market. The
The necessity of an economic analysis was emphasized to an even greater extent in the *yeast distribution* case adjudicated by SOKiK which concerned an exclusive purchase agreement. SOKiK found here that the mere inclusion of an exclusivity clause was not sufficient to classify the agreement as anti-competitive. It was necessary instead to consider also all those economic aspects of the case which were essential from a business point of view. Dr. Jurkowska concluded by discussing the status of purchasing and selling groups in competition law considering that they have a special status as they do not constitute a separate part of the distribution chain. Thus their role is close to that of an intermediary, whilst not being of a purely vertical nature.

The reasoning adopted by the court of first instance in the *yeast distribution* case was recently upheld by the Warsaw Court of Appeals (VI ACa 61/09) which stressed the need for an economic analysis of vertical relationships and stated that the burden of proof lies in this context with UOKiK. Even if the market share of a supplier exceeds 30% and falls outside the scope of the block exemption, the authority should carry out an in-depth market analysis in order to support its findings.

Dr. Kohutek followed with a discussion of the aim behind the prohibition of a dominant position abuse in light of consumer welfare, which is the main objective of competition law. In cases of exclusionary abuse, consumer harm was presented as a constitutive element of the notion of an abuse. Dr. Kohutek saw the ‘equally efficient competitor test’ as a useful tool in assessing whether an abuse took place in cases of price-based exclusionary conduct since it centres on the assumption that consumers are harmed when an equally efficient competitor is excluded from the market by an abuser. The test may be omitted in cases of presumed abuse, i.e. conduct which has an anti-competitive objective or in cases with harm to commercial consumers. Still, this presumption can be rebutted by demonstrating the objective need to act in such manner or by the application of an efficiency defence. In order to apply the efficiency defence, three conditions must be fulfilled cumulatively: that the efficiency is a direct result of the abuse (i.e. that the abuse is indispensable in creating that efficiency); that no net harm is caused to consumers and; that there is no elimination of effective competition. The second condition (no net harm to consumers) is the hardest to satisfy as it requires a balancing of the gains and losses caused to consumers by the abuse.

Professor Richard Whish discussed the upcoming reform of Regulation 1/2003. He noted current criticisms of the act including those provisions which in the opinion of competition law practitioners should be revised. Professor Wish stressed here the need for greater clarity as to the allocation of jurisdiction. The bulk of his speech was devoted to existing procedural problems and the necessity for procedural harmonization between national and EU laws in the area of competition. The lack of coordination between the Commission and NCAs, especially in cases involving dual investigations of the same subject matter, was the subject of much debate and caused deep concerns among participants. According to Professor Wish, the Commission’s investigative and adjudicative powers should be separated. Still, some of the provisions of Regulation 1/2003 cause problems in the application of such a separation, the overall result of which could otherwise be a considerable success. In conclusion, he presented statistical data on antitrust cases conducted by NCAs and the Commission.
The final presentation was given by Mr. Kopke and dealt with the referral mechanism under the EC Merger Regulation. After describing the system of referring cases between NCAs and the Commission, he focused on the specific referral criteria which are essential in establishing whether the scrutinised concentration has a community dimension and how to apply the rule of the most appropriate authority under Article 4(4). Mr. Kopke presented a detailed timetable for the referral procedure and statistical data concerning referrals under Article 4(4) (including the economic sectors of the referrals and their outcomes). It should be noted that, according to the presented data, 63% of the referrals received clearance, 34% a conditional clearance and just 3% were prohibited. Referrals under Article 4(5) were then analysed in the same manner. First Mr. Kopke described the detailed conditions that must be fulfilled in order to make a referral under Article 4(5) with great emphasis placed on the notion of the location of the effects on competition. Particular attention was paid to factors such as a cross-border nature of cases and their effects on competition in the territories of more than one Member State. Statistical data concerning the numbers and economic sectors of the said referrals was also presented. In conclusion, Mr. Kopke explained the criteria of the so-called German (Article 9) and Dutch clauses (Article 22) which, respectively, make referrals possible from the Commission to a Member State and vice versa.

This part of the conference concluded with a panel discussion. Mr. Robert Gago (Hogan Lovells) expressed the view that the Polish courts were right to go against UOKiK’s mechanical qualification of vertical agreements as an infringement of competition law by their very object. He noted that an economic analysis was often omitted simply to make life easier for the case handlers. In response to Dr. Kohutek’s presentation, Ms Bettina Volpi (Bonelli Erede Pappalardo) described the new trends seen in the assessment of abuse cases by the Court of Justice of the European Union. Mr. Kanton (Soltyński Kawecki & Słężak) highlighted then the views share by many practitioners regarding the reform of Regulation 1/2003. He was also in favour of the use of an economic approach to vertical agreements.

In his concluding remarks, Prof. Jacques Bourgeois (President of the GCLC) stressed that this was the first conference on competition law held in the Warsaw Natolin Campus. He saw it as a great success for GCLC, the College of Europe in Warsaw, the supporting organisers and local competition law practitioners. He noted that the conference brought with it the opportunity to exchange important experience, ideas and concepts. The need for such a debate was demonstrated by the fact that so many distinguished representatives of the academia, competition enforcement agencies, practitioners and, most importantly, Polish judges have gathered to discuss such sophisticated competition law problems. He also stressed that the Natolin campus, with its 18th century manor house, was the ideal venue for this type of initiative and expressed his hope that a similar conference will be held there in two years’ time.

Małgorzata Szwaj  
Partner and Head of the Competition/Antitrust Practice in Linklaters Warsaw

Robert Gago  
Hogan Lovells
I. General information

In the third year of its activities CARS primarily pursued the goals prescribed in its founding documents. The Centre was particularly active in the publishing department; it cooperated on a major research project, held an open PhD seminar and organized a training course – all activities that proved successful in previous years.

Without a doubt, the Centre’s greatest achievement of 2009 was the publication of the first volume of its Yearbook of Antitrust and Regulatory Studies (YARS) – CARS’s first English-language publication meant to introduce foreign readers to the law, enforcement practice, and jurisprudence of antitrust and sector specific regulation in Poland. At the same time, the fourth book was published by the Centre within the framework of its publication series Studies and Monographs on Antitrust and Regulation. The year 2009 also saw the conclusion of an extensive publishing project in which many members of CARS participated very actively over the last year: C.H. Beck’s publication of the Commentary on Competition and Consumer Protection Act edited by the Centre’s Director, Professor Tadeusz Skoczny.

Considering its outside relations, CARS initiated in 2009 the signing of a co-operation agreement between the Faculty of Management of the University of Warsaw and the State Enterprise ‘Polish Airports’. This agreement became the basis for the implementation, by experts of both institutions, of a research project entitled ‘Airport services in the European Union and in Poland – competition law and regulations’. Furthermore, an interesting PhD seminar was held at the Centre on procedural fairness in antitrust proceedings, among others, which has gathered many distinguished Polish judges and scholars. CARS was also contracted to organize a training program on the application of competition rules for a major Polish oil company.

From an organizational point of view, a library catalogue has been created to accompany CARS’s continuing efforts to enlarge its library collection. The number of competition and regulation volumes, both Polish and foreign, has reached around 200 items in the course of 2009.

II. PhD seminars

CARS’s PhD seminars are organized in the form of a discussion forum concerning a relevant antitrust or regulatory thesis presented by a chosen speaker. They are
open to the wider public and the speaker does not necessarily have to be a CARS member. Outside guests are always invited to participate in the seminars originating from relevant public authorities or the judiciary as well as from the private sphere. CARS’s PhD seminars are centered around a debate on substantive research problems or methodological issues connected to the draft PhD dissertation of the speakers.

The 2009 PhD seminar was held on 14 May. It focused on the draft dissertation prepared by Maciej Bernatt with Professor Andrzej Wróbel, a distinguished judge of the Polish Supreme Court, acting as co-speaker and moderator. The seminar focused on the theoretical and constitutional standard of a ‘procedural fairness pattern’ that should be used by legislators when formulating procedural rules to be applied in the proceedings before every public body including, among others, the antitrust authority and sector specific regulators. The debate considered the entire catalogue of fundamental values that define the pattern of procedural fairness covering: the right to be heard, due process and equal access to process, protection of ownership rights, judicial control of administrative decisions, and impartiality and independence of the ruling body. The seminar gathered several judges of the Polish Supreme Court, Supreme Administrative Court, Constitutional Tribunal and academics specializing in administrative procedures.

Aside from the aforementioned open PhD seminar, Prof. Tadeusz Skoczny has also been consulted by a number of PhD candidates on the progress of their research projects prepared under CARS’s overview.

III. Publications

1. Yearbook of Antitrust and Regulatory Studies (YARS)

The first volume of YARS was published in January 2009. This fully English-language periodical includes: academic articles (among them a guest paper prepared by a distinguished representative of the international antitrust or regulatory doctrine), reviews of Polish antitrust and regulatory legislation, a review of EU case law concerning Poland in the antitrust and regulatory field as well as case-comments on key Polish judgments in this areas, book reviews, reports on Polish events dedicated to competition or regulation, and a list of Polish writings on competition and regulation from the preceding year.

The yearbook was distributed among both Polish and foreign institutions specializing in the research on competition protection and regulation from both the economic as well as legal perspective. The first volume of YARS has generated a great degree of interest from its readers, illustrated by a growing number of proposals for future articles as well as the fact that a number of polemics were sent to the editorial board of YARS concerning its previous articles. One of the submitted polemics can be found in YARS vol. 2(2).

Much of the year 2009 was dedicated to a wide-spread promotion of YARS and to the further development of the basic concepts for its following volumes. In particular,
it has become the priority of the editorial board to increase the number of economic articles in the total number of papers published in YARS.

2. Corporate Social Responsibility. Constitutional and International Perspective

This book (ISBN: 978-83-61276-27-2) by Maciej Bernatt represents the fourth publication issued in the framework of CARS’s publishing series Studies and Monographs on Antitrust and Regulation. It is the first comprehensive Polish study on the concept of corporate social responsibility considered from the perspective of legal science, focusing in particular on the constitutional and international standpoint. The norms of corporate social responsibility are analysed in the light of the Constitution of the Republic of Poland as well as with reference to international legislation. The author also refers to Corporate Social Responsibility in the context of competition and consumer protection. The book is intended for academics, students, politicians, entrepreneurs, managers and representatives of NGOs and other leaders of civil society.

IV. Research

In co-operation with the State Enterprise ‘Polish Airports’ (PPL), CARS conducted in 2009 a research project on competition law and regulation in airport services. Many academics from the Faculty of Management of the University of Warsaw as well as specialists from PPL participated in this project. Antitrust rules concerning the provision of airport services were identified, presented and analyzed in light of the latest European case-law. Regulatory rules and their evolution between 1992/1993 and 2009 were identified which stem from legal acts that have already been in force for a long time and those that have only recently been drafted. Special attention was paid to the legal acts and draft legislation (as well as other documents, among them studies carried out on request of the Commission) which are part of the so-called ‘airport package’ adopted by the European Commission in January 2007. The research project covered the following aspects of airport functioning:

1. the rules on relevant market definition in airport services;
2. the antitrust context including: (a) the application of competition law to entities managing airports in the light of European and Polish case-law, (b) preventive merger control on the airport services market, (c) state aid issues;
3. the regulatory context including: (a) the distribution of traffic between airports, (b) airport charges, (c) ground-handling services, (d) environment protection/ noise;
4. the relationships between the ownership and management of airports covering the four biggest airports markets in the EU: Great Britain, Germany, Spain & Portugal (cumulatively) and France.

The detailed research findings concerning all of the aforementioned problems can be applied by all those engaged in the management of airports and/or the provision...
of airport services. The full research report is scheduled to be published in 2010 in the form of a book entitled *Airport Services in the European Union and Poland – competition law and airport regulations* (Usługi portów lotniczych w Unii Europejskiej i w Polsce a prawo konkurencji i regulacje lotniskowe) edited by Filip Czernicki and Tadeusz Skoczny. It will constitute the fifth publication of CARS’s “Studies and Monographs on Antitrust and Regulatory” series.

V. Training

CARS also conducted in December 2009 a training course for the employees of a major oil industry company. Its program included competition rules in the context of parallel imports, distribution agreements and potential antitrust effects of information exchange.

*Dr. Agata Jurkowska-Gomulka*  
CARS Scientific Secretary
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ADRANNA ZABŁOCKA, Antitrust and copyright collectives – an economic analysis
University of Warsaw, Faculty of Management Press was established in 2003 following the idea of the Faculty’s present Dean, Professor Alojzy Z. Nowak. Since its creation, the economist, sociologist and journalist Jerzy Jagodziński has been its Editor-in-Chief.

The publishing house primarily aims to ensure proper use of the many strengths of the Faculty of Management, in particular, its teaching staff which includes as many as 35 Professors and higher-degree Doctors many of whom are internationally respected scholars with considerable academic records. At the same time, the Faculty has many foreign students originating from: the United Kingdom, Austria, France, Finland, Russia, Belarus, USA, Canada, India, Iran, Saudi Arabia, Nigeria, Georgia, Azerbaijan, Armenia, Taiwan and China. The number of students applying for the International Business Program has been increasing over recent years. This fact alone makes the market for foreign language publications grow with each year, even within the Faculty itself.

The Faculty of Management Press is encouraged therefore, quite understandably, to primarily publish books written by members of the Faculty’s academic staff including: monographs, textbooks, periodicals and working papers. It is worth noting in particular the quarterly entitled “Problemy Zarządzania” (“Problems of Management”) which has been published since 2003 and which enjoys a high status among academic periodicals.

The number of publications in foreign languages (mainly in English) has also been constantly growing. We would like to recommend to the Readers of the YARS some of the most recent releases in English of the Faculty of Management Press:

**Global Economy: In search of new ideas and concepts, volume 4**, edited by Mina Balamoune-Lutz, Alojzy Z. Nowak, Jeff Steagall, annual publication, prepared in cooperation with Coggin College of Business, University of North Florida, USA

**Management in Poland after accession to the EU – selected aspects.** Edited by A. Z. Nowak, Beata Glinka, Przemyslaw Hensel

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**European Economic Integration: Chances and Challenges**, by Alojzy Z. Nowak

**The EU through the eyes of Asia**, edited by Martin Holland, Peter Ryan, Alojzy Z. Nowak and Natalia Chaban.

**Global Economy: In search for solutions to stabilize the global economy. The role of infrastructure, culture and international education. Volume 5**, edited by Mina Balamoune-Lutz, Alojzy Z. Nowak, Jeff Steagell, annual publication, prepared in cooperation with Coggin College of Business, University of North Florida, USA.

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