ARTICLES

ANNA FORNALCZYK, Competition Protection and Philip Kotler's Strategic Recommendations

ANTONI BOLECKI, Polish Antitrust Experience with Hub-and-Spoke Conspiracies

MACIEJ BERNAUT, The Powers of Inspection of Polish Competition Authority. The Question of Proportionality

KONRAD STOLARSKI, Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?

ŁUKASZ GRZEJDZIAK, Mr Hoefner, Mr Elser, Please Welcome to Poland. Some Comments on the Polish Healthcare System Reform from the Perspective of State Aid Law

MARLENA WACH, Polish Telecom Regulator's Decisions Regarding Mobile Termination Rates and the Standpoint of the European Commission

MICHAŁ WOŁAŃSKI, Estimation of Losses Due to the Existence of Monopolies in Urban Bus Transport in Poland

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Editorial foreword

The Editorial Board is pleased to present the fifth volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2011, 4(5)). In the fourth year of its publication, two volumes of YARS are issued in 2011: the current ‘regular’ volume as well as a sector-specific one dedicated solely to competition protection and regulation in the energy sector in Poland (YARS 2011, 4(4)).

YARS 2011, 4(5) continues to present to our foreign readers a number of academic papers dealing with key problems of substantive and procedural competition rules and regulation. Although the papers concentrate on Polish law and practice, they also usually refer to European experiences in the enforcement of competition law and regulation in infrastructure markets. We believe the papers presented in the current volume of YARS can inspire Polish and foreign academics alike to conduct further research in both its fields. We hope the readers of YARS 2011, 4(5) will be encouraged to co-operate with us in the future as the periodical is now open to foreign authors writing on antitrust and regulatory issues in Central and Eastern Europe. Setting our sights on such regional expansion, we thus welcome Professors Kolesná, Pecotić Kaufman, Stanikunas, Tichy and Tihamér, this region’s most prominent academics, as new members of the YARS Scientific Board.

YARS 2011, 4(5) opens with a paper by Prof. Anna Fornalczyk, former President of the Polish Antimonopoly Office, analyzing Philip Kotler’s marketing recommendations from the perspective of competition law. The author points out, most importantly, that some of the proposals on how to reach and sustain market dominance may in fact cause a violation of Polish and European competition law. Antoni Bolecki presents the problem of hub-and-spoke conspiracies, practices that involve an exchange of confidential information in a vertical context, with reference to three decisions issued in recent years by the President of the Polish Office of Competition and Consumer Protection. Considering the issue from entirely different perspectives, two separate articles deal with the exercise by the Polish competition authority of its powers of inspections. Dr. Maciej Bernatt focuses on procedural guarantees of proportionality as the actions of the public authority limit the economic freedom and right to privacy of the inspected undertakings in the name of competition protection. The aim of the paper by Konrad Stolarski
is to assess if fines for a failure to co-operate with an inspection carried out in the framework of antitrust proceedings constitute ‘the ultimate weapon’ for its enforcement bodies. The article considers the decisional practice of the Polish competition authority as well as the European Commission and presents the way in which their approach has evolved over the years. Łukasz Grzejdziak analyses the recent reform of the Polish healthcare system from the perspective of State aid rules. The author considers the hypothesis that a debt write-off in favour of public hospitals only constitutes in fact State aid within the meaning of EU law. In the next paper, Dr. Marlena Wach presents key issues relating to the methods of mobile termination rates calculation by the Polish telecoms regulator. The final article by Dr. Michał Wolański analyses different de-monopolisation approaches used in Polish and European urban public transport. It compares the efficiency of these models and estimates the total losses incurred in Poland due to high monopolisation of its public transport.

Aside from its research papers, the current volume of YARS contains also a review of new Polish antitrust legislation and key jurisprudence as well as a series of detailed reviews of legislative amendments in specific infrastructure sectors: telecoms, energy, rail transport, aviation, and the postal sector. Most of these reviews refer to 2010; the developments in the postal sector cover both 2009 and 2010.

The following part of YARS 2011, 4(5) contains a number of case comments concerning both European and Polish antitrust jurisprudence. Two separate judgments delivered by the European Court of Justice, both regarding Polish telecoms operators, are discussed by Anna Pisarkiewicz (C-522/08) and Cathal Flynn (C-99/09). Two important judgments of the Polish Supreme Court are then presented by Dr. Bartosz Targański (III SK 37/09) and Szymon Syp (III SK 41/09). M. Modzelewksa de Raad comments on a judgment of the Court of Appeals in Warsaw (VI Aca 61/09) and Dr. Malgorzata Kozak discusses two decisions of the Polish competition authority concerning inspections during antitrust proceeding.

Reviews of Polish books concerning various aspects of EU competition rules are presented next. They concern the general characteristics of EU competition rules, co-operation in mergers cases within the European Competition Network and, EU antitrust jurisprudence in the years 2004-2009. YARS 2011, 4(5) closes with a report on the conference ‘New Amendments Introduced to European Union Competition Law Due to the Expiration of Block Exemption Regulations’ and reports on the activities of CARS: general Activity Report for 2010 and on the CARS open PhD seminar dedicated to conditional approvals of mergers.

The Editorial Board hopes that YARS will once again provide its readers with up to date insights into the workings of antitrust and regulation in Poland.

Warsaw, November 2011

Agata Jurkowska-Gomulk
Volume editor
List of acronyms

POLISH COMPETITION AND REGULATORY AUTHORITIES:

UOKiK  
(Urząd Ochrony Konkurencji i Konsumentów)  
– Office for Competition and Consumer Protection

SOKiK  
(Sąd Ochrony Konkurencji i Konsumentów)  
– Court of Competition and Consumer Protection

UKE  
(Urząd Komunikacji Elektronicznej)  
– Office of Electronic Communications

ULC  
(Urząd Lotnictwa Cywilnego)  
– Civil Aviation Office

URE  
(Urząd Regulacji Energetyki)  
– Energy Regulatory Office

UTK  
(Urząd Transportu Kolejowego)  
– Rail Transport Office

OTHER INSTITUTIONS:

ECtHR  
– European Court of Human Rights

FTC  
– Federal Trade Commission

IGKM  
(Izba Gospodarcza Komunikacji Miejskiej)  
– Polish Chamber of Urban Transport

IPHF  
– Independent Public Healthcare Facilities

KIGEiT  
(Krajowa Izba Gospodarcza Elektroniki i Telekomunikacji)  
– National Chamber of Commerce of Electronics and Télécommunications

NCA  
– National Competition Authority
NHF – National Health Fund
NRA – National Regulatory Authority
OFT – Office of Fair Trading
PTA – Public Transport Authority

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

PP – Polish Postal Law of 2003

PT – Polish Telecommunications Law of 2004

PL – Polish Aviation Law of 2002

TEC – Treaty on European Communities

TFEU – Treaty on the Functioning of the European Union

OTHER ACRONYMS:

LGU – local government unit
LRIC – long run incremental costs
MIF – multilateral interchange fee
MNO – mobile network operators
MS – Member State of the European Union
MTR – mobile termination rates
MVNO – mobile virtual network operator
Competition Protection
and Philip Kotler’s Strategic Recommendations

by

Anna Fornalczyk*

CONTENTS
I. Competition and dominance in Kotler’s theory
II. Pricing policy as a tool of effective competitive struggle
III. Strategic alliances and anti-competitive agreements
IV. Preventive control of concentrations
V. Antitrust recommendations for modern marketing

Abstract
P. Kotler’s recommendations of modern marketing tell managers how to achieve and maintain a dominant market position. Some of the recommended activities may, however, infringe European and Polish competition law. Objections are not raised by market success achieved as a result of high product quality, good customer care, high market shares, continuous product improvements, new product release, entry onto fast growing markets, and exceeding customer expectations. Competition law problems may appear when a given company, having reached a dominant position, starts abusing it by subjugating the market and dictating business conditions to other market players (suppliers, customers, consumers). This article focuses on predatory pricing, strategic alliances, mergers and acquisitions and State aid issues that may arise from the implementation of Kotler’s recommendations. For market success not to transform into a competition law problem, it is worth remembering the limitations imposed by competition law on the actions of dominant companies. The paper outlines these limitations.

* Prof. Anna Fornalczyk, Lodz Technical University, Organisation and Management Department, Institute of European Integration and International Marketing.
Résumé

Les recommandations de Philip Kotler concernant le marketing moderne conseillent aux managers comment atteindre et maintenir une position dominante. Certaines des activités recommandées peuvent, pourtant, être en contravention avec la loi polonaise et européenne. Les problèmes du droit de la concurrence peuvent apparaître quand une entreprise donné, après avoir atteint une position dominante, commence à en abuser par subjuguer le marché et dicter ses conditions aux autres participants du marché (fournisseurs, clients, consommateurs). Cet article se concentre sur les prix prédateurs, alliances stratégiques, fusions-acquisitions et sur les questions de l’aide publique resultant de l’implantation des recommandations de Kotler. Pour que le succès du marché ne se transforme pas en échec, il faut prendre en considération les limitation imposées par le droit de la concurrence sur les actions des entreprises dominantes. Cet article décrit ces limitations.

Classifications and key words: competition; dominant market position; predatory pricing; strategic alliances; preventive control of mergers and acquisitions; exploitive or anti-competitive practices; State aid; leniency procedure; Kotler’s theory of modern marketing.

I. Competition and dominance in Kotler’s theory

Philip Kotler, a renowned authority of marketing theories, famous lecturer and advisor to global companies, assumed that market dominance is indicative of effective marketing that can guarantee success in business relations1. Other commentators recommend striving to attain market dominance also within the framework of effective strategic management and marketing concepts2. Another eminent theoretician of management sciences, P. F. Druker, uses the expression ‘to go the whole hog’ in order to reflect the essence of a business strategy aimed at dominating the market. He explains it using the example of two companies: Hoffman-LaRoche and Du Pont which, having conquered their own competitors, dominated the market of vitamins and plastics respectively. Practice showed, however, that by implementing a strategy of market dominance, they violated the rules of European competition law and American antitrust law and thus became subject to infringement proceedings in Europe as well as in the U.S.3.

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1 P. Kotler, Kotler o marketingu. Jak tworzyć, zdobywać i dominować na rynkach, Katowice 2006.
The definition of marketing stating that ‘Marketing is the art and science of winning and keeping customers and taking care of relations with them’\(^4\) is of key importance for P. Kotler’s concept. The last part thereof has found particular confirmation in practical terms. A survey conducted within the framework of the Technical Assistant Research Program (1986) referred to by P. Kotler illustrated that the cost of winning a new client is five times higher than that of keeping an existing one\(^5\). Experience shows that this is, for instance, why telecoms operators offer promotions to new clients only despite the fact that such offers may be perceived as a form of discrimination of clients already loyal to the company.

P. Kotler’s recommendations on effective marketing aimed at the acquisition of market power may also lead to a situation known in the economic practice (Microsoft, Intel, Tetra Pak) as business success combined with a competition law problem. Although the mere fact of enjoying a dominant position does not violate competition law in itself, the abuse thereof is considered an infringement. The methods of arriving at a dominant position by internal (profit accumulation) or external growth (concentration of companies) may also be subject to the provisions of competition law. Indeed, its application constantly raises questions about the efficiency criteria when assessing a given company’s marketing behavior. Born in mind must be the fact, however, that consumer interests, understood as the fulfillment of their right to choose the place, price and quality of the goods purchased, is the ultimate criterion for the evaluation of the consequences of the behavior in question.

P. Kotler is right in saying that to be successful in business one needs to use modern marketing techniques and its fundamental elements, such as: networking with other market players (especially when it comes to the reduction of distribution costs by creating common distribution networks); focusing marketing activities on the market with a view to find new customers and win their loyalty; and selecting suppliers based on the criteria of price, quality and delivery terms\(^6\). However, paths leading to market dominance, if continued after it has already been attained, may be considered to constitute a prohibited monopolistic practice exercised by a dominant company. Warnings of that type are absent from P. Kotler’s theory even though they may complicate the operations of a dominant company when it finds itself facing a conflict with competition law.

Although it would be a too far-reaching simplification to assume that P. Kotler’s theory of modern marketing recommends the monopolization of the economy, it is worth highlighting the potential negative external effects of its

\(^4\) P. Kotler, *Kotler o marketingu…*, p. 199.
\(^5\) Ibidem, p. 200.
implementation\(^7\). Despite the fact that P. Kotler’s very sizable textbook contains some brief notes on American antitrust rules, these comments are not reflected in his marketing recommendations\(^8\). The author expects thus his readers to singlehandedly answer the question: how to run a business without infringing antitrust provisions? P. Kotler pays somewhat more attention to pricing policy making it possible for his readers to skillfully surf between the antitrust reefs\(^9\).

This paper illustrates what competition law threats arise from the application of P. Kotler’s concept of modern marketing. Examples are given of competition law enforcement practice in both Poland and European Union to anti-competitive and exploitive practices\(^10\) resulting from the abuse of a dominant position (taking advantage of existing market power) and to restrictive agreements. The paper covers also preventive control of concentrations and competition-distorting State aid.

A number of specific considerations are important to the concept of modern marketing formulated by P. Kotler including: pricing policy as a tool of an effective competitive struggle\(^11\); winning and keeping client loyalty\(^12\); strategic alliances as an effective future of marketing\(^13\); and mergers by acquiring other companies or brands\(^14\). When advising company managers to engage in the above activities, it is worth drawing their attention to issues where they potentially collide with competition law\(^15\).

II. Pricing policy as a tool of effective competitive struggle

Pricing independence is the inherent right of companies in the market economy. Nevertheless, having attained market power, a dominant company makes pricing decisions indicative of the existence of exploitive or anti-competitive practices. Competition law is designed to prevent such situations. When it comes to pricing practices, competition law enforcement focuses on

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\(^12\) Ibidem, p. 37.

\(^13\) Ibidem, p. 38.

\(^14\) Ibidem, p. 82.

the analysis of data and information which makes it possible to distinguish normal business activities from monopolistic practices.

P. Kotler recommends conquering competitors by way of lower prices in order to arrive at a high market share. The strategy of offering prices lower than those of the competition is justified in business terms and does not infringe competition law provided it results from cost advantages enjoyed by the dominant company. Predatory pricing strategies, which aim to eliminate competition, are not allowed however16.

S. Bishop and M. Walker define predatory pricing as ‘...the deliberate sacrifice of profits in the short run in the expectation of earning more profits in the long run after the rival has exited the market.’17 Accordingly, when assessing a predatory pricing policy of a dominant company it is essential to identify the ultimate objective of that strategy. Once competitors are driven out of the market, dominant companies tend to increase their prices to a level that excessively compensates (‘monopoly rent’) their losses born as a result of the earlier offering of glaringly low prices.

The Areeda – Turner test (TAT) can be used in order to assess whether a policy of low prices used in the competitive struggle bears the signs of predatory pricing. The test considers a price below short-term marginal costs to be predatory (glaringly low)18. However, since short-term marginal costs are difficult to calculate in practice, its authors allow for the possibility to apply average variable costs instead. The TAT method has been open to criticism as it is difficult to apply in competition law proceedings19. Although the test is applied in both explanatory and full antitrust proceedings, it is used as an auxiliary tool only. It is assumed in competition law enforcement practices that a price below average variable costs should be considered to be predatory and, as such, illegal. However, the intention to apply predatory prices must be proven, that is, the dominant company’s aim to drive its competitors out of the market must be clear. In Europe, the Tetra Pak case20 is an unprecedented example of counteracting predatory pricing. The President of the Polish Office of Competition and Consumer Protection (in Polish: Urząd Ochrony

16 In the Polish Act on Competition and Consumer Protection [Art. 9(2)(1)] predatory prices are referred to as glaringly low prices.
Konkurencji i Konsumenta; hereafter, UOKiK) takes actions to counteract predatory pricing also\textsuperscript{21}.

While recommending the application of a low prices strategy, P. Kotler discusses also the possibility of a company being subsidized by the government and, as a result, offering prices lower than its competitors\textsuperscript{22}. In the European Union, State aid is subject to the provisions of Article 107–109 of the Treaty on the Functioning of the European Union (TFEU), to Regulations issued by the European Parliament and Commission, and to a number of soft-law documents that help prevent lasting infringements of market competition by the beneficiaries of State aid.

State aid may take a variety of forms in practice (subsidies, tax allowances, preferential loans, capital injections) all of which are monitored by the European Commission. Aid granted by the governments of individual Member States must be notified to the Commission according to a set of notification requirements specific in appropriate legislation. Aid granted in breach of EU rules is illegal and should be recovered. A low prices policy pursued as a result of State aid infringes EU competition law and is incompatible with the internal market.

In parallel to the activities of the European Union, the World Trade Organization also counteracts the attainment of a competitive advantage by entities subsidized by the governments of one of its members on the basis of its own antidumping provisions. The difference between the EU and WTO set of State aid rules lies in the fact that the former provisions are applied ex ante while the later procedures are implemented on an ex post basis. When developing a low prices strategy with a view to conquer competition and dominate a market, it is thus worth keeping in mind such strategy’s potential conflicts with competition law and State aid provisions.

A low prices policy may also consist of granting rebates to customers which, according to P. Kotler, may be helpful in winning and keeping client loyalty\textsuperscript{23}. P. Kotler rightly stresses the consequences of rebates for the profit levels of the company granting them. Excessive rebates may indeed increase sales and help win loyal customers, but they may reduce the profitability of the dominant company also. Nonetheless, attention should be paid to restrictions placed by


\textsuperscript{22} P. Kotler, \textit{Kotler o konkurencji…}, p. 230.

\textsuperscript{23} Ibidem, p. 37, p. 167.
competition law on the formulation and implementation of a rebates policy by dominant companies.

Loyalty rebates are recommended by P. Kotler as a method of maintaining a given company’s dominant market position. However, such practices are considered restrictive vis-a-vis competition by both the European as well as Polish competition law jurisprudence as they eliminate competitors with a weaker market position than the dominant company and close the market to potential competitors. The essence of rebates may lie in the imposition of a given scale of purchase that excludes suppliers other than the dominant company. It may also lie in retroactive rebates or making the size of the rebate dependent upon the length of the commercial agreement between the dominant company and its customers. Rebates policy, if justified from a business standpoint, should be conducted in accordance with binding competition law provisions if the company wishes to be successful in business without having to face competition law problems.

III. Strategic alliances and anti-competitive agreements

P. Kotler considers strategic alliances the ‘effective future of marketing’. This statement is true albeit it is worth adding that strategic alliances may also include R&D, production cooperation, staff training, investment and the building of common marketing channels. The theory of management, especially strategic management, describes and studies the premises and positive effects of agreements between undertakings. ‘Strategic alliance is a cooperation between present or potential competitors which impacts the position of other competitors, suppliers or customers within the same or related sectors.’ Most generally, the reasons for strategic alliances can be defined as: ‘(...) the reduction of risk and re-grouping of resources by creating new structural...

25 P. Kotler, Kotler o marketingu..., p. 38.
27 M. Romanowska, Planowanie..., p. 15.
configurations, “hybrid organizations” which enable the implementation of assumed goals with simultaneous protection of partners’ interests\textsuperscript{28}.

While taking advantage of the benefits of strategic alliances, it is worth remembering that horizontal agreements between competitors are not allowed to lead to the restriction of market competition. Restrictive agreements strengthen the market position of their parties and may result in practices identical to the abuse of dominance\textsuperscript{29}. Both European and Polish competition law counteract such agreements.

Cartels are especially dangerous to competition as agreements between competitors that fix prices, output and sales quotas or share the markets. To establish that an infringement of competition law took place by a cartel, it is irrelevant whether the pricing policy, as well as any other coordinated activity, was agreed upon directly by the companies participating in the agreement or via their sectorial associations. From the point of view of competition law, it is not the form of the agreement that is important (e.g. gentlemen agreement, in writing) but its objective and market outcome. Indeed, competition law applies to companies participating in non-operational collusions\textsuperscript{30} also and even to situations when the participants did not stick to the cartel decision but merely remained party to it\textsuperscript{31}.

H. Hovenkamp states on the basis of economic practice studies that cartels are more damaging to the economy than a company’s dominant position because they are formed more quickly and do not require outlays as high as those needed to attain dominance\textsuperscript{32}. Taking account of P. Kotler’s recommendation to use strategic alliances in marketing, it should be noted that the latter constitute the most sensitive type of activity in terms of competition law. Hence, both the European Commission and the UOKiK President enforce competition law to fight cartels\textsuperscript{33}.

\textsuperscript{30} Exemplified by the case Ferry Operators, OJ [1997] L 26/23.
\textsuperscript{31} Exemplified by the case BELASCO, OJ [1986] L 232/15.
As cartels are particularly detrimental to market competition, the European Commission imposes especially high fines on their participants. Between 1990–2011, the total amount of cartel fines imposed in the EU exceeded EUR 17 bn. In the case of the car-glass cartel, the fine imposed on its participants in 2008 amounted to EUR 1.400 m; in the case of the elevators and escalators cartel, the fine totaled EUR 1.100 m\textsuperscript{34}. Having said that, pecuniary penalties imposed by the authorities are not the only problem for the participants of a cartel. They might also need to face the consequences of private enforcement of competition law whereby company which suffered losses as a result of the operation of a cartel may file for damages and be compensated for profits lots.

Cartel participants that wish to avoid painful fines may take advantage of the leniency procedure. It consists of a reduction or non-imposition of a pecuniary penalty on the company that was first to inform the competent authority about the existence of a cartel and submits data on its duration, operation and market consequences. The leniency procedure helps competition law enforcement bodies to uncover cartels. The scale of cartel fines may thus be dependent upon the tendency among cartel participants to cooperate with the competent authorities in the course of the proceedings.

In order to reduce transaction costs, strategic alliances in marketing may also take the form of vertical agreements between producers and distributors\textsuperscript{35}. Transaction costs are of key importance when deciding on how to build marketing channels: as an organizational part of a given company or long-term distribution agreements with independent distributors\textsuperscript{36}. Long-term selective or exclusive agreements are very often applied together with distribution franchising agreements. They are anti-competitive if they excessively restrict the independence of the participating distributors, especially by interfering with their pricing and purchase policies. Both European and Polish competition law prevents such agreements – an important realization for managers responsible for the development of distribution networks\textsuperscript{37}.

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is clearly dominated by decisions concerning re-sell price fixing in distribution networks\(^{38}\).

### IV. Preventive control of concentrations

Mergers and acquisitions (M&A) offer an alternative to strategic alliances in order to strengthen market position. Mergers result in higher concentration of assets in the hands of a single company, the outcome of acquisitions is the creation and expansion of capital groups. Competition law treats a capital group as one economic entity because subsidiaries are coordinated by the dominant company within the group. A joint venture is also a form of concentration whereby control is exercised together by the participants to the concentration.

There can be strategic, financial and managerial reasons for concentrations. Practice shows that strengthening of the market position of a given operation’s participants constitutes an important reason for concentrations, especially when it involves competitors\(^{39}\). This is why P. Kotler recommends concentrations and the acquisition of brands among other methods of arriving at and maintaining market dominance. Summing up the strategy, it is worth knowing that concentrations are subject to preventive control by competent authorities, the conditions of which are specified by competition law. When assessing the market consequences of a planned concentration the following are taken into account: existence of distribution agreements between the participants; market scope of the distribution networks belonging to the parties to the planned concentration; as well as their joint undertakings\(^{40}\).

The effects and organization of the marketing activities of the participants of a concentration may thus be important for a competition law assessment of its market consequences. An extensive distribution network belonging to the parties covering a substantial part of the market in question may make it difficult for the transaction to be cleared. A prohibition of a concentration may also occur when the planned operation leads to the creation of a duopoly or an oligopolistic market structure\(^{41}\).

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\(^{40}\) *Pilkington-Techint/SIV*, 21 December 1993, IV/M.358.

Concentrations restrict market competition in most cases, decisive for a competition law assessment is the scale of that restriction. Competition law stipulates that if a market is dominated by a company created as a result of a merger, or by a capital group created by acquisition, the appropriate competition law body is likely to issue a negative or conditional decision in that case. Divestiture is a usual approval condition for a new company or capital group. When advising a company or a capital group to gain market power by way of a concentration, it is worth stressing the need to perform a pre-merger assessment of the operation in light of competition law criteria. A pre-emptive evaluation conducted within the company will save it crucial time and money during the official investigation and will allow it to better prepare the notification documents that must be submit to the relevant authority.

Companies often perceive the duty to notify concentrations which meet the criteria of specific competition law regimes as an obstacle to such transactions. Statistics show, however, that the European Commission does not block transaction justified by economic reasons. Between 1990–2011, the Commission received a total of 476 notifications. Only 36 of them underwent a more detailed assessment (they went through to the 2nd stage of the procedure) as a result of which, 21 negative and 4 conditional decisions were ultimately issued[^42].

**V. Antitrust recommendations for modern marketing**

Market success achieved thanks to high product quality, good customer care, high market share, continuous product improvements and new product entry, entering fast growing markets, or going beyond customer expectations[^43] does not raise competition law objections. Such problems may appear, however, when a company arrives at a dominant position and starts abusing it so as to subordinate the market to itself and to dictate business conditions to other market players (suppliers, customers, consumers). In order for market success not to transform into a competition law problem, it is worth being aware of the restrictions inscribed thereby upon marketing activities of a dominant company. A strategy of low prices cannot take the form of predatory pricing but competition law will not be infringed if low prices result from cost reductions


[^43]: Such recommendations are formulated by P. Kotler in his book *Kotler o marketingu…*, pp. 23–29.
due to technical or technological innovations or efficient goods distribution which reduces the dominant company’s transaction costs.

Strategic alliances, as long-term agreements on business cooperation, may contribute to the achievement of any of the aforementioned elements of market success. They should not, however, take the form of cartels that monopolize the market (horizontal agreements) and should not restrict competition by limiting the pricing and purchasing independence of distributors (vertical agreements). Economic importance of cooperation and competition was correctly defined by A.M. Brandenburger and B.J. Nalebuff as co-opetition, that is, cooperation in value creation and competition in its division\textsuperscript{44}. Value is created in the production process (R&D, techniques and technology) and divided on the market where competition is protected by the law. The strategy of achieving and maintaining market dominance should not infringe competition law if a company wishes to avoid becoming subject to enforcement proceedings leading to the prohibition of its anti-competitive or exploitive practices as well as a pecuniary penalty.

Concentrations meeting the criteria specified in competition law are subject to a notification duty to the relevant competition body. Well drafted notification documents, preceded by an initial assessment of the probability of a positive decision, shorten the wait for an official decision to be taken by the relevant authority. This, in turn, translates into cost savings in the transaction budget. Managers who conquer markets following P. Kotler’s recommendations should be aware of these facts.

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Polish Antitrust Experience with Hub-and-Spoke Conspiracies

by

Antoni Bolecki*

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I. Definition of conduct known as ‘hub-and-spoke’
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Abstract

A hub-and-spoke conspiracy involves an exchange of confidential information primarily concerning future prices. The exchange takes place generally between competing distributors via a common supplier but a reverse relationship is also possible. The essence of hub-and-spoke lies in the fact that there is no direct contact between competitors – the party guaranteeing the information flow is normally the common supplier (distributor in a reverse scenario). A hub-and-spoke conspiracy was first identified and specifically described by the British Office of Fair Trade in 2003. There are currently several pending investigations concerning hub-and-spoke practices in a number of EU Member States including Germany, France, Italy and the UK.

Three cases of that type have been so far assessed in the Polish antitrust practice: Polifarb Cieszyn Wroclaw (2007), Tikurilla (2010) and Akzo Nobel (2010). The main objective of this article is the reconstruction of hub-and-spoke conduct in Poland. Commented will also be issues such as: the connection between hub-

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and-spoke practices and ‘classic’ retail price maintenance; standard of proof, and duration of the agreements.

Résumé


Classifications and key words: hub-and-spoke; AtoBtoC coordination; exchange of information; vertical restraints; RPM; horizontal effect; standard of proof; duration of an agreement; initiator.

I. Definition of conduct known as ‘hub-and-spoke’

The Polish Act of 16 February 2007 on Competition and Consumer Protection (hereafter, Competition Act¹) does not contain a definition of a hub-and-spoke conspiracy². The Polish competition authority does not use this term either. Nonetheless, a careful study of its selected antitrust decisions makes it possible to reconstruct the features characterising this particular type of market conduct. In general, the economic events defined as hub-and-spoke that were assessed in Poland were similar to analogous practices put into question by the British, German and American antitrust authorities (see pt. 2 below).

Hub-and-spoke consists of the sharing of confidential trade information between the supplier and its retailers and, in simple terms, can assume two forms:

• The supplier acts as the ‘hub’ whereas retailers play the role of ‘spokes’.

The supplier obtains confidential information from one of its retailers

¹ Journal of Laws 2007 No. 50, item 331, as amended.
concerning, most often, retail prices that the latter intends to introduce. Then the supplier forwards that information to other retailers who, at the same time, inform it of their own intended retail prices, which the supplier in turn forwards to other retailers. In this manner, retailers become aware of the retail prices that their competitors intend to introduce despite the fact that they have not actually been in direct contact with each other.

• The retailer acts as the ‘hub’ whereas its suppliers play the role of ‘spokes’. The flow of information pertains to sale prices that suppliers intend to introduce, and which are, from the retailer’s perspective, purchase prices. Suppliers can find out from their common retailer what price rises their competitors intend to introduce despite not having been in direct contact with each other. This type of reverse hub-and-spoke conduct has not yet been assessed by the Polish antitrust practice.

Research material that served as the basis for this paper consisted primarily of three separate decisions issued by the President of the Polish Office of Competition and Consumer Protection (in Polish: Prezes Urzędu Ochrony Konkurencji i Konsumenta; hereafter, UOKiK) concerning vertical price collusion entered into by DIY store chains and paint & varnish manufacturers:

• UOKiK President’s decision of 18 September 2006, DOK-107/06, in the Polifarb Cieszyn Wrocław case – the PCW decision;
• UOKiK President’s decision of 24 May 2010, DOK-4/2010, in the Tikkurila case;
• UOKiK President’s decision of 31 December 2010, DOK-12/2010, in the Akzo Nobel case.

II. Hub-and-spoke – legal decisions made in other jurisdictions

Hub-and-spoke is a relatively new phenomenon in antitrust case law also in Poland. The first, highly publicised cases of that type occurred on the British market and concerned three decisions of the Office of Fair Trading (OFT) in

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3 Decisions available at: www.uokik.gov.pl. None are final and can thus be subject to amendments by the Court of Competition and Consumer Protection (SOKiK), Court of Appeals or Supreme Court. The PCW case has already been adjudicated by SOKiK and the Court of Appeals. The case was returned for a renewed assessment by SOKiK in August 2011. The judgments did not however directly deal with the hub-and-spoke conduct.

the Hasbro\textsuperscript{5}, Replica Football Kit\textsuperscript{6} and Double Glazing\textsuperscript{7} cases. Hub-and-spoke was also considered in the OFT’s Tobacco case, but the latter investigation was ultimately discontinued with respect to prohibited information-sharing due to lacking evidence\textsuperscript{8}. Another OFT proceeding, this time relating to dairy products, was also discontinued for the same reason\textsuperscript{9}. Hub-and-spoke was referred to in the Bundeskartellamt’s CIBA Vision case\textsuperscript{10} and in the Federal Trade Commission’s Toys ‘Я’ Us case\textsuperscript{11}. It is also worth noting in this context two recent American court judgments, PSKS, Inc v. Leegin Creative Leather Products Inc\textsuperscript{12}, and Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield\textsuperscript{13}. Despite the fact that the plaintiffs’ claims that the defendants engaging in hub-and-spoke practices were not actually accepted, the Court of Appeals presented in its Total Benefits Planning Agency v. Anthem Blue Cross and Blue Shield judgment a useful description of hub-and-spoke practices: ‘A hub and spoke conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes. Each of the three parts is integral in establishing a per se violation under the hub and spoke theory’\textsuperscript{14}. Following this description, the District Court added in PSKS v. Leegin that: ‘The critical issue for establishing a per se violation with the hub and

\textsuperscript{5} OFT decision no. CA98/8/2003 of 21 November 2003 concerning retail-price fixing between a manufacturer of toys (e.g. the game Monopoly) and his retailers Argos Ltd and Littlewoods Ltd. On 14 December 2004, the British Competition Appeal Tribunal issued a judgement essentially upholding the OFT decision. In turn, the Court of Appeal dismissed Hasbro’s appeal by a judgement of 19 October 2006.

\textsuperscript{6} OFT decision no. CA98/6/2003 of 1 August 2003 concerning retail-price fixing of replica football kits made by Umbro. By judgement of the British Competition Appeal Tribunal of 14 December 2004, the OFT decision was upheld in principle. In turn, by judgement of the Court of Appeal of 19 October 2006, a retailer’s appeal was dismissed (in the appeal proceedings, the Hasbro and Replica Football Kit cases were examined jointly).

\textsuperscript{7} OFT decision of 8 November 2004 in the Double Glazing case.

\textsuperscript{8} OFT decision of 15 April 2010 in the Tobacco case.

\textsuperscript{9} OFT communiqué of 30 April 2010, available on the OFT website.

\textsuperscript{10} Bundeskartellamt decision of 25 September 2009 in case no. B3–123/08.

\textsuperscript{11} FTC decision of 27 September 1997 in the Toys ‘Я’ Us case, available on the FTC website, pertaining to the exchange of information on intended market activities between U.S. game and toy makers through their common retailer.

\textsuperscript{12} See United States District Court For The Eastern District Of Texas Marshall Division, Case No 2:03 CV 107 (TJW), available at http://www.globalcompetitionreview.com/_files/_news/13218-leegin_final_decision.pdf


\textsuperscript{14} Ibidem, p. 8.
spoke system is how the spokes are connected to each other\textsuperscript{15}. Neither of the American courts found any such connections and thus they dismissed both cases.

A hub-and-spoke conspiracy was also the subject of antitrust proceedings in Slovenia in 2009. The Slovenian competition authority questioned there a practice whereby distributors forced certain suppliers to inform them when other distributors would increase their retail prices. A commitment decision was issued in this case\textsuperscript{16}.

Two British cases, \textit{Hasbro} and \textit{Replica Football Kit}, are commonly quoted in antitrust literature. Many commentators agree that the main issue which arose in those cases was the awareness of the ‘hub’ and its ‘spokes’ of the information use\textsuperscript{17}. The British Competition Appeal Tribunal presented a more restrictive opinion with respect to this subject than the OFT. This issue is well described in the British contribution to the 2010 OECD report where it is stated that: ‘It must be demonstrated to the required standard of proof that where a retailer (A) discloses to their supplier (B) their future pricing intentions, the circumstances of this disclosure are such that A may be taken to have intended that B will/would make use of that information to influence market conditions, or did in fact foresee this by passing that information on to other retailers (C). B must also be shown to have actually passed that information to C and that they disclosed this in circumstances where C may be taken to have known the circumstances in which the information was disclosed by A to B or that C in fact appreciated that the information was passed to it with A’s concurrence (i.e. to influence market conditions). It must also be demonstrated that C does, in fact, use the information in determining its own future pricing intentions. In these cases, the provision of, receipt of or passing on of information between competitors through an intermediary in circumstances where it can be taken for one to have intended to influence the market conduct of the other is anticompetitive\textsuperscript{18}.

Hub-and-spoke practices have recently caught the interest of other European competition authorities. Antitrust proceedings concerning this issue are currently underway in Italy (cosmetics and toiletries), France (cleaning products), and Germany (chocolate)\textsuperscript{19}.

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\textsuperscript{15} Ibidem, p. 12.
\textsuperscript{18} \textit{Information Exchanges between Competitors under Competition Law}, OECD 2010, p. 286.
\textsuperscript{19} After P. Whelan, ‘Trading negotiations between retailers and suppliers: a fertile ground for anti-competitive horizontal information exchange?’ (2009) 5(3) \textit{European Competition Journal}
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The three aforementioned cases were assessed by the UOKiK President between 2005 and 2010 as separate proceedings with no formal links between them. Nonetheless, their joint assessment is justified by the nature of the practices identified therein and similarity of the circumstances of their application. The issue at hand was an agreement concluded between paint and varnish suppliers on the one hand, and Polish Do-It-Yourself store chains (‘DIY’) on the other. The scrutinised practices were in effect from 2003 to 2006 and were meant to fix retail prices of paints and varnishes made by PCW, Tikkurila\(^{20}\) and Akzo Nobel\(^{21}\).

From the perspective of the scrutinised manufacturers, those arrangements were vertical, that is, they did not involve any direct or indirect contact between the competing suppliers themselves. From the point of view of the retailers however, the contested practices bore the features of vertical agreements with a horizontal effect\(^{22}\). In other words, no direct contact between individual retailers was identified and yet they were aware, as a result of the practice in question, of the intended/current pricing activities of their competitors. Indeed, pertinent information was being provided by individual suppliers. Horizontal effects of this practice were achieved in particular thanks to the information exchange on retail prices applied by individual DIY store chains between the latter and the paint and varnish manufacturers.

Each of the Polish cases had a similar history. As the Polish DIY market grew between 2000 and 2003, price wars between competing DIY chains were waged increasingly often. They caused a steady drop in retail prices of paints and varnishes made by the aforementioned suppliers. At the same time

824. See also H. Wollmann, ‘Category Management, Private Labels und Informationsaustausch zwischen Wettbewerbern’ (2011) 1 Ecolex – Fachzeitschrift Für Wirtschaftsrecht 51. The author does not present any Austrian hub & spoke cases but points to the fact that category management agreements may facilitate hub-and-spoke conduct if the same category manager is dealing with many competing retailers and has access to their confidential data.

20 In the period covered by the *Tikkurila* decision, the scrutinised paint and varnish maker was TBD S.A. That company was taken over in 2007 by the Finnish concern Tikkurila. See pt. 11 of the UOKiK decision in the *Tikkurila* case.

21 In the period covered by the *Akzo Nobel* decision, the relevant scrutinised paint and varnish maker was Nobiles Sp. z o.o. That company was taken over in 2007 by the international concern Akzo Nobel, the latter was taken over by the ICI Group in 2008. Since the reorganisation of the ICI Group in 2009, ICI operates in Poland under the name Akzo Nobel Decorative Paints sp. z o.o. See p. 7 of the decision in the *Akzo Nobel* case.

22 See p. 41 of the *PCW* decision, pt. 342 of the *Tikkurila* decision and pp. 94–95 of the *Akzo Nobel* decision.
however, the purchasing power of DIY retailers was growing in comparison to
the so-called traditional market. As a result, paint and varnish manufacturers
found it increasingly difficult to convince DIY chains to accept successive
price rises even though they were indispensable due to growing prices of
raw materials. The issue at stake here was whether the growing production
costs were to be borne by the supplier or, whether they would be shifted
onto retailers and, consequently, onto end users. Price wars between DIY
store chains ultimately resulted in a reduction of their profit margins and
thus, their will to accept successive price increases waned. Sometime during
2003, individual suppliers began persuading their retailers to comply with
recommended retail prices which were usually higher than the shelf prices
charged at that time. The initial scope of the retail price setting arrangements
was limited. They were restricted to negotiations with the market leader only,
covered a very narrow range of products and their nature was infrequent and
ad hoc.

The scrutinised parties disagreed as to who had initiated the anticompetitive
practices in the first place. Tikkurila and Akzo Nobel claimed that they had
been forced into price fixing and information exchange by one of the DIY
chains. Retailers accused in turn the two manufacturers of having initiated the
contested practices. In both cases, the scrutinised supplier and one of the
retailers filed for leniency. According to Polish competition law however, the
undertaking which has initiated the prohibited practice cannot expect a full
penalty waiver. This is why both suppliers were attempting to prove that the
restrictive practice had been initiated by one of the DIY chains, while the
latter argued that it had in fact been initiated by the suppliers. Ultimately,
the UOKIK President shared the position of the retailers and decided that
the restrictive arrangements had been initiated by the suppliers as it was them
who stood guard over the cohesion of the retail-price fixing and information
exchange system. It was also them who took active measures to stabilise market
prices, set retail-price levels and then endeavoured to persuade particular
retailers to apply them.

The pace of the restrictive practices undertaken by the scrutinised suppliers
and their retailers accelerated from early 2005 onwards due to the determined
actions taken by Polifarb Cieszyń Wrocław. At that time, PCW introduced
a ‘price stabilizing system’. Its purpose was to ensure that DIY store chains

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23 In the Tikkurila and Akzo Nobel cases. In the PCW case, the agreement started to be
executed in an organised manner in 2005 – see, for example, p. 40 of the PCW decision which
describes its history.

24 See pp. 76–80 of the Akzo Nobel decision and pts. 143, 196 and 203 of the Tikkurila
decision.

25 See pp. 96–99 of the Akzo Nobel decision and pt. 32 of the Tikkurila decision.
maintain the retail prices of its 10 best-selling products at a level not lower than that recommended by the manufacturer. Any failure to comply with those prices would cause a PCW intervention into the purchasing department of the given chain and ‘taking corrective measures meant to persuade the store chain to return to the suggested prices, e.g. halting supplies’. In return for the introduction of the recommended prices, retailers received a so-called ‘stabilizing rebate’. If any of the stores that form part of a given DIY chain charged prices different than those indicated by the supplier, the entire chain would lose the stabilizing rebate or be faced with a supply refusal from PCW. Polifarb Cieszan Wroclaw instructed its retailers that ‘stores that maintain PCW suggested prices as their retail prices will be receiving an additional stabilizing rebate in their invoice as a bonus for price compliance. If a given store does not comply with the prices suggested by PCW, all supplies of all products will be stopped and the stabilizing rebate will be put on hold until prices are brought back to the suggested level’.26

The UOKIK President established that PCW had played the role of a ‘mediator’ who would ‘appease disputes’, explain price differences, and inform retailers about how quickly would the prices of their competitors return to the agreed level. The manufacturer would notify retailers of all price changes of their competitors (most often increases), no matter how small, so as to prevent price changes by other trading partners.27 By taking structured and wide-ranging measures to persuade DIY store chains to participate in the price stabilizing system, PCW was able to bring about a stabilization of its retail prices within as little as one week.28

PCW activities were watched by other paint and varnish suppliers – Akzo Nobel and Tikkurila. When it became clear that the uncompromising implementation of PCW’s price stabilizing system was bringing about measurable results, they also began to take more decisive steps in order to level out the retail prices of their own products.29

The Polish competition authority was not able to prove in any of the discussed cases that the scrutinised suppliers had ever been in direct or indirect contact with each other. Neither was there any evidence of direct contact between the DIY chains. On the other hand however, the UOKIK President managed to prove indirect horizontal contacts between the scrutinised retailers through their common suppliers. This factor was of utmost importance to those involved in the prohibited practice as it could result in a substantial increase of the antitrust fine they ultimately faced.

26 See p. 22 of the PCW decision.
27 See p. 25 of the PCW decision.
28 See p. 24 of the PCW decision.
29 See pt. 153 of the Tikkurila decision.
The Polish competition authority classified the aforementioned agreements as the most serious type of competition law infringement. The UOKIK President’s decision in the Tikkurila case states that ‘(…) the nature of the agreement in question was, in fact, horizontal – a cartel of retailers supervised and kept stable by the supplier. Therefore, despite having formally classified the infringement as a vertical agreement, i.e. concluded by entities operating at different levels of the trade chain (supplier-retailer), in reality it had a horizontal effect – the introduction or the intent to introduce minimum retail prices by DIY stores, dependant on analogous conduct by other market participants (i.e. other retailers). The result of such activities was a complete elimination of competition at the level of retail sales of Tikkurila products, hence, in the horizontal dimension’.

Moving onto the discussion of the individual aspects associated with information exchange between paint and varnish suppliers and DIY store chains in the PCW, Tikkurila and Akzo Nobel cases, a distinction needs to be made however between different types of information exchange.

**Types of information exchanged**

*a. Information on current paint and varnish shelf prices*

The compliance by all major DIY chains participating in the agreement with the prices set by the suppliers was the key to the success of the price stabilization program. A deviation by one of the retailers generally caused an immediate reaction from other DIY store chains – the latter would either lower or threaten to lower their retail price so as to remain competitive with each other. Information concerning the competitors’ retail prices was thus of primary importance to the participating DIY chains. As the UOKIK President established in the Tikkurila decision, ‘(...) measures taken by [DIY store chains] depended on the supplier “tidying up” the market, i.e. introducing full transparency of prices applied by other store chains. (...) Participants in the agreement reacted “violently” to promotion campaigns organized by other points-of-sale and to other cases of ‘retail price dumping’. All DIY chains permanently monitored the retail prices of their competition. The UOKIK President stated in the PCW decision: ‘the objective of monitoring prices applied by the competition in the case at hand was to check whether everyone was applying fixed prices. When a store chain applied prices lower

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30 See pt. 372 of the *Tikkurila* decision.
31 See pt. 303 of the *Tikkurila* decision.
32 See pt. 28 of the *Tikkurila* decision, p. 104 of the *Akzo Nobel* decision and p. 21 of the *PCW* decision.
than agreed, other chains would inform Polifarb Cieszyn Wrocław thereof and the supplier would then “discipline” the head office of that chain, whereas the head office would subsequently intervene at the store level\textsuperscript{33}.

Retail prices applied by individual stores were known and access to them was not a problem, in theory at least. In practice however, retailers would sometimes come across some difficulties in this area, which the supplier would help solve by providing appropriate pricing information. This issue requires a few words of explanation.

Two publicly accessible sources of information exist about retail prices charged by specific DIY chains. The first is promotional flyers, their usefulness is limited however because a flyer only refers to a very narrow range of items of a given type. The second source of information on current retail prices is found on store shelves. The usefulness of this source is also limited because the shelf price setting system by individual stores is in most cases decentralized. The head office of a given DIY chain establishes a system price which serves as a guide for all its stores. However, individual store managers are free to decide to lower or increase the system price (this freedom does not generally extend to best-selling products, i.e. products advertised nationally with a specific retail price)\textsuperscript{34}. For example therefore, the fact that one of the DIY chains knew the retail price charged for Jedynka Biała paint in 10 litre containers at a competing store in Gdańsk did not mean that it knew the retail price of the same product in the same competing chain’s store in the neighbouring city of Gdynia. Indeed, each individual store could charge a different price. In 2005, the scrutinised DIY store chains owned more than 100 stores. Checking shelf prices in all or most of those stores was theoretically possible but individual retailers found it troublesome as it required a lot of work, time and resources. As a result, DIY chairs would often monitor their competitors’ prices in a hap-hazard manner only and thus rely on the supplier’s assistance in getting comprehensive information about the retail prices applied by competing stores nationwide\textsuperscript{35}.

In this respect, the supplier held a trump card in the form of a team of sales agents whose duties included regular visits to all retail stores for the purpose of order collecting, taking care of product displays, conducting marketing campaigns, etc. At the same time, they had the opportunity to note down shelf prices applied in particular outlets. A sales agent could also contact an employee of a given chain and ask for information about the level of specific retail prices. Such contact was a natural occurrence between trading partners. The decisions issued by the UOKIK President in the three aforementioned cases

\textsuperscript{33} See p. 49 of the PCW decision.

\textsuperscript{34} See pp. 13 and 76 of the Akzo Nobel decision and pts. 1 and 138 of the Tikkurila decision.

\textsuperscript{35} See pts. 56, 139 and 150 of the Tikkurila decision.
indicate that such contact, and the accompanying exchange of information, was frequent. There was however no contacts between the employees of competing DIY chains\textsuperscript{36}. Nevertheless, the arrangements made between the parties generally concerned centrally determined system, retail prices. It was indeed obvious that the price established by the head office served as a clear guide for particular stores as to what level of retail price was expected by the head office and, consequently, what profit margin were to be generated on the sales of particular products.

Having obtained information on competitors’ retail prices, a given DIY chain would behave in one of the following ways:

- It would raise its retail price if the DIY chain saw that it was charging less than, or equal, to the price of its competitors. Such raise could also take place if a given retailer had information that competing DIY chains were intending to increase their price\textsuperscript{37};

- It would lower its retail price if the DIY chain saw that it charged more than its competitors. If the level of prices which the supplier promised would be maintained by other retailers actually changed, a decision to cut the retail price was often combined with a request to the supplier to grant the given retailer a so-called ‘margin-loss rebate’. The retailer in question would argue that it accepted a particular purchase price because the supplier had promised to maintain market prices at a set level. Since the supplier did not keep its word, the retailer was forced to lower its own retail prices, which resulted in a loss of that retailer’s expected profit margin. The supplier should thus compensate for that loss\textsuperscript{38};

- It would not lower its retail price, even though the DIY chain saw that its competitors charged less, but request at the same time from the supplier an additional rebate in return for maintaining the set retail price\textsuperscript{39}. There were times in addition when DIY chains would request compensation for the price difference. The latter situation occurred with respect to those retailers that guaranteed their customers the lowest price on the market. If a customer found the same product for less somewhere else, he could request the store where he had originally bought the product to reimburse him for the price difference. The chain would pay that difference and then sometimes request an equivalent return from the supplier (often with success)\textsuperscript{40}.

\textsuperscript{36} See p. 22 of the Akzo Nobel decision and pt. 83 of the Tikkurila decision.
\textsuperscript{37} See pp. 27 and 50 of the PCW decision and pp. 18 and 20 of the Akzo Nobel decision.
\textsuperscript{38} See pp. 18 and 79 of the Akzo Nobel decision and pt. 30 of the Tikkurila decision.
\textsuperscript{39} See pt. 63 of the Tikkurila decision.
\textsuperscript{40} See pt. 222 of the Tikkurila decision.
• It would not change its retail price as that was apt to start a price war but instead, the DIY chain would add a free gift to the products sold in its stores such as a paint roller or extra litre of paint, etc.41

b. Information on intended retail prices

Another type of data conveyed by retailers to the supplier and then by the supplier to competing retailers was information on retail prices that the various DIY chains intended to introduce in the future. That information came in two types:

• Price information associated with the joint production of advertising material

The analyzed body of material confirms the existence of a frequent practice of joint marketing campaigns organised by the supplier and its retailers. As a rule, those campaigns consist of press and billboard advertising whereby the advertisements would, for example, refer to a DIY chain but also to a specific paint that could be purchased therein. The paint was sold at the retail price shown in the advertisement. The campaign would be commissioned by the given DIY chain but the manufacturer would usually participate in its costs. Consequently, it was natural for the supplier to want to see the draft of the advertisement before it was finalized, seeing as it co-financed its production.

It goes without saying that the supplier had the right in such situations to make sure that its product was properly portrayed and described, that its photograph was of good quality, that its trademarks were properly used, etc. Nonetheless, when sending the draft for a supplier’s approval, retailers would often disclose at the same time that product’s intended retail price42. If the price shown on the draft was lower than the price recommended by the supplier, the latter would try to persuade the DIY chain to raise it, for example by threatening to withdraw the co-financing of the campaign43. Suppliers would transmit information obtained in this way to other retailers, thus curtailing the uncertainty with respect to competitive measures taken by retailers. This action would also reduce the risk of price wars.

• Information on intended retail prices obtained in a different way

Suppliers would obtain information from retailers on their intended retail prices in the course of standard conversations or e-mail contacts. Suppliers would also inform DIY chains of expected non-compliance

41 See p. 26 of the PCW decision.
42 See pts. 26, 79, 83 and 95 of the Tikkurila decision and pp. 67-68 of the Akzo Nobel decision.
43 See pp. 67-68 of the Akzo Nobel decision.
with the recommended price by a given chain, explaining at the same
time that it was not the fault of that supplier\textsuperscript{44}.

d. Other types of information

Other types of information about retailers’ activities that were transmitted
to competing retailers included the reasons behind price changes in particular
chains/stores. A retailer would be less inclined to lower its own price to match
that of its competitor if it knew beforehand that the latter has lowered its
prices to clear excess stock, due to an error or automatic price rounding by its
computer system or even, if the competing store was conducting a small scale
promotion to respond to the situation on a local market\textsuperscript{45}. The DIY chain
would thus be aware of the fact that the competitor lowered its prices only
temporarily and that the price would soon return to ‘normal’. As a result, not
lowering its own price would not cause any loss of competitiveness with respect
to the retailer who had lowered its price for the above reasons.

On the other hand however, there was no evidence of suppliers sharing
information of any other type, such as retailers’ know-how, investment plans,
intention to open new stores, volume of sales of specific products, volume
of returned products, commercial terms such as rebate levels, purchase
targets, payment terms, payment arrears, etc. Still, it is hard to tell whether
that meant that there really was no such information exchange between the
scrutinised parties or whether the UOKiK President simply did not question
such exchange.

IV. Hub-and-spoke – independent practice or element
of another practice?

Two questions come to mind when examining the nature of hub-and-spoke
conspiracies:

1. Can such practice be seen as an independent agreement / concerted
   practice? If not, is it an element of a different agreement? In other
   words, is a hub-and-spoke practice meant to bring another agreement
   into being or facilitate its smooth operation?

2. What is the importance of treating a hub-and-spoke conspiracy as an
   independent competition restricting practice?

Considering the first issue, foreign antitrust authorities have usually
classified hub-and-spoke practices as an element of a wider agreement meant

\textsuperscript{44} See pp. 18 and 20 of the \textit{Akzo Nobel} decision.

\textsuperscript{45} See p. 19 of the \textit{Tikkurila} decision.
to fix retail prices in a vertical configuration. Only in the American Toys ‘R’ Us case can it be said that the FTO treated the hub-and-spoke conspiracy as an independent practice seeing as its sentencing part specifically prohibited suppliers from exchanging any future information pertaining to sales of their products through their common retailers. Hub-and-spoke practices were treated in all other foreign cases more like an element of a wider agreement than a separate practice.

Also the Polish PCW, Tikkurila and Akzo Nobel decisions leave no doubt that the UOKiK President did not treat hub-and-spoke practices as an independent agreement. This finding is confirmed by the unequivocal wording of the sentencing part to those decisions which state that the parties were engaged in only one prohibited practice – a competition restricting agreement consisting of retail price fixing of their paints and varnishes. Indeed, a different approach could have been applied seeing as in the Polish Cement Cartel case46, the UOKiK President did in fact divide the scrutinised information exchange according to its aim into two separate agreements: a) an independent agreement and b) an element of another wider agreement.

Considering the existence of this type of division, the question arises whether there are in actuality any material differences in separating independent hub-and-spoke practices from those seen only as part of more extensive multilateral agreements. Theoretical issues notwithstanding, such differences should be seen as of minor importance. This question can however impact four areas: evidence, antitrust statute of limitations, right of the party to mount a proper defence (awareness of charges) and the penalty level. Owing to the fact that the Polish competition authority may achieve the same intended objective by classifying hub-and-spoke as either an independent or derivative practice, this issue is important only in theoretical terms and will thus not be discussed further in this paper.

It is quite simple in actual fact to decide when should hub-and-spoke be treated as an independent agreement and when as part of another practice. Where the main economic function of the agreement (concerted practice) lays in the hub-and-spoke conspiracy itself, the latter should be treated as an independent agreement (an agreement in itself). If, in turn, the main object of a given market conduct is to fix prices directly in a ‘classical’ way and the hub-and-spoke practice merely underpins this primary object as an additional tool to facilitate it, then it should be treated as part of that wider agreement. The circumstances of the three Polish cases show very clearly that they were an example of the latter. The aforementioned division criteria can be found

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46 Decision of the UOKiK President of 8 December 2009, DOK-7/2009, concerning a pricing collusion between Polish cement suppliers.
also the \textit{Polish Cement Cartel} decision as well as in point 56 of the European Commission’s Horizontal Guidelines of 2011.

\section*{V. ‘Hub’ as the initiator of the agreement}

The issue of who had initiated the retail price fixing agreement played an important role in the \textit{Tikkurila} and \textit{Akzo Nobel} cases because both of these manufacturers, as well as retailers, applied for leniency. The importance of this issue results from the fact that leniency applies in Poland, as opposed to most other European jurisdictions, to vertical agreements also. However, an entity that files a leniency application but is recognized as the initiator of the restrictive practice cannot expect a full waiver. It is thus essential for the UOKiK President to establish who the ‘initiator’ of the contested agreement is.

In the \textit{Akzo Nobel} and \textit{Tikkurila} decisions, the Polish competition authority adopted a broad interpretation of the notion ‘initiator’\footnote{See pp. 96–100 of the \textit{Akzo Nobel} decision and pts. 305-310 of the \textit{Tikkurila} decision.}. The UOKiK President associated this status not only with the undertaking that had started the practice by persuading others to join it but first and foremost, with the entity that was actively implementing, organizing and supervising the practice (i.e. acting as the leader of the practice). The UOKiK President stressed the role of the ‘hub’, played in both cases by paint suppliers, for proving who the initiator of both practices was. It is worth quoting here the relevant part of the decision in the \textit{Tikkurila} case: ‘The role played by Tikkurila also involved pacifying ‘trouble spots’ mainly by transmitting to the parties information on the date the given store would return to applying prices fixed by other stores and compensating for the lost margin as well as informing the parties of the pricing policy pursued by other market participants (i.e. giving them retail prices that competing stores were intended to introduce). Market stability and transparency were meant to prevent price wars between DIY store chains’\footnote{See pt. 308 of the \textit{Tikkurila} decision.}.

The Polish competition authority expressed the following view in the \textit{Akzo Nobel} case: ‘Akzo Nobel was transmitting to its retailers information on price changes intended by their competitors. As shown by the collected evidence, the company was not doing that at the request of the chains but rather to convince them that the given participant in the agreement would indeed comply with the arrangements. Such assurances would give the supplier more certainty as far as the compliance with the arrangements by those participating in the agreement’\footnote{See pp. 98-99 of the \textit{Akzo Nobel} decision.}.

\footnotesize{47 See pp. 96–100 of the \textit{Akzo Nobel} decision and pts. 305-310 of the \textit{Tikkurila} decision.  
48 See pt. 308 of the \textit{Tikkurila} decision.  
49 See pp. 98-99 of the \textit{Akzo Nobel} decision.}
VI. Standard of proof

The Polish competition authority applies in its decisions the presumption of an anticompetitive aim (object) of price arrangements. As a result, the requirements to conduct a detailed economic analysis, in order to demonstrate the restrictive consequences of agreements containing such arrangements, are notably ‘softened’. Literature suggests however that lowering of evidence standards should not be tantamount to completely neglecting the economic context of the given agreement, particularly when it comes to vertical relations50.

What characterised the PCW, Tikkurila and Akzo Nobel decisions was the very high standard of proof of the UOKiK President’s findings (except on the issue of the duration of the prohibited agreement). The adopted standard of proof resulted however more from the nature and circumstances of these cases, as well as from the evidence collected in each of them, than from any formal legal requirements in that respect. Polish legislation makes it possible to prove a restrictive practice also on the basis of indirect evidence, on the basis of regulations referring to factual presumptions51. Moreover, the Polish competition authority is of the opinion that it can fully apply European case law with regard to the standard of proof in antitrust proceedings52.

In all three of the Polish cases, evidence was primarily found in an abundant number of e-mails exchanged between the personnel of the paint and varnish manufacturers and the employees of the DIY chains. Those individuals, most probably unaware of the fact that vertical pricing agreements are prohibited by the Polish Competition Act, described the details of the contested arrangements in their messages53. Part of that correspondence was seized by UOKIK officials during dawn raids performed in the premises of the scrutinised companies; the remaining was filed in relation to leniency applications.

52 See. pt 430 of the decision of 8 December 2009, DOK-7/09.
53 In a survey conducted by the Polish Competition Authority in June 2009, Polish undertakings were asked whether price fixing was legal. A mere 53% of them replied that it was not. On the positive side, competition law awareness, although still very low, is systematically rising in Poland. In 2006, only 46% of the respondents were able to answer the same question correctly. Examining knowledge of competition law and rules on granting state aid among Polish undertakings, Office of Competition and Consumer Protection, Warszawa 2009, pp. 60–63. See also: ‘Firmy nie chcą na siebie donosić’ Dziennik Gazeta Prawna of 23 August 2011.
Indeed, leniency submissions were the second source of relevant information which, together with the content of the aforementioned e-mails, created a cohesive, logical and reliable whole of evidentiary material in support of the antitrust decision. In consequence, it is possible to conclude that most of the findings of the UOKiK President in the discussed cases have the character of findings ‘beyond reasonable doubt’ (note however the reservations in pt. 7 below). As a result, the most interesting issue of the British hub-and-spoke practice did not materialise in Poland at all as the UOKIK President had no doubts about the parties’ joint awareness of the anticompetitive aim of the information exchange in question.

Such strong standard of proof was possible thanks to the character of the evidence collected by UOKIK. Truthfully, most antitrust proceedings concerning vertical price-fixing conducted so far by the Polish competition authority have seen a similar methodology of evidence collection. Usually, evidence is essentially limited to written distribution agreements containing clauses referring to minimum resale prices, parties’ written explanations and additional documentation, mainly in the form of piecemeal correspondence between the parties\textsuperscript{54}. There does not seem to exist a Polish vertical price-fixing case where evidence was sourced from economic experts nor from witness testimonials. The main reason for such phenomenon is likely the aforementioned unawareness of Polish undertakings with regard to the restraints laced upon them by competition law. This means in practice that company employees often create documentary evidence which can be later used by the UOKIK President against their employers. Advanced and in-depth evidence collection proceedings, including expert witnesses and testimonies, are thus not necessary in most cases.

VII. Duration

The UOKIK President expressed in the \textit{Tikkurila} decision the opinion that a vertical retail price fixing agreement (supported by the hub-and-spoke practice) lasts as long as the retailer applies the price set with its supplier\textsuperscript{55}. The same opinion was expressed in the \textit{ICI} case\textsuperscript{56}, which could not refer to

\footnotesize
\begin{itemize}
  \item \textsuperscript{55} See pt. 316 of the \textit{Tikkurila} decision.
  \item \textsuperscript{56} See p. 31 of the decision of 7 April 2008, DOK-1/08.
\end{itemize}
hub-and-spoke because it involved only two undertakings (retail price fixing by one paint supplier and one DIY store chain) and is thus not analyzed in detail in this paper. Nonetheless, the ICI case concerned the same antitrust issues as the PCW, Tikkurila and Akzo Nobel decisions (with the exception of the hub-and-spoke practice). The Polish competition authority decided in the ICI case that the fact that the given paint’s retail price fixed in September 2005 was still used in April 2008 (the issue date of the antitrust decision) meant that the retail price fixing agreement was still in operation in 2008 and continued to have an anticompetitive effect until then.

If the UOKIK President’s line of argumentation expressed in the Tikurilla and ICI decisions was consistently pursued and applied by analogy to hub-and-spoke practices, the following conclusion would emerge:

Assuming that the supplier receives information from Retailer A that the latter will apply as of 1 January 2012 a new retail price agreed upon with the supplier; Retailer A counts on the supplier conveying this information to Retailer B. The supplier deliberately conveys that information to Retailer B and the latter, knowing the origin of that information, deliberately accepts it and as of 1 January 2012 applies the same price as Retailer A. Retailer B shapes its own price on the basis of the information previously obtained from the common supplier; Retailer B maintains the retail price until December 2014.

If the approach of the Polish competition authority was consistently applied to the above example, the conclusion would be reached that the anticompetitive agreement lasted and had an effect all the way until December 2014.

How significant is the UOKIK approach with respect to the duration of the restrictive agreement presented in the above example? Its impact is enormous in practical terms. Indeed, the duration of an anticompetitive practice is very important in relation to issues such as a) antitrust statute of limitations, b) the position of a leniency applicant, and c) the level of fines.

- Antitrust statute of limitations – according to Article 93 of the Competition Act, proceedings in matters of competition restricting practices are not instituted if at least one year has lapsed since the end of the year in which those practices were discontinued.
- Leniency applicant’s position – according to Article 109.1.3 of the Competition Act, a full waiver of the penalty may be expected only by a leniency applicant who has ceased to participate in the given prohibited agreement at the latest on the date of notifying the UOKIK President of the agreement’s existence.
- Penalty level – according to pt. 3 of the UOKIK Guidelines on the Determination of the Level of Fines for Applying Competition Restricting Practices issued in December 2008, long-term infringements are those that last in excess of one year. In the case of long-term infringements, the
level of the base used in calculating the antitrust fine can be increased by 200%.57

Deciding how long a restrictive vertical agreement has actually been in operation is fundamental to the outcome of antitrust cases. The approach of the UOKIK President is clearly very convenient from the perspective of prosecuting competition law infringements. It makes it possible to postpone the moment when the statute of limitations comes into effect. It also makes it possible to impose higher fines. However, is it compliant with the principles of the economic approach? It certainly does not seem so.

The approach adopted by the UOKIK President concerning the duration of vertical retail price fixing agreements is worth noting due to its dangerous automatism, which might not consider details of individual case. When preparing its decisions, the Polish competition authority did not conduct any economic or even quasi economic analysis of how long, account being taken of specific market conditions, a particular retail price remains the same as the one originally fixed between the parties.

The economic approach should be applied in order to perform a fair assessment of whether a vertically fixed retail price remains in fact the same price after it has been applied for an extended period of time. Such assessment is closely tied to the evaluation of the effects of the agreement, and this does not refer to the effect in the form of the introduction of a shelf price in the agreed amount, which is simple to examine. The problem is more complex and requires an analysis of how long can those effects be felt on the relevant market. It is accepted in both Polish and EU literature that an analysis of the effects of an antitrust practice requires the application of the economic approach and the consideration of the entire complexity of the economic environment in which the scrutinised practice took place58.

UOKIK abandoned that approach in favour of one that is purely formalistic and automatic. Meanwhile, account should be taken of factors such as inflation, purchase price changes, currency exchange fluctuations, demand and supply changes, the introduction of new products including substitutes, changing market structures and the competitive environment, etc. Only an economic analysis covering all of these variables would make it possible to assess whether a retail price fixed in 2005 and still applied, for example in 2008, continues to remain the very same price as before or if it is perhaps lower, and if so, since when. If it is decided that as of a certain moment in time

the original price has in fact dropped (for example, because of a substantial rise of inflation), it would mean that both the restrictive agreement as well as its effects have ceased to exist. From an economic perspective, the retailer is now charging a lower price than the one originally fixed if the nominal value of that price has not changed over a considerable period of time. A retail price that has not risen, despite inflation or growing costs for instance, means that it has in fact been reduced. As a result, there can be no talk of the continuing existence of the anticompetitive agreement or of the agreement continuing to trigger an anticompetitive effect.

The presumption of the anticompetitive nature of price fixing arrangements lowers the requirement to conduct a detailed economic analysis of the contested practice in order to demonstrate the restrictive effect of a contract containing anticompetitive provisions. Nonetheless, the views of A. Jurkowska should be fully supported here whereby lowering the standard of proof in such cases should not equal to the complete abandoning of the economic context of the case. Doing so would be contrary to contemporary axiology of competition law expressed in the economic approach. In addition, the cited author correctly indicates that restricting the assessment of an agreement to its formal elements only is more justified in horizontal cases than it is in vertical relations.

Foreign antitrust decisions concerning hub-and-spoke conspiracies did not deal with the issue of their ‘duration’. Duration does not seem to have been considered in vertical relations in EU case law either. Attention should however be drawn to three European judgements in the *CBS Grammofon*, *Binon* and *Petrofina* cases all of which express, in principle, the following view: ‘With regard to agreements which are no longer in force, it is sufficient, for article 85 to be applicable, that they continue to produce their effects after they have formally ceased to be in force’. Nonetheless, the essence of these three cases differed significantly from hub-and-spoke conduct and retail price maintenance practices. In the *CBS Grammofon* and *Binon* cases, the presented view did not refer to price fixing at all. Although it did so in the *Petrofina* case, the latter differed significantly from the Polish cases as it concerned direct horizontal price fixing and the set prices were charged only two months after the last meeting of the competitors.

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60 86/75 *CBS Grammofon*, ECR [1976] 871, para. 27.
63 As stated in para. 17 of the *Binon* judgment.
VIII. Conclusions

Polish antitrust practice has dealt with three major hub-and-spoke cases. All concerned sales of paints and varnishes in Polish DIY store chains. It is possible in summary to distinguish the following characteristic features of hub-and-spoke practices in Poland:

- In all cases, the role of the ‘hub’ was played by the supplier, whereas retailers (DIY store chains) acted as ‘spokes’. No direct contacts between suppliers were identified.
- The supplier would obtain information from its retailers referring not only to retail prices they intended to introduce but also to current prices. If the latter were too low, the supplier would also obtain information referring to the reasons ‘justifying’ such state of affairs. The supplier would transmit that information to other DIY chains. The information exchange served as an incentive for retailers to increase their retail prices or to refrain from lowering them.
- Hub-and-spoke conspiracies were not recognized by the UOKiK President as an independent restrictive practice. Instead, the transmission of information on prices applied by other retailers was recognized as an element of vertical retail-price fixing. The existence of the hub-and-spoke practice was the very reason why the Polish Competition Authority decided that the vertical practice caused a horizontal effect. As a result, the UOKiK President substantially increased the level of the fines imposed.
- The fact that the supplier played the role of the ‘hub’ was recognized as one of the factors proving that it had indeed been the initiator of the agreement involving vertical retail-price fixing with a horizontal effect. The notion of the ‘initiator’ was understood more as an ‘instigator’ than the undertaking that actually started the practice. This prevented the treatment of the supplier as a ‘fully-fledged’ leniency applicant.
- The standard of proof was very high in all of the aforementioned cases. This was due to the abundance of evidence found in the hundreds of e-mails found by UOKiK that contained details of the anticompetitive arrangements at hand as well as the explanations provided by leniency applicants.
- The interpretation of the ‘duration’ of the contested practice was definitely incorrect. Without having conducted any economic analysis, the UOKiK President automatically recognized that the agreement was still in operation and continued causing anticompetitive effects. Its duration was said to extend for as long as one of the retailers was still applying the retail price initially fixed in violation of the Competition
Act, even if nearly three years have passed since the price setting actually occurred. The Polish Competition Authority would have done better by applying the economic approach rather than exercising formalistic automatism.

**Literature**


Powers of Inspection of the Polish Competition Authority. 
Question of Proportionality

by

Maciej Bernatt*

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Abstract

The principle of proportionality applies to competition proceedings especially, when it comes to the exercise by the competition authority of its powers of inspection. Their use limits the economic freedom and right to privacy of the scrutinised undertakings in order to protect free competition. The use of inspection powers must thus be proportionate and remain the least onerous possible for the inspected companies. In consequence, legislation must provide procedural guarantees of proportionality of inspections.

This article analyses whether the powers of inspection bestowed upon the Polish competition authority are regulated in a way that guarantees the observance of

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the principle of proportionality. The analysis focuses on the powers of control and search. Subsequently covered is also the issue of judicial control over the use of the powers of inspection by the competition authority. Proposals for changes in the practice of the competition authority as well as in the Polish legal framework are made in conclusion.

Résumé

Le principe de la proportionnalité s’applique quand il vient à l’exercice des puissances de l’inspection par l’autorité de concurrence. L’utilisation de ces puissances – limitant, au nom de la protection de la libre concurrence, la liberté économique et le droit des entreprises à l’intimité – doit être proportionnée et la moins onéreuse possible pour les entreprises inspectées. Par conséquent, dans le cadre juridique les garanties procédurales de la proportionnalité des inspections doivent être fournies. L’article analyse si les puissances des inspections de l’autorité de concurrence polonaise sont réglées d’une manière qui garantit le respect du principe de la proportionnalité.

Classifications and key words: competition proceedings; antitrust proceedings; dawn raids; inspection; right to privacy; right of defense; judicial control over the administrative proceedings; procedural fairness.

I. Introduction

Proportionality is an essential legal principle which states that interference by public authorities with the rights and freedoms of private entities is permissible only if it is in accordance with the law and is necessary in a democratic society for the protection of key interests such as public order or the rights and freedoms of others. For that reason, the use of public measures in order to attain objectives legitimately pursued by legislation should remain the least onerous possible for private entities. Actions of the State will be disproportional if the same aim can be achieved in a less intrusive way.

The principle of proportionality is useful when analysing competition proceedings. Competition authorities act for the protection of free competition on the market and ultimately, for consumer welfare. There is no doubt that these interests can be a reason for limitations being placed on the economic freedom of undertakings as well as their right to privacy. Competition authorities, including the Polish President of the Office of Competition and Consumers Protection (in Polish: Prezes Urzędu Ochrony Konkurencji i Konsumentów; hereafter, UOKiK President), have major powers of inspection.

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Their use, limiting the economic freedom and right to privacy of undertakings in the name of competition protection objectives, should be proportionate². This article analyses if the powers of inspection granted to the UOKiK President by the Competition Act are formulated so as to guarantee the observance of the principle of proportionality. Problematic issues in this respect are discussed. Attention is drawn to the powers of control and searches covered by Articles 105a-105l of the Act of 16 July 2007 on Competition and Consumers Protection (the Competition Act)³. The article deals also with judicial control over the use of the powers of inspection by the competition authority. In conclusion, proposals for changes in the interpretation of the current legal framework are made. Suggested are also certain amendments of the Competition Act. Due to its limitations, the article does not deal with powers of inspection concerning private premises nor with inspections run by the UOKiK President under authorization of the European Commission.

II. Limitations of rights and freedoms

The principle of proportionality derives in the Polish legal system from Article 2, as a consequence of the democratic state of law clause, and Article 31(3) of the Constitution of 1997⁴. According to the latter rule, a limitation upon the exercise of constitutional rights and freedoms may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, to protect the environment, health or public morals, or the rights and freedoms of others. Such limitations shall not however violate the essence of specific rights and freedoms. Interference with the economic freedom and interests of companies [Article 64(1) of the Constitution] is thus allowed only if it meets the requirements of Article 31(3) of the Constitution. According to Article 22 of the Constitution, limitations upon the freedom of economic activity may be imposed only by means of a statute and only for important public reasons.

Inspections run by the UOKiK President interfere with the right to privacy of the scrutinised companies (right to respect its premises). Taken into consideration when assessing if an inspection is proportionate, must be the standards of Article 8 of the European Convention on Human Rights (ECHR)

³ Journal of Laws 2007 No. 50, item 337.
which guarantees the right to privacy. The ECHR is binding and directly applicable in Poland5. Consequently, all Polish public authorities including the UOKiK President are under the obligation to observe the ECHR.

The European Court of Human Rights (ECtHR) confirmed directly in the field of competition law procedure that Article 8 ECHR protects undertakings against arbitrary inspections by competition authorities. The ECtHR noted in Société Colas Est and Others v France6 that even if the scale of the steps taken by the French competition authority in order to prevent the disappearance or concealment of evidence of anti-competitive practices justified the interference with the applicant’s right to respect its premises, law and practice had not afforded the inspected company adequate and effective safeguards against power abuse. The ECtHR pointed out that the French competition authority had extensive powers of inspection which gave it an exclusive competence to determine the expediency, number, length and scale of inspections. Moreover, inspections were carried out without a prior warrant from a judge and without a senior police officer being present. The ECtHR accepted at the same time however that the entitlement of State authorities to interfere with the rights protected by Article 8 if the ECHR may be more far-reaching where the business premises of a legal person are concerned7. It concluded nevertheless, having regard for the manner of the proceedings in the case in question, that impugned inspections cannot be regarded as strictly proportionate to the legitimate aims pursued8.

The principle of proportionality is also recognised by EU law as one of its general principles. Article 5(4) of the Treaty on European Union9 clearly specifies that under the principle of proportionality, the content and form of EU actions shall not exceed what is necessary to achieve the objectives of the Treaties. This stance is also confirmed by jurisprudence. In C-133/92 Crispoltoni, the European Court of Justice (ECJ) held that the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the EU law in question10. If a choice exists between several appropriate measures, the least onerous one must be used and the disadvantages caused must not be disproportionate to the aims pursued.

5 See Article 91(1) in conjunction with Article 9 of the Constitution.
6 Application no. 37971/97, judgment of 16 April 2002, see para. 48-49.
7 See also Niemietz v Germany, application no. 13710/88, judgement of 16 December 1992, para. 31.
8 See also other ECtHR judgments in which the proportionality of inspections was assessed – Funke v France, application no. 10828/84, judgment of 25 February 1993, para. 55-57; Créminieux v France, application no. 11471/85, judgment of 25 February 1993, para. 38-40; Miallhe v France, application no. 12661/87, judgement of 25 February 1993, para. 36-38.
pursued\textsuperscript{11}. The ECJ held also that any intervention by public authorities in the sphere of anyone’s private activities, be it a natural or legal person, must have a legal basis and be justified on the grounds laid down by the law\textsuperscript{12}. Consequently, protection against arbitrary or disproportionate intervention must be ensured by legislative means\textsuperscript{13}.

EU courts identified procedural safeguards to be provided with respect to inspections run by the European competition authority – the Commission. It has been concluded that the Commission must, before starting an inspection, be able to specify its extent and goal\textsuperscript{14}, especially by describing the facts that it wishes to establish through it\textsuperscript{15}. Therefore, it should have prior to the inspection significant knowledge that a possible violation of EU competition law may have taken place\textsuperscript{16}. Moreover, the inspected undertaking must be informed about the reasons for the inspection before it is started. Such information is crucial for the right of defence of those subject to an inspection. In addition, coercive measures used in its course should be neither arbitrary nor excessive having regard to the subject matter of the inspection\textsuperscript{17}.

Taking all this into account it can be concluded that the economic freedom and the right to privacy of undertakings can indeed be legitimately limited as a result of an inspection run by competition authorities. However, such a limitation is permissible only if procedural safeguards are put in place and only if the goal of the inspection cannot be achieved with the use of less intrusive methods.

III. Proportionality safeguards in Polish competition proceedings

According to Polish competition law, the UOKiK President can run inspections in two ways: an ordinary inspection known as a control (Article 105a of the Competition Act, in Polish: \textit{kontrola}, hereafter called a control) and; an inspection that includes a search of the premises and belongings of the undertaking (Article 105c of the Competition Act, in Polish: \textit{kontrola}

\begin{thebibliography}{9}
\bibitem{11} Ibidem.
\bibitem{12} \textit{Hoechst AG v Commission}, para. 19.
\bibitem{13} Ibidem.
\bibitem{14} Ibidem, para. 29 and T-23/09 \textit{CNOP and CCG v Commission}, not yet reported, para. 34.
\bibitem{16} Ibidem.
\end{thebibliography}
When it comes to a control, inspectors are entitled to study materials provided on their request by the employees of the scrutinised undertaking. During a search, inspectors are entitled to look actively for proofs of the alleged infringement without the cooperation of the employees of the inspected undertaking.

The Competition Act contains some provisions that safeguard the proportionality of inspections run by the UOKiK President. First, both ordinary controls and searches can be run only in the field of the proceedings to which they belong to [Article 105a(1) in fine of the Competition Act]. There must therefore be a direct link between the inspection (a control or a search) and the subject matter of the proceedings. This means that there ought to be a link between the alleged objections or objection already raised against the undertaking and the scope of the inspection. In consequence, items to which inspectors had access to during a control or search should not be taken into consideration or seized (under Article 105g of the Competition Act) unless they are related to the subject matter of the actual proceedings. A need to run an inspection shall be supported by evidence already in the possession of the UOKiK President before its commencement.

Another procedural safeguard set out in the Competition Act is the obligation for the inspectors to deliver an authorisation issued by the UOKiK President, which specifies the extent of the given control, to the representatives of the undertaking subject to that control. According to Article 105a(1) of the Competition Act, an authorisation to carry out a control must contain: designation of the inspection authority; indication of the relevant legal basis; date and location of issue of the authorisation; inspectors’ data; designation of the entity to be inspected; determination of the object and scope of the inspection; determination of the inspection starting and expected end date; signature of the authorisation granting individual; instructions on the rights and obligations of the entity being inspected. With respect to a search, handed in must be an equivalent court order permitting it to start.

Any undertaking can become subject to an inspection under the Competition Act. Grounds for the limitation of the freedom of economic activity are stronger however with respect to those suspected, even informally during explanatory proceedings, to have infringed competition rules. Inspections should thus concern alleged offenders first rather than those not believed to have breached competition law. Only if proofs of the infringement cannot be

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found at the premises of the alleged offender can an inspection be carried out at the premises of non-suspects (for example their competitors or distributors).

IV. The distinction between a control and a search

The fact that the Competition Act distinguished between a control and a search makes Polish solutions different to EU law where inspections run under Article 20 of Regulation 1/2003 include, automatically, the power of search\textsuperscript{21}. This distinction creates practical problems in Poland since procedural safeguards circumscribing the powers of the UOKiK President are more limited with respect to controls (ordinary inspections) than they are with respect to searches. The authority does not need judicial consent to carry out a control, unlike to start a search. Moreover, a control is merely based on a written authorisation handed in to the representatives of the inspected undertaking by the inspectors – UOKiK employees. The authorisation issued by the UOKiK President does not take the form of an order\textsuperscript{22} in the sense of Article 123 of the Code of Administrative Procedure (in Polish: \textit{Kodeks Postępowania Administracyjnego}; hereafter, KPA)\textsuperscript{23}. The inspected undertaking is thus deprived of the right to contest before a court the legality and proportionality of such an informal decision authorising the control of its premises. This situation takes place despite the fact that companies are obliged to cooperate with the UOKiK inspectors during a control and cannot deny them access to premises. Entry denial or lack of cooperation can in fact cause the imposition of a fine of up to 50 000 000 Euro [Article 106(2)(3) of the Competition Act]\textsuperscript{24}. By contrast, a decision concerning an inspection

\textsuperscript{21} ECJ held in \textit{Hoechst AG v Commission}, para. 27, that the right of the Commission to enter any premises, land and means of transport of undertakings would serve no useful purpose if the Commission’s officials could do no more than ask for documents or files which they could precisely identify in advance. On the contrary, in the opinion of the ECJ, such right implies the power to search for various items of information which are not already known or fully identified; without such power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude.

\textsuperscript{22} See the opinion of R. Janusz in this respect, ‘Dostosowywanie prawa polskiego do prawa wspólnotowego w zakresie instytucji, procedur i sankcji antymonopolowych’, [in:] P. Saganek, T. Skoczny (eds), Wybrane problemy i obszary dostosowania prawa polskiego do prawa Unii, Warszawa 1999, p. 292.


\textsuperscript{24} A fine was recently imposed on undertakings in the UOKiK President’s decision of 4 November 2010, DOK-9/2010 and the decision of 24 February 2011, DOK-1/2011. See M. Kozak,
issued under Article 20(4) Regulation 1/2003 – a decision that the undertaking must submit to – can be appealed to EU courts by the inspected undertaking.25

Despite the procedural distinction between controls and searches, the difference in the way they are run in practice may turn out rather minor. The Competition Act fails to define either of the two forms of inspections. Jurisprudence has pointed out that a search takes place when the inspectors run it independently from the representatives of the company concerned, without their cooperation and help.26 During a search, inspectors are entitled to look actively for proofs of the alleged infringement rather than only, as is the case with respect to a control, to study the material provided by the employees of the scrutinised undertaking. However, since controls can be performed even without the presence in the premises of the company representative, procedural safeguards do not exist to stop a control from becoming a search. This very problem has become the basis for a dispute between a specific undertaking that was subject to a control and the UOKiK President. The company in question refused to cooperate with the inspectors (computer files were not made available to them) claiming that the officials were conducting a search, rather than a control. A fine was thus imposed upon that undertaking by the UOKiK President, later to be upheld by the courts.28

A search is more intrusive than a control with respect to an undertaking’s freedom of economic activity and right to privacy. It should thus be used in exceptional cases only when the UOKiK President is unable to obtain sought after documents or when the undertaking in question fails to cooperation with the inspectors.29 A search may only be performed if there is a high probability that the documents the competition authority wishes to get hold of cannot be

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25 See also Hoechst AG v Commission, para. 26. A complaint to EU courts does not suspend the inspection.

26 Judgment of the Supreme Court of 7 May 2004, III SK 34/04, UOKiK Official Journal 2004 No. 4, item 330; the judgment of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02.

27 Article 80(2)(3) of the Act of 2 July 2004 on the Freedom of Economic Activity (Journal of Laws No. 173, item 1807, as amended) provides in the case of competition proceedings an exception from general rules which state that the presence during a control of the representative of the undertaking is obligatory.

28 Judgment of the Supreme Court of 7 May 2004, III SK 34/04. See also the judgement of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02.

29 E. Modzelewska-Wąchal, Ustawa o ochronie konkurencji i konsumentów. Komentarz, Warszawa 2002, p. 228; M. Swora, [in:] Skoczny, Jurkowska, Miąsik (eds), Ustawa..., Art. 105c,
obtained in a different, less intrusive manner (especially by way of a simple information request under Article 50 of the Competition Act) or when there is suspicion that the undertaking will hide, destroy or alter them unless a search is carried out. As the provisions of the Code of Criminal Procedure are applicable per analogiam to searches run by the UOKiK President, for a search to be started, a high probability must exist that proofs of the alleged infringement will be found in the given premises (Article 219 § 1 of the Code of Criminal Procedure).

V. Prior notice of an inspection

Another issue that poses questions about proportionality in Polish competition proceedings is whether it is true that only unexpected can be deemed effective. Under the standards of EU law, an unannounced inspection is considered to be proportionate if it is justified in the given case. Competition authorities must be able to search for various items of information which are not already known to them or fully identified. Polish courts also accept that control can be run without prior notice.

In the light of the principle of proportionality, an unannounced control should be seen as an exception rather than the rule. Unfortunately, the Polish Act on the Freedom of Economic Activity provides in this respect that, specifically in the case of competition proceedings, undertakings are not given notice of a planned control [Article 79(2)(4)]. This provision constitutes therefore an exception from the general rule of the prior announcement of

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31 C. Banasiński, E. Piontek (eds), Ustawa…, pp. 868-869.


33 See Article 105c(4) of the Competition Act.

34 E. Modzelewsk-Wąchach, Ustawa o ochronie konkurencji…, p. 228; M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miaśik (eds), Ustawa…, Art. 105c, No 9.

35 National Panasonic v Commission, para. 30.

36 Hoechst AG v Commission, para 27.


controls [Article 79(1)]. The existence of a general statutory rule excluding prior notice in competition law proceedings is excessive. It is likely that a forewarning may in many situations undermine the possibility of finding proofs of the competition law infringement. Unlike searches however, controls are based on cooperation between the undertaking and inspectors. They therefore tend to focus on the physical examination of facts already known to the authority. Indeed, a control can also concern those not suspected of a violation. At least in such cases, controls should be carried out only if the undertaking in question has been duly informed about it. The UOKiK President should decide on the issue of prior notification on a case by case basis – statutory provisions should thus not generally preclude the competition authority from issuing a forewarning of an inspection.

VI. Inspections during explanatory proceedings

Proceedings before the UOKiK President can take the form of explanatory or full competition proceedings (officially called antimonopoly proceedings in the Polish Competition Act). Under Article 48(1) of the Competition Act, the UOKiK President can institute explanatory proceedings if circumstances indicate that it is likely that the provisions of the Competition Act had been infringed. Article 48(2) of the Competition Act states that explanatory proceedings may, in particular, aim at (1) initially determining whether an infringement took place of the provisions of the Competition Act which would justify the institution of antimonopoly proceedings; (2) a study of the market, including the determination of the structure and degree of concentration thereof; (3) initially determining whether an obligation exists to submit a notification of an intended concentration. There are no parties to explanatory proceedings – objections against undertakings are not yet raised at this stage. Companies are not informed about the start of explanatory proceedings even if the actions of the UOKiK President undertaken therein

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39 Other reasons are: need to examine a given branch of economy, or as to matters regarding the protection of consumer interests, and in any other cases as provided for by the Competition Act.

40 The list of grounds for establishing explanatory proceedings is not exhaustive.

41 In the field of consumer law explanatory proceedings can also aim at (1) initially determining whether there was an infringement of the provisions of the Competition Act, such as may justify the institution of proceedings regarding the use of practices violating the collective interests of consumers and (2) determining whether a violation of any consumer interests being protected by the law occurred.
refer to them. It is common for undertakings to not know officially about the existence of explanatory proceedings until an inspection is carried out despite the fact that they can lead to competition law charges. The question arises in this context whether inspections (controls or searches) can take place during explanatory proceedings. An affirmative answer derives from the wording of Article 105a(1) of the Competition Act (a control) and Article 105c(1) of the Competition Act (a search) which provide that an inspection can be carried out during any kind of proceedings before the UOKiK President including explanatory ones.

Still, the interpretation of any legal act cannot be limited to a literal meaning of its provisions. Article 105a and 105c of the Competition Act read in conjunction with Article 48 should be interpreted in the light of the principle of proportionality. The use of inspections must thus be excluded in certain kinds of explanatory proceedings. Generally speaking, a control and a search can be carried out only when the explanatory proceedings may lead to a decision being taken by the UOKiK President whether it is likely that a competition law violation had occurred. It is unfounded to consider that the authority is entitled to carry out an inspection when the premise of Article 48(1) of the Competition Act is not met, in other words, when the UOKiK President has no knowledge about circumstances suggesting that Competition Act had been infringed. The competence of the competition authority to carry out an inspection (both controls and searches) must be excluded in particular with respect to explanatory proceedings meant to conduct a market study, including the determination of the structure and degree of concentration thereof and initially determining whether an obligation exists to submit a notification of an intended concentration. Performing an inspection in such cases would have the character of a ‘fishing expedition’ – an inspection that has no factual and legal basis suggesting that competition rules could have been infringed.

Concerns arise in this context because controls are carried out primarily during explanatory proceedings when undertakings have very limited powers to oppose unfounded controls. Out of the 26 controls that took place in the first half of 2011, 25 occurred during explanatory proceedings, the respective

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42 Such situation was assessed critically by A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąśik (eds), *Ustawa…*, art. 48, No 10.
43 A search (if accepted by the court) makes an integral part of a control.
44 Such a conclusion justifies opening of competition law proceedings by raising objections against particular undertakings.
46 Some scholars suggest that this is a correct situation – see C. Banasiński, E. Piontek (eds), *Ustawa…*, p. 840 and K. Różiewicz-Ladoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów…*, p. 213.
numbers were 23 out of the total of 28 in 2010, 23 out of 29 in 2009 and; 23 out of 36 in 2008\textsuperscript{47}. It is true that controls can often be effective only if carried out without a forewarning. They must therefore take place before official objections are raised – at the stage of explanatory proceedings. However, the presumption for controls to be carried out during explanatory proceedings has no legal basis. Respect for proportionality (the use of the least intrusive methods possible to establish facts) suggests caution in their use\textsuperscript{48}. A control is an instrument that significantly interferes with the freedom of economic activity of the inspected undertaking also because the UOKiK President has the power to seize items that may constitute evidence in the case [Article 105g(1) of the Competition Act].

When it comes to searches, their use during explanatory proceedings should be even more restrained and primarily concern possible hard-core infringements of competition law. The Competition Court should decide on authorising a search on a case by case basis rather than by a formal qualification of given proceedings as dealing with cartels. The assessment whether a search is needed must take into account the fact that it is permissible during explanatory proceedings only if a justifiable suspicion exists of a breach of the Competition Act, particularly if it is feared that evidence might be obliterated (see Article 105c(2) of the Competition Act). As a rule therefore, a search should be performed during full competition proceedings rather than in their explanatory phase. Statistics of the last two year paint a different picture however. Between January and June 2011, the UOKiK President carried out 6 searches all of which occurred during explanatory proceedings; 5 searches took place in 2010 and again, all of them occurred during explanatory proceedings. The situation was slightly different in earlier years: 2 out of the 5 searches carried out in 2009 took place in explanatory proceedings as did 2 out of the 3 searches performed in 2008\textsuperscript{49}.

The UOKiK President is entitled to carry out a search during explanatory proceedings only in situations described in Article 48(2)(1) of the Competition Act – explanatory proceedings aiming at an initial determination whether an infringement of the Competition Act took place which may justify the institution of full competition law proceedings. The authority cannot carry out a search in explanatory proceedings described in Article 48(2)(2-5) of

\textsuperscript{47} The situation was different in 2007 where only 8 out of the total of 30 controls were carried out during explanatory proceedings. This data were obtained from UOKiK in effect of the notion for disclosure of public information.

\textsuperscript{48} R. Janusz, Dostosowywanie prawa polskiego..., p. 294.

\textsuperscript{49} No searches were carried out in 2007.
the Competition Act\textsuperscript{50}. The performance of a search is excluded therefore in explanatory proceedings meant to conduct a market study including the establishment of its competitive structure\textsuperscript{51}. It can be added that the UOKiK President does not have, at such an early stage of the investigation, justifiable suspicions of a serious infringement of the Competition Act. It is also correct to state that conducting a search in concentration proceedings would be contrary to the character of these proceedings\textsuperscript{52}. For that reason, the provisions of the Competition Act should be interpreted in the light of the principle of proportionality and thus exclude the use of searches during explanatory proceedings unless the UOKiK President has prior knowledge of competition restricting practices.

\section*{VII. Right of complaint and judicial control}

Procedural safeguards circumscribing the UOKiK President’s inspection powers consist of: (1) the right to lodge an objection under the Act on the Freedom of Economic Activity; (2) prior judicial control with respect to searches and; (3) subsequent judicial control of final decisions issued by the competition authority where it is possible to rise procedural objections about the way in which the administrative proceedings were conducted.

\subsection*{1. Objections under the Act on the Freedom of Economic Activity}

The Act on the Freedom of Economic Activity of 2004 states that an undertaking may lodge an objection against the way public administrative bodies exercise their inspection rights. Filing such an objection suspends the inspection. The administrative body carrying it out has three days to decide whether the objections are justified. If the administrative order concerning the objections is negative for the company, in other words, if the control is to be continued, the undertaking in question can file a complaint to an administrative court.

\begin{itemize}
  \item \textsuperscript{50} This is also an opinion of B. Turno, ‘Komentarz…’, [in:] A. Stawicki, E. Stawicki (eds), \textit{Ustawa}..., p. 1073.
  \item \textsuperscript{51} See different opinion, [in:] C. Banasiński, E. Piontek (eds), \textit{Ustawa}..., pp. 869-870.
  \item \textsuperscript{52} B. Turno, ‘Komentarz…’, [in:] A. Stawicki, E. Stawicki (eds), \textit{Ustawa}..., p. 1073. The concentration proceedings shall be deemed civil and not criminal in a light of the Article 6 of the ECHR.
\end{itemize}
The application of the Act on the Freedom of Economic Activity is very limited with respect to competition proceedings. Companies may lodge objections on the basis of Article 84c(1) of this Act claiming that a violation occurred of its Article 79a(1) and 79a (3)-(9). Those subject to an inspection may thus complain only on irregularities when it comes to the authorisation to carry out a control within competition proceedings. Undertakings may, in particular, lodge an objection that the extent of the control being carried out is actually broader than that set out in its authorisation.

A company being controlled, Polkomtel S.A., has tried at one point, albeit unsuccessfully, to use the above institution to complain also on the lack of impartiality of the inspectors and disproportional character of actions taken in the framework of the inspection with respect to the object of the explanatory proceedings. The undertaking claimed moreover that the contested control was run by UOKiK employee without an appropriate authorization. Polkomtel alleged in this respect that the inspection was carried out on the basis of an authorization issued prior to the initiation of the investigation, and that the scope of the control was broader that the object of the proceedings. The company noted additionally that the control was carried out outside its normal working hours. Polkomtel’s objections were dismissed by the UOKiK President as well as the Competition Court.

2. Prior judicial control

In competition proceedings, prior judicial control over the UOKiK President’s powers of inspections is limited to searches only [Article 105c(1) of the Competition Act] because a control [Article 105a(1) of the Competition Act] is carried out on the basis of a written authorisation issued by the authority itself. Companies subject to controls can thus question them only in cases prescribed in the Act on the Freedom of Economic Activity or complain

53 Under the general rules of the Act on the Freedom of Economic Activity, objections may refer to the violations of Article 79(1) and 79 (3)-(7), Article 80(1), Article 82(1) and Article 83(1). These provisions, due to the existence of a clear statutory exemption in this respect, are not applicable in the case of proceedings before the UOKiK President. See also B. Turno, ‘Komentarz…’, [in:] A. Stawicki, E. Stawicki E. (eds), Ustawa..., p. 1156.

54 See the order of the Court of Competition and Consumer Protection of 22 December 2009, XVII Amz 54/09/A, described in the decision of the UOKiK President of 24 February 2011, DOK-1/2011, p. 12. The Court of Competition and Consumer Protection (not an Administrative Court) is competent to deal with complaints on orders of the UOKiK President issued as a result of objections raised under the Act on the Freedom of Economic Activity, see judgment of the Regional Administrative Court in Warsaw of 5 March 2010, III SA/Wa 1496/09. See also K. Róziewicz-Ładoń, Postępowanie przed Prezesem Urzędu…., pp. 261–262.
to the Competition Court if the UOKiK President imposes on them a fine for their lack of cooperation during a control.

Article 105a(1) and 1051(3) of the Competition Act fails to set out however the extent of judicial control over searches carried out by the UOKiK President. It provides only that the Competition Court has 48 hours for issuing an order authorising a search upon the authority’s request. Lacking legal provisions together with problems in distinguishing between a search and a control make procedural guarantees unclear in this context. It has been pointed out in the jurisprudence of the Polish Constitutional Court that those legal provisions which result in a limitation of rights and freedoms must be characterized by their non-ambiguity and precision as required by Article 2 of the Polish Constitution. The more far-reaching the limitation in question is, the stronger the procedural guarantees shall be to protect them.

The premises for consenting to a search should be interpreted in a strict manner. The Competition Court must decide first whether a reasonable basis exists to believe that possible proofs can be found in the premises the authority wishes to search (per analogiam Article 219 § 1 of the Code of Criminal Procedure). Proportionality requirements must be taken into account next to decide if it is highly likely that the documents, or other items the UOKiK President wishes to get hold of, cannot be obtained in a different, less intrusive manner (such as a control) or if is suspected that the scrutinised undertaking will hide, destroy or alter them. When dealing with a request to consent to an exceptional search in explanatory proceedings, the Court has to decide also whether a justifiable suspicion exists that the Competition Act had actually been violated. It should assess in particular if past misconduct of the undertaking the premises of which the authority wishes to search suggests that there is an objective risk that evidence will be obliterated.

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57 The UOKiK President should show in the request concrete informations he/she believes can be established by way of a search in given premises, see M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), Ustawa..., Art. 105c, No 9.

Article 105c(3) of the Competition Act constitutes a negative exception from the perspective of the constitutional requirement of a two-instance judicial process [Article 78 and Article 176(1) of the Polish Constitution]. It specifies that the decision of the Competition Court concerning a search cannot be appealed. This happens despite the fact that searches interfere significantly with the rights and freedoms of private entities (especially their right to privacy). It would be possible to amend the Competition Act so as to compromise procedural effectiveness with adequate procedural standards by introducing two-instance judicial proceedings and giving the inspected undertakings the right to appeal the court order authorising a search at the moment of its commencement (such appeal would not have to suspend a search). Similar solutions exist in the Polish Code of Criminal Procedure (Article 236).

Judicial control over the powers of inspections of the UOKiK President cannot be illusory. Statistics put this issue into doubt however since the Competition Court has in practice authorised all searches requested by the UOKiK President in the last three and a half years (3 in 2008, 5 in 2009, 5 in 2010 and 6 in the first half of 2011).

3. Subsequent judicial control

According to the jurisprudence of the ECtHR, decisions taken by administrative bodies which do not satisfy the requirements of Article 6(1) ECHR must be subject to subsequent control by a ‘judicial body that has full jurisdiction’ over questions of facts and law. Full jurisdiction means that courts must be entitled and actually examine all relevant facts of the case as well as to have the power to quash the appealed administrative decision.

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59 See also M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), Ustawa..., Art. 105c, No 16.


61 Schmautzer v Austria, para. 35.

in all its aspects (facts and law). When it comes to the assessment of their legality, the ECtHR expects the judiciary not to be limited to an assessment whether the impugned decision is in line with substantive law. Courts shall also be empowered to set aside an administrative decision in its entirety or part, if it is established that procedural requirements of fairness were not met in the proceedings which led to its adoption. The observance of the principle of proportionality by the UOKiK President should thus be assessed by the Competition Court during appeal proceedings where UOKiK infringement decisions are being controlled. This is an indispensable safeguard as inspections are crucial for finding proofs of competition law violations.

Article 77(6) of the Act on the Freedom of Economic Activity states in this respect that evidence obtained in violation of legal norms on inspections cannot be considered as proof in any administrative proceedings regarding the inspected undertaking, provided the violation influenced the results of that inspection. EU jurisprudence follows the same line specifying that the illegality of a Commission decision authorizing an inspection (as well as its disproportional character) prevents it from using, for the purposes of competition law infringement proceedings, any documents or evidence which it might have obtained in the course of that investigation. If that is not the case, the final decision on the infringement might be annulled by EU Courts in so far as it was based on such evidence.

The Polish Competition Court should exercise effective control over the way in which evidence is collected during inspections (both controls and searches). If an infringement of procedural rules is established concerning evidence, such as a violation of the principle of proportionality in the course of an inspection, the Court should disregard such evidence. In cases where the remaining evidence is insufficient to prove a competition law infringement, the Court should change the UOKiK decision by not establishing an infringement in line with the jurisprudence of the Polish Supreme Court. The Competition

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63 See Potocka and others v Poland, application no. 33776/96, judgment of 4 October 2001, para. 55, 58; Sigma Radio Television Ltd v Cyprus, application no. 32181/04, 35122/05, judgment 21 July 2011, para. 153–154.

64 Ibidem.

65 With respect to Polish rules governing judicial control over procedural infractions in competition proceedings see M. Bernatt, ‘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 (No. III SK 5/09)’ (2010) 3(3) YARS 300–305.

66 C-94/00 Roquette Freres, para. 49; H. Andersson, E. Legnerfalt, Dawn Raids in Sector Inquiries..., p. 444.

67 Ibidem.

68 The Supreme Court of 19 August 2009, III SK 5/09, LEX, No. 548862.
Court is also entitled to quash a decision of the UOKiK President if it is established that the undertaking in question was deprived of, as a consequence of an inspection, the opportunity to defend itself during the proceedings, that is, if a violation took place of a requirement indispensable for their validity.69

VIII. Conclusions

Several problems were identified in this article concerning the observance of the principle of proportionality when it comes to inspections carried out by the Polish competition authority.

The first deals with the lack of clarity in the distinction between two inspection powers granted to the UOKiK President – a control and a search. It must be accepted that whenever the authority plans to actively look for proofs of a competition law breach independently from the representatives of the undertaking concerned, it should carry out a search (after obtaining judicial authorisation to do so) rather than an ordinary control. Otherwise the inspected undertakings will have a reasonable right to question before the Competition Court the legality of such control.

Second, unannounced inspections should be an exception rather than the rule. There is a need to abolish the general exception provided by the Act on the Freedom of Economic Activity which states that undertakings are not notified about planned inspections in competition law proceedings. Prior knowledge can often undermine the possibility of finding proofs of a competition law infringement. This, however, the competition authority should decide on a case by case basis. The existence of a general statutory exception in this regard brings about the risks that the inspected company’s right of defence will be disproportionally limited at least in some cases.

Third, the sake of the principle of proportionality requires a reasonable use of controls and an exceptional use of searches in explanatory proceedings. The UOKiK President is not entitled to carry out an inspection (controls and searches) during explanatory proceedings when the premise of Article 48(1) of the Competition Act is not met, that is, without a suspected breach of the Competition Act. The competences of the UOKiK President in this respect must be excluded in particular with respect to explanatory proceedings aimed at conducting a market study. Such inspections would amount to a

69 The Supreme Court in the judgment of 29 April 2009, III SK 8/09, suggested that a violation of requirements indispensable for the validity of proceedings can be the ground for the revocation of a UOKiK decision. With respect to the consequences of improper inspections see also: C. Banasiński, E. Piontek (eds), Ustawa..., pp. 919–920.
'fishing expedition' – an inspection that has no factual and legal basis. The Competition Court must exercise caution especially when dealing with authorization requests for a search at the stage of explanatory proceedings. An approval should be granted only if the UOKiK President has managed to shown a justifiable suspicion of a serious infringement of the Competition Act and when a reasonable basis exists to believe that possible proofs of anticompetitive behaviour can be found in the premises the authority wants to search. It must be also borne in mind that a search during explanatory proceedings is permissible only if they are aimed at an initial determination whether an infringement of the provisions of the Competition Act took place.

Finally, judicial control over the UOKiK President's powers of inspection should be more intensive. The grounds for raising objections under the Act on the Freedom of Economic Activity could be broader and refer directly to the question of proportionality of inspections. When it comes to prior control of searches, the Competition Court must check in detail – on a case by case basis – whether carrying out a search is indispensable for finding proofs of the competition law violation and whether less intrusive investigative measures would not be sufficient. The Court must pay special attention to requests for authorising a search in the course of explanatory proceedings. There is also a need for an amendment of the Competition Act so as to introduce a two-instance judicial procedure applicable to search requests submitted by the UOKiK President. The right of the inspected undertaking to appeal an order of the Competition Court authorizing a search would be better at guaranteeing the proportionality of searches. Such an appeal, if not suspensory for a search, would not undermine the effectiveness of the investigation. Moreover, the Competition Court must consider procedural infractions when controlling final infringement decisions issued by the UOKiK President. Thus, the way the evidence was collected by the authority must be scrutinised by the judiciary. If a violation of procedural rules is established concerning the inspection, or indeed a direct violation of the principle of proportionality, the Competition Court should disregard such evidence.

The aforementioned problems can be largely solved by changing the enforcement practice of the UOKiK President and the approach of the Competition Court as well as an alteration of the interpretation of existing legal provisions. However, it would be wise for the UOKiK President to use works under the mandate of the Competition Policy 2011-2013 program not only to increase the effectiveness of the authority’s investigative powers but also to propose new legal solutions for guaranteeing the observance of

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the principle of proportionality in the course of inspections carried out in competition law proceedings.

**Literature**


Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?

by

Konrad Stolarski*

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Abstract

The aim of this article is to analyse a powerful competence available to antitrust authorities in Europe in the form of the imposition of fines for the failure to cooperate within antitrust proceedings. While fines of that type are imposed in practice very rarely, the article considers the existing decisional practice of the Polish antitrust authority as well as the European Commission, and presents the way in which their approach has evolved throughout the years. The article analyses also the question of the formal initiation of proceedings concerning procedural violations and the importance of the use of a uniform and fair approach towards the scrutinized undertakings, especially as fine graduation is concerned. For that purpose, the article provides also a comparative analysis of past proceedings conducted by the European Commission and selected judgments of EU Courts.

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Résumé

Le but de cet article est d’analyser la compétence puissante des autorités de la concurrence en Europe qui est l’imposition des amendes pour l’absence de coopération dans le cadre d’une procédure administrative en matière de concurrence. Quoique ces amendes soient imposées très rarement dans la pratique, l’article considère les expériences actuelles de l’autorité de la concurrence polonaise et de la Commission européenne et présente la manière dont leur approche de cette question a évoluée dans le temps. De plus, l’article comporte une analyse du problème de l’ouverture formelle de la procédure et d’importance de l’approche juste et uniforme aux entreprises engagées dans cette procédure, en particulier concernant la graduation de l’amende. Dans ce but, l’article aussi comporte l’analyse comparative des procédures déjà conduites par la Commission européenne et des jugements sélectionnés des cours de l’Union européenne.

Classifications and key words: fines; antitrust proceedings; dawn raid; inspection; cooperation; procedural infringements.

I. Introduction

In Europe, both state antitrust authorities as well as the European Commission (hereafter, Commission)1 are equipped by their respective laws with the competence to discipline undertakings2. Those infringing competition rules can be fined at the level determined (and limited) by the size of their revenue generated in past fiscal years. Recent case law shows a very decisive approach being taken towards violators as a result of which a number of severe fines have been imposed both in Poland and the EU3. Clearly, there are other factors influencing the size of the fine aside from the company’s economic

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1 The term antitrust authorities will in this article apply to both EU member states’ antitrust authorities as well as to the Commission when acting on the basis of Treaty provisions on competition protection.

2 It should be noted that the term ‘undertaking’ is used mainly in EU legislation and case law whereas Polish antitrust generally refers to companies and other entities participating in antitrust proceedings as ‘entrepreneurs’. In this article the term ‘undertaking’ and the term ‘entrepreneur’ are used as synonyms.

3 Exemplified best by the record fines imposed by the UOKiK President in the Grupa Ożarów decision of 8 December 2009, DOK-7/09 (fines of PLN 411,586,477, see further comments herein) and by the Commission in the Microsoft Case T-201/04 of 17 September 2007 (fine of EUR 497,000,000). As calculated by John M. Connor, the severity of the 2007–2009 cartel fines under the 2006 Commission Guidelines is more than five times higher than those figured under the 1998 Guidelines, John M. Connor, ‘Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines’ (2011) 32(1) ECLR 27–36.
strength. They include: the scale, character and severity of the infringement and possibly even the social response to the imposed penalty\textsuperscript{4}. Before determining and imposing fines, antitrust authorities are thus obliged to diligently analyze the facts of each case and gather evidence that supports their final evaluation. Proving that an infringement of competition law took place may at times turn out to be extremely difficult because unlawful market practices are often agreed upon and conducted in secret. As a result, it is frequently difficult to find hard proof and/or witnesses to a competition law infringement. At times therefore, even the sole support of ‘soft evidence’ is permissible when building a case against the culprits\textsuperscript{5}. Furthermore, the fines themselves need to be directly related to the facts and character of the infringement committed. Although they may be of substantial value (as past experience shows), the rules and policy followed by the authorities as regards the imposition of fines for antitrust infringements are generally transparent. They can be found in the extensive body of case law relevant to the imposition of fines in competition law proceedings as well as in the official guidelines issued by the respective antitrust authorities. Two soft law acts should be emphasized here that are of particular relevance to both the Polish and European market: (i) Commission Guidelines on the method of setting fines imposed pursuant to Article 23 (2)(a) of Regulation No. 1/2003\textsuperscript{6} and (ii) Explanations regarding the setting of the level of fines for practices restricting competition of the Polish Antitrust Authority (hereafter, UOKiK)\textsuperscript{7} (hereafter, Commission Guidelines and UOKiK Guidelines respectively)\textsuperscript{8}. However, neither of these acts refers expressively to fines for procedural infractions committed within antitrust proceedings which may be imposed on the basis of Article 106(1) (2) of the Polish Act on Competition and Consumer Protection\textsuperscript{9} (hereafter, Competition Act), Article 23(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in


\textsuperscript{5} Especially visible when it comes to coordinated parallel behavior which, as stated by the European Court of Justice (presently: Court of Justice) ‘may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market’ (judgement of 14 July 1972 48/69 Imperial Chemical Industries), see also K. Kohutek ‘Komentarz do art. 1 Rozporządzenia 1/2003 (WE) nr 1/2003 z dnia 16/12/02 r. w sprawie wprowadzenia w życie regul konkurencji ustanowionych w art. 81 i 82 Traktatu’, SIP Lex el/2006.

\textsuperscript{6} OJ [2006] C 06/3


\textsuperscript{8} On the character of Commission Guidelines – see judgment of the European Court of Justice of 28 June 2005 in combined cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 and C-213/02 P in the Dansk Rørindustri and others v European Commission, ECR [2005] I-5425.

\textsuperscript{9} Journal of Laws 2007 No. 50, item 331, as amended.
Articles 81 and 82 of the Treaty (hereafter, the Regulation 1/2003) and Article 14(1) of Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereafter, Regulation 139/2004) (the latter two referred here as EU Regulations). The terms ‘fines for procedural infractions/violations’ and ‘fines for the lack of cooperation’ within antitrust proceedings shall be understood widely in this article and apply to fines imposed as a consequence of all violations of a procedural character which may take place within such proceedings, that is, also during inspections. In practice, they are often referred to as ‘procedural fines’, as opposed to ‘substantive fines’ for competition law infringements – this however seems imprecise due to the also ‘procedural’ character of periodic penalty payments referred to in Article 107 of the Competition Act.

Considering that case law on fines for procedural violations is extremely sparse and at times incoherent, the question remains therefore – how and exactly in what circumstances should such fines be imposed by European antitrust authorities, and how far does their discretion go with respect to their size? Can this instrument be seen as the ‘ultimate weapon’ of competition law enforcement allowing antitrust authorities to impose multimillion fines on undertakings without conducting a full investigation of their alleged breach of competition law?

II. Grounds and level of fine imposition on the basis of the Polish Competition Act, Regulation 1/2003 and Regulation 139/2004

There are currently three legal acts which regulate fine imposition for the lack of cooperation within antitrust proceedings. Deciding which act is applicable in any given case is determined firstly by the ‘host’ of the primary proceedings (i.e. the Competition Act when conducted by the UOKiK President or one of the EU Regulations when conducted by the Commission), and secondly, by the subject matter of the main case (i.e. Regulation 1/2003 in alleged violations of Article 101 and 102 TFEU and Regulation 139/2004 for alleged violations of merger control rules10). The construction of the respective rules is rather similar (Article 106(1)(2) of the Polish Competition Act, Article 23(1) of Regulation 1/2003 and Article 14(1) of Regulation 139/2004), almost identical in fact in the case of the two EU Regulations. There are nevertheless some differences that deserve attention.

10 The latter division is relevant to EU competition law only which, unlike the Competition Act, regulates separately the issue of restrictive practices and merger control.
Pursuant to the Polish Competition Act, fines for procedural infractions within antitrust proceedings may be imposed by the UOKiK President generally in two cases only – when a given undertaking, intentionally or unintentionally,

(i) either refuses to provide the UOKiK President with requested information or documents, or provides false or misleading information or documents (Article 106(2)(1) and Article 106(2)(2) of the Competition Act), or

(ii) fails to cooperate with the UOKiK President in the course of an inspection conducted within the primary antitrust proceeding (Article 16(2)(3) of the Competition Act).

With respect to fines, the term ‘failure to cooperate’ is thus expressly used only in relation to inspections (Article 106(2)(3) of the Competition Act). On the other hand, neither Regulation 1/2003 nor Regulation 139/2004 address the obligations placed on undertakings in this context in general as ‘obligations to cooperate’ and indicate specific behavior which is considered as an infringement. Aside from inspections, cases in which undertakings are threatened with fines for their lack of cooperation are all related to situations concerning the provision of information and documents. This terminological discrepancy in Article 106(2) of the Competition Act is partially explained by the fact that antitrust proceedings generally have a written character. The contact between UOKiK (or the Commission) and the scrutinized undertaking(s) is therefore limited to the exchange of procedural writs on the ‘inquiry – answer’ basis. The vast majority of cases in which a given undertaking may ‘fail to cooperate’ take place during the provision of documents in writs addressed to the antitrust authority. By contrast, inspections conducted in the course of antitrust proceedings are situations where the undertaking and its employees come into direct contact with UOKiK officials. Hence, the forms in which the company (its employees) can obstruct an inspection are virtually unlimited. Thus, the premise of a ‘failure to cooperate’ referred to in Article 106(2)(3) of the Competition Act allows the UOKiK President to impose a fine upon an undertaking which obstructs in any way the course of an inspection performed

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11 Practice shows that the ‘creativity’ of such undertakings and their staff is also ‘unlimited’ when it comes to making the officials’ job in the course of an inspection as difficult as possible. E.g. in one of the inspections carried out by the Spanish antitrust authority, a company CEO almost literally tried to run away with a series of documents and photos removed from his closet in the presence of the inspectors. (Extraco case, Resolución de la Comisión Nacional de la Competencia of 6 May 2010, case ref. SNC/0007/10. About the power of inspection see also: M. Pedraz Calvo, ‘Competition authorities’ power of investigation and respect of fundamental rights: Inviolability of domicile’ [in:] M. Krasnodębska-Tomkiew, Zmiany w polityce konkurencji na przestrzeni ostatnich dwóch dekad, Warszawa 2010, pp. 113–124.
according to Articles 105a – 105l of the Competition Act, irrespective of the form of the obstruction.

The different approach adopted in Article 106 of the Competition Act with respect to antitrust proceedings as a whole and inspections in particular, makes its construction incoherent and can thus lead to legal problems in practice. Above all, the closed catalogue of illegal behaviors specified in Article 106(2)(1) and 106(2)(2) of the Competition Act can leave some situations beyond the scope of penalization. In Article 106(2)(2) for example, the legislator refers precisely to situations where an undertaking is obliged to provide the antitrust authority with specific information when summoned to do so. Polish doctrine correctly indicates that information requests authorized by Article 28(3) of the Competition Act are omitted. As a result, there is currently no legal basis to impose a fine on an undertaking that fails to comply with an information request issued by the UOKiK President regarding the scope of the fulfillment of its obligations imposed by a decision issued pursuant to Article 28(1) of the Competition Act. This problem would have been eliminated if the Polish legislator used a general premise of a ‘failure to cooperate’ with respect to the entirety of antitrust proceedings (similarly to inspections conducted therein) complemented by an exemplary catalogue of procedural violations.

Unlike Article 23(1) of Regulation 1/2003 and Article 14(1) of Regulation 139/2004, Article 106(2) of the Polish Competition Act does not specifically list the ‘breaking of official seals’ affixed in the course of an inspection. Both EU Regulations address this issue in provisions separate from those concerning general cooperation (lack thereof) during antitrust inspections – a fact that shows the particular importance associated with this matter by the EU legislator. Furthermore, both Regulations (‘seals affixed have been broken’) set a very high level of liability of the scrutinized undertaking where broken seals are found, irrespective of who and in what circumstances was responsible for their breaking. As a result, the construction of this legal provision de facto causes the reversal of the burden of proof normally associated with antitrust proceedings as it is the undertaking that must prove that it had nothing to do with the breaking of the seal rather than the authority. Seeing as the Polish legislator failed to create a separate premise for fine imposition in such cases,
the legal basis for the evaluation of the breaking of official seals in Poland should be found in Article 106(2)(3) \(^{17}\) of the Competition Act. Therefore, if it is established in the course of an inspection that seals previously affixed by UOKiK officials in the premises of the scrutinized undertaking have indeed been broken – such situation bares analogue consequences to the aforementioned provisions of both EU Regulations.

Accordingly, fines for the failure to cooperate within antitrust proceedings are determined on the basis of the turnover generated by the culprit and may reach a maximum of 1% of its yearly turnover. The methodology of that provision is analogue to that of fine imposition for competition law infringements, where the turnover limit is set at a much higher level of 10%.

However, Article 106(2) of the Polish Competition Act limits fines for procedural infractions by the maximum threshold of EUR 50,000,000. This provision seems to indicate \textit{prima facie} that the size of the fines is not related to the level of turnover generated by the offender in the fiscal year previous to the year where the fine is imposed. UOKiK’s decisional practice shows however that financial penalties imposed for the lack of cooperation remain connected to the offender’s economic strength, hence their yearly turnover is also taken into consideration\(^{18}\). The imposition of such fines is generally directly preceded by a UOKiK request for detailed information regarding the scrutinized undertaking’s financial results. As such, this is an analogue step to the conduct prior to the imposition of fines on the basis of Article 106(1) of the Competition Act.

\section*{III. Initiation of proceedings}

If in the course of an antitrust proceeding an undertaking suspected of an infringement of competition law\(^{19}\) refuses to cooperate, the antitrust authority has generally two ways to handle this fact. The first option is to ‘include it’ in the final decision ending the antitrust proceedings, the second is to address it directly and independently from the final verdict. In the first case, the procedural violation would be treated as an aggravating circumstance influencing the level of the overall fine imposed for the competition law infringement.

\^{17}\textit{Breaking of a seal would be thus considered, depending on the case, as an intentional or unintentional lack of cooperation in the course of an inspection.}

\^{18}\textit{E.g. see pt 108 of the decision of the UOKiK President of 4 November 2010, DOK-9/2010 (Polska Telefonia Cyfrowa).}

\^{19}\textit{Entities other than the suspects may be subject to a document request or inspection.}
In the second case, separate proceedings would have to be initiated in order to impose a fine for the failure to cooperate, independent to the proceedings in the course of which the procedural infraction occurred in the first place.21 The initiation of formal proceedings regarding the imposition of a fine for non-cooperation would be generally justified (i) either by the violation being committed by a entity other than the one suspected of the infringement of competition law or (ii) the procedural violation committed by the ‘main suspect’ is so grave, that it would seriously jeopardizes the outcome of the primary case. The rationale for this evaluation is clear in the first situation, infraction committed by another party, because the initiation of separate proceedings is the only way to assess the procedural violation and fine it. The second situation requires however separate attention.

Without a doubt, the competence of antitrust authorities to impose multimillion fines for procedural violations is meant to have a preventive character. Undertakings should be discouraged from attempting to unlawfully influence the investigation by concealing certain facts and information or by misleading the officials. It is easy to imagine a situation for example, when certain documents are deliberately destroyed by company staff during an inspection, prior to which UOKiK officials had justified expectations of finding evidence of allegedly anti-competitive practices. At times, especially in cartel cases, it is very difficult to find hard proof for unlawful conduct. Therefore, the deletion from a hard-drive of a set of emails for instance may at times hinder or potentially even preclude the antitrust authority from building a case against the scrutinized undertaking. In such cases, the authority’s ability to prove that a certain document was destroyed in the course of an inspection is very likely to indicate that such undertaking was in fact engaged in illegal practices. Nevertheless, high probability is in itself not sufficient to justify the imposition of a fine for an infringement of competition law in the primary case. The antitrust authority must therefore initiate separate proceedings regarding the procedural violation. An undertaking should in no way benefit from the fact that the main proceedings were obstructed by it or its employees.

If the antitrust authority decided to assess the violation of the obligation to cooperate in its decision regarding the main infringement, failure to cooperate could potentially have an impact on both of those violations. According to the Commission and UOKiK Guidelines, an obstruction of antitrust proceedings can be treated as an aggravating factor that makes it possible to increase the

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20 Assuming the undertaking is found guilty and fined – the direct legal basis for a fine increase would be Art. 111 of the Competition Act, Art. 23(3) of Regulation 1/2003 and 14(3) of Regulation 139/2004.

21 On the independent character of both of the proceedings vide K. Kohutek, ‘Komentarz do art. 161 ustawy o ochronie konkurencji i konsumentów’, point 1, SIP LEX el/2008.
overall level of fine imposed for the competition law infringement. However, non-cooperation is in such cases directly connected with the main infringement which the undertaking is accused of. If, by appealing the antitrust decision for instance, the undertaking managed to prove that there was insufficient evidence of the main infringement, then the court would have to annul the decision in its entirety. In consequence, the procedural infraction, even if clear and proven beyond all doubt, would remain unpunished.

On the other hand, if the antitrust authority managed in the same situation to gathered enough evidence to impose a fine for the primary infringement, the deliberate destruction or concealment of evidence should be treated as an aggravating factor enabling the authority to further increase the overall fine, rather than assessing the obstruction in a separate decision. Such approach should be justified by reasons of procedural economy – the initiation of separate proceedings generally prolongs the main investigation because the authority must engage its resources in two separate cases that are formally independent from each other. Thus, where the undertaking fails to distort the course of the main proceedings, there is no justifiable reason to open separate proceedings addressing its procedural infractions since they would delay the imposition of the ‘main’ fine for the infringement of competition law.

Nevertheless, considered should also be arguments that could lead to an opposite conclusion. To illustrate, the maximum level of fines for competition law infringements should in no event exceed 10 % of the offender’s yearly turnover\textsuperscript{22}. It is possible that the imposition of a maximum fine is justified by the scale, character and duration of the restrictive practice alone. In such cases, procedural non-cooperation could no longer act as an aggravating circumstance for a further fine increase. But does this mean that the culprit actually benefited from this situation? After all, it still received the highest possible fine.

It should be born in mind that the proceedings regarding non-cooperation and the main antitrust investigation are closely related even if they are formally independent from each other. Also connected should therefore be the level of the fine which may be imposed on the same undertaking for its procedural violations and substantive infringements. The fine cap was set out by both the Polish and EU legislator intentionally. Stressing that the level of all fines should remain in adequate proportion to the economic strength of the culprit\textsuperscript{23}, it was nevertheless decided that exceeding a certain maximum level would be unreasonable. Irrespective of the number of aggravating factors which could be applied in a given case, no antitrust fine should thus go above the cap.

\textsuperscript{22} Art. 106(1) of the Competition Act, Art. 23(2) Regulation 1/2003 and Art. 14(2) Regulation 139/2004 respectively.

\textsuperscript{23} E.g. see the judgment of the Polish Supreme Court of 27 June 2000, I CKN 793/98.
Penalizing an undertaking already receiving a maximum fine for an antitrust infringement with yet another fine for a procedural violation, only because this is possible due to the formal separation of the two proceedings, would be considered excessive and contradict the general rules of the Competition Act and EU Regulations.

IV. Hereto fines imposed by the UOKiK President and the Commission

In general, fines for the failure to cooperate within antitrust proceedings are imposed rather rarely. Nonetheless, the frequency and situations where they have indeed been used by the Commission and the UOKiK President vary significantly. Their respective decisional practice should thus be addressed separately.

1. Decisions of the UOKiK President

Although fines for procedural infractions within antitrust proceedings have been used rather regularly by the UOKiK President, their vast majority was not overly excessive. Out of approximately sixty of such fines imposed between 2003 and 2010, only eleven reached the level of PLN 50,000 (app. EUR 12,500). However, five of the latter were imposed in 2010 alone. Although their frequency has not greatly changed, a tendency to increase their severity can clearly be observed. Almost all of the procedural violations subject to a fine concerned situations, where the scrutinized undertaking either failed to provide the UOKiK President with the requested data or provided information which was false or misleading. By contrast, only a few of the decisions concerned the lack of cooperation. Nevertheless, it was that very non-cooperation in the course of a UOKiK inspection that has generated the highest fines imposed so far for procedural infractions in Poland.

For a long time however fines for the failure to cooperate in the course of an inspection did not differ greatly from those imposed by the UOKiK President for other procedural infractions. To illustrate, the Polish mobile operator PTK Centertel was fined PLN 16,730 (app EUR 4,100). Międzynarodowa
Korporacja Gospodarcza InCO – PLN 23,585 (app. EUR 5,900)\textsuperscript{27}, and Unia Rozwoju i Wspierania Finansowego Sp. z o.o. – PLN 50,160 (app. EUR 12,500)\textsuperscript{28}. All three companies were penalized for refusing to provide UOKiK officials with documents requested during an inspection. Non-cooperation during inspections and during the remaining part of the proceedings was therefore treated similarly as far as the level of fines is concerned. The highest fine imposed by UOKiK until 2007 for a procedural infraction reached a mere PLN 101,975 (EUR 25,000). It was imposed on Visa International Service Association for its refusal to provide the requested data\textsuperscript{29}.

However, by decision of 19 April 2007, the UOKiK President imposed a fine of PLN 2,000,000 (EUR 522,030) on Grupa Ożarów\textsuperscript{30} for its attempt to conceal and change the content of crucial documents during a UOKiK inspection. The inspection was conducted in the course of an antitrust investigation regarding a price cartel on the Polish cement production market. The cartel proceedings ended with a decision whereby six cartel participants were fined a total of PLN 411,586,477 (app. EUR 102,900,000)\textsuperscript{31}. The UOKiK President referred in the final decision to a series of aggravating factors concerning Grupa Ożarów, which eventually resulted in the imposition of a fine at the maximum level of 10\% of the company’s yearly turnover\textsuperscript{32}. Even though none of these circumstances concerned non-cooperation, it should be emphasized that Grupa Ożarów was in fact fined twice: for its infringement of competition law as well as for the lack of procedural cooperation\textsuperscript{33}.

The PLN 2,000,000 fine imposed on Grupa Ożarów in 2007 reflected a definite shift in the approach of the UOKiK President to the level of fines for non-cooperation within antitrust proceedings. Still, all other decisions imposing such fines between 2007 and 2010 were significantly lower\textsuperscript{34} and concerned infractions in the provision of information. On 4 November 2010, the UOKiK President imposed however a fine of PLN 123,246,000 (EUR 30,000,000) on the mobile phone operator Polska Telefonia Cyfrowa\textsuperscript{35} for its failure to cooperate

\textsuperscript{27} Decision of the UOKiK President of 22 March 2004, RPZ-7/2004.
\textsuperscript{28} Decision of the UOKiK President of 8 December 2004, RŁO-13/2004.
\textsuperscript{29} Decision of the UOKiK President of 8 May 2006, DAR-430-01/05/EK.
\textsuperscript{30} Decision of the UOKiK President of 19 April 2007, DOK-48/07.
\textsuperscript{31} Decision of the UOKiK President of 8 December 2009, DOK-7/09. The aforementioned fines are the highest ever imposed in a single case in history of the existence of the Polish antitrust authority.
\textsuperscript{32} The precise amount of the fine was not made public.
\textsuperscript{33} See in this scope pt III herein.
\textsuperscript{34} The highest fine in that period of time equaled PLN 150,000 (EUR 41,867), it was imposed by the UOKiK President on Zakład Energetyczny Warszawa – Teren by decision of 12 December 2008, RWA-58/2008.
\textsuperscript{35} Decision of the UOKiK President of 4 November 2010, DOK-9/2010.
in the course of an inspection conducted in its premises in connection with a suspected\textsuperscript{36} cartel agreement on the Polish mobile television market. The obstruction was said to have consisted of a delay in the start of the dawn raid and preventing UOKiK officials from accessing certain premises. A fine of a very similar amount of PLN 130,689,900 (EUR 33,000,000)\textsuperscript{37} was subsequently imposed on Polkomtel, another alleged participant of the same cartel for its obstruction of the inspection carried out simultaneously to that of Polska Telefonia Cyfrowa. Aside from delaying the start of the dawn raid, Polkomtel was accused of refusing to provide UOKiK officials with certain documents and a hard-drive disk from one of its computers. As the main antitrust proceedings have not yet been closed, reference to the potential fines is at this point impossible. It should be emphasized however that the fines for non-cooperation already imposed on both operators are the highest individual fines in the decisional practice of the UOKiK President so far. Having said that, both of the decisions were appealed by the mobile operators and thus their modification by the court cannot be excluded since the appeal proceedings are still pending.

2. Decisions of the Commission

When faced with the lack of procedural cooperation, the Commission has so far rarely exercised its competences to penalize such infractions in a separate decision. Indeed, stumbling against an undertaking’s unwillingness to produce the requested documents or cooperate in any other ways, the Commission was most likely to address such issues in its final antitrust decisions\textsuperscript{38}. Formally, the legal basis for the imposition of fines for procedural infractions within antitrust proceeding was for a long time found in Article 15.1 Council Regulation No 17/62 implementing Articles 81 and 82(4) of the Treaty (‘Regulation 17/62’)\textsuperscript{39}, the legal predecessor of Regulation 1/2003. Regulation No 17/62 capped the maximum fine for procedural violations at the level of 5,000 ECU (later EUR) making past fines seem rather symbolic from today’s point of view. For example, in the decision of 14 October 1994, the Commission imposed the equivalent of ECU 5,000 on Akzo Chemicals BV\textsuperscript{40} for providing false

\textsuperscript{36} The main proceedings have not yet been completed.
\textsuperscript{37} Decision of the UOKiK President of 24 February 2011, DOK-1/2001.
\textsuperscript{38} I.e. as aggravating circumstances such as e.g. in the Industrial Bags case (Decision of 30 November 2005, case ref. COMP/38354) or the Bitumen case (Decision of 13 September 2006, case ref. COMP/F/38.456) where the fines for the primary infringement of competition law were raised by an additional 10%.
\textsuperscript{40} Commission Decision 94/735/EC of 14 October 1994 (Akzo Chemicals BV).
information about the existence of its offices in certain cities, and for denying Commission representatives entry to its managements’ offices. This decision can now be treated more as a curiosity than a basis for an evaluation of the level of Commission fines for procedural infractions or the infringement itself\textsuperscript{41}. It is certainly not a coincidence that in the last years of the validity of Regulation 17/62, the Commission preferred to address non-cooperation in its final decisions\textsuperscript{42}. By doing so, it could go around the fine cap imposed by its Article 15(1) and \textit{de facto} increase the severity of the financial penalties imposed for infractions committed in the course of antitrust proceedings.

Taking the aforementioned into account, a representative analysis of the Commission’s position as regards fines for non-cooperation within antitrust proceedings should be made on the basis of current EU Regulations. The latter cap the maximum amount of fines to be imposed in such cases at a much higher level of 1\% of the company’s yearly turnover. It was however only once that the Commission exercised its authority in this context under the new provisions. In the famous decision of 30 January 2008, a fine of EUR 38.000.000 was imposed on E.ON Energie AG\textsuperscript{43} for the braking of a Commission seal placed in the course of an inspection in E.ON’s premises. Even though the fine itself is of a clearly significant amount, the Commission emphasized that it was well below the theoretical maximum\textsuperscript{44}. The financial penalty was moderated because it was the first time that a seal had ever been broken by a company subject to an inspection and the first time in which a fine was imposed under Article 23(1) Regulation 1/2003. The violation was however qualified as serious due to the fact that the broken seal was intended to secure a room in which all documents previously collected by the inspectors were stored (i.e. highly sensitive data). As these documents were not yet catalogued, the Commission was unable to ascertain whether, and if so which documents were actually removed by E.ON. In the course of the proceedings, the company denied having broken the seal listing a number of factors which could have caused the seal to break (the use of an aggressive cleaning product, the age of the seal and a high level of humidity\textsuperscript{45}). The decision was however upheld in full by the General Court in its judgment of 15 December 2010\textsuperscript{46}.

\textsuperscript{41} Nevertheless, cases existed where EU fines for non-cooperation did not reach the maximum level e.g. Commission Decision of 7 October 1992, case ref. IV/33.791 (CSM) imposing a fine of ECU 3.000 on CSM for its refusal to provide Commission officials with certain requested documents.

\textsuperscript{42} E.g. Industrial Bags and Bitumen cases.

\textsuperscript{43} Commission decision of 30 September 2008, case ref COMP/B-1/39.326 (E.ON Energie).

\textsuperscript{44} The fine reached only 14\% of the maximum possible level.

\textsuperscript{45} Commission seals are made of plastic film, if removed, they do not tear, but show irreversible ‘VOID’ signs on their surface.

\textsuperscript{46} Judgment of the General Court T-141/08 E.ON Energie, not yet reported.
Although the E.ON. decision is the only example of the Commission imposing a fine on the basis of Article 23.1 Regulation 1/2003, several other such cases are currently pending. Proceedings were opened in 2008 against Sanofi-Aventis47 for an alleged obstruction of an inspection. The procedural violation took the form of an initial refusal to let the officials examine and copy relevant documents until the French authorities produced a national search warrant. Three other companies were targeted in 2010 – proceedings are currently pending against the Energetický a průmyslový holding and J&T Investment Advisors48, Suarez Environment49 and Laboratoires Servier and Servier SAS50.

Increased activity of the Commission as regards procedural cooperation (lack thereof) within antitrust proceedings is thus certainly visible. More decisions of that type are to be expected shortly.

V. Fine graduation

The latest fines imposed by both the UOKiK President and the Commission signalize the disappearance of the trend to treat procedural violations committed in the course of antitrust proceedings less severely than substantive infringements of competition law itself. The same or a similar level of fines as those imposed on Polska Telefonia Cyfrowa, Polkomtel and even E.ON. Energie could have easily been observed in final infringement decisions. Unfortunately however, neither of these decisions unambiguously defines or clarifies what factors were taken into account by the authorities when setting the amount of these fines. There are furthermore no UOKiK or Commission guidelines that directly consider the issue of fine graduation in procedural cases and it is thus necessary to turn to other sources in order to establish what factors should be taken into consideration here. First of all, the level of fines for non-cooperation within antitrust proceedings should remain in line with general principals of fine graduation51 similarly to any other antitrust fine. Both

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47 See Press release of 2 June 2008, MEMO/08/357.
48 Suspected non-cooperation with Commission officials during inspections and non-disclosure of all documents relevant to the investigation, see press release of 28 May 2010, IP/10/627.
49 Suspected of breaking a seal in the course of the inspection, see press release of 4 June 2010, IP/10/691.
50 Suspected of providing misleading and incorrect information, see press release of 26 July 2010, IP/10/1009.
51 As stated by the Polish Court of Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumenta; hereafter, SOKiK) in its judgment of 17 February 1999,
EU Regulations as well as the Competition Act contain specific provisions that indicate precisely which factors should be taken in consideration when setting the level of fines (i.e. the nature, gravity and duration of the infringement\textsuperscript{52}). These factors are widely analyzed in both case law and doctrine\textsuperscript{53}. Despite the fact that most of these discussions relate to fines for competition law infringements, rather than procedural non-cooperation, their conclusions should be taken into consideration in this context also.

First, since the given failure to cooperate takes place within given antitrust proceedings, the obstruction may by its nature influence the course and result of the main case. Therefore, the setting of fines for procedural infractions must take into consideration if they have influenced, and if so, to what a degree, the outcome of the primary proceedings. Antitrust authorities request information or documents from an undertaking in order to realize their statutory mission of finding and preventing competition law infringements\textsuperscript{54}. By analogy, the objective of an inspection of the premises of a scrutinized undertaking is to verify the legality of its actions – to gather as much evidence as possible confirming the infringement of competition law or proving that no such violation took place\textsuperscript{55}. If that objective has not been distorted by the procedural offence, the fine for non-cooperation should be fixed at a noticeable yet not excessive level\textsuperscript{56}. In other words, when setting the fine, the authority should analyse what were the potential consequences of the obstruction and what ‘benefits’ occurred as its result\textsuperscript{57}. The gain to the scrutinized undertaking should be analyzed by taking into consideration its market power and influence on the market (established by its turnover)\textsuperscript{58}. As stated by the Court of First

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\textsuperscript{52} Art. 111 Competition Act, Art. 23(3) Regulation 1/2003 and Art. 14(3) Regulation 139/2004 respectively whereby the latter, for unexplained reasons, refers only to the ‘gravity and duration’.


\textsuperscript{54} Decision of the UOKiK President of 20 July 2010, RPZ-14/2010, p. 10.

\textsuperscript{55} Decision of the UOKiK President of 4 November 2010, DOK-9/2010, p. 12, pt. 44.

\textsuperscript{56} As for the form in which such fine should be imposed, i.e. as an independent fine or as an element of the “main” substantive fine.

\textsuperscript{57} Judgment of SOKiK of 24 May 2006, XVII Ama 17/05.

\textsuperscript{58} See M. Sachajko, \textit{Administracyjna kara pieniężna…’}, p. 195
Instance\textsuperscript{59}, in assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case\textsuperscript{60}. Therefore, considered should also be the subject matter of the main proceedings where the failure to cooperate took place. For instance, if it occurred during a cartel investigation, it would be reasonable to expect a higher fine than if it occurred in the course of a notification procedure for concentrations.

Duration should also be assessed when possible in cases concerning non-cooperation despite it being \textit{prima facie} linked to the antitrust infringement instead. What may potentially have a decisive influence on the effectiveness of a procedural obstruction is, in particular, the time during which an undertaking refused to submit to a dawn raid and delayed officials from entering its premises\textsuperscript{61}. Obviously, it is the surprising character of the dawn raid which should make it impossible for the undertaking to conceal or alter any documents, plan the content of statements etc. Nevertheless, the aforementioned does not mean that, a dawn raid has to start immediately\textsuperscript{62} upon the officials’ arrival in the company premises. The undertaking must at least have the opportunity to review the authorization documents before consenting to the inspection, let the doorman contact its manager, in-house lawyer or the company’s external counsel etc. The time needed for a dawn raid to start has to be analyzed taking into consideration the size and character of the company – it should be short enough however to avoid delaying tactics\textsuperscript{63}.

When fixing the level of a fine, antitrust authorities are of course also bound by general principles of EU law such as proportionality or observance of fundamental rights\textsuperscript{64} as well as general rules of administrative law\textsuperscript{65}. The sanction cannot be disproportionate to the offence. The less disruptive the behavior, the less severe the sanction should be. It should be stressed that fines can be imposed under both EU Regulations and the Competition Act

\textsuperscript{59} Currently the ‘General Court of the EU’.

\textsuperscript{60} Judgment of the Court of First Instance of 5 April 2006, T-279/02 Degussa, ECR [2006] II-897, also judgment of the European Court of Justice (currently Court of Justice of the EU) of 10 May 2007 C-328/05 P SGL Carbon, ECR [2007] I-3921, para. 43.

\textsuperscript{61} Duration of the infringement was addressed in particular in the decision of the UOKiK President concerning Polska Telefonia Komórkowa (DOK-9/2010), see para. 98.

\textsuperscript{62} Undertaking are obliged to submit to an inspection without delay rather than immediately.

\textsuperscript{63} Similarly P. Berghe, A. Dawes, ‘Little pig, little pig let me come in’: an evaluation of the European Commission’s powers of inspection in competition cases’ (2009) 30(9) ECLR 8.

\textsuperscript{64} See judgment of the General Court of the European Union in the \textit{E.ON. Energie} case, para. 274, similarly M. Sachajko, ‘Administracyjna kara pieniężna...’, p. 199.

irrespective of the fact whether the procedural violation was intentional or not (i.e. committed by negligence). Case law and doctrine emphasize however that the scale of the fine should above all reflect the level of guilt associated with the infringement\(^{66}\).

It should be noted finally that Polish case law and doctrine suggest that the level of fines in antitrust cases should depend on the level of the threat to the public interest associated with the violation (i.e. how possible is the occurrence of negative effects for competition and consumers\(^{67}\)). However, the form in which the public interest is threatened or violated by a competition law infringement (e.g. by cartels) and a failure to cooperate within antitrust proceedings seems slightly different because competition is not distorted directly in the latter case. It may also occur nevertheless that an inadequate level of fine (too mild) would make undertakings ponder what would be more beneficial to them – a fine for non-cooperation or a fine for an infringement of competition law. Such situation is of course unacceptable.

VI. Conclusions

Fines for the failure to cooperate within antitrust proceedings are a powerful tool available to antitrust authorities in their fight against those that infringe competition law. This is true particularly because potentially severe fines for procedural violations can be imposed on the offender irrespective of the course of the main case and actual antitrust violation. Nevertheless, by no means should they be treated as a substitute for addressing the primary infringement. Fines for non-cooperation should have a preventive character without violating the right of defense and fair treatment of the scrutinized undertakings. Recent case law suggests that fines for the lack of cooperation are increasing, especially in the case of obstructions in the course of an inspection where the emotions of both the inspectors and the inspected play frequently a role. If antitrust authorities do meet with a failure to cooperate, high fines should not be imposed automatically simply because no incriminating material was found. Each case should be analyzed separately, taking into consideration all of the relevant factors both mitigating and aggravating. At the same time however, they should be considered in the light of the antitrust proceedings where they occurred in the first place.

\(^{66}\) See M. Król-Bogomilska, *Kary pieniężne w prawie…*, p. 90 and 93.

\(^{67}\) Judgment of the Court of Competition and Consumer Protection of 24 May 2006, XVII Ama 17/05; M. Król-Bogomilska, *Kary pieniężne w prawie…* p. 91, see also judgment of the Polish Constitutional Tribunal of 5 May 2009, P 64/07.
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Some Comments on the Polish Healthcare System Reform from the Perspective of State Aid Law

by

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Abstract

The purpose of this paper is to verify the hypothesis that a debt write-off implemented recently by Polish authorities in favour of public hospitals constitutes State aid within the meaning of Article 107(1) of the Treaty of the Functioning of the European Union. The paper contains a detailed description of the nature of the measure – its historical background, regulatory context, as well as its construction. It presents an in-depth analysis of the fulfilment by the measure of the conditions

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stipulated in Article 107(1) TFEU. As a preliminary issue, the analysis addresses the problem whether Polish public hospitals can be considered as undertakings within the meaning of EU competition law, particularly, as to their activity financed by the sickness fund organized under the principle of social solidarity. The answer to this question seems to be affirmative and in line with the landmark Hoefner and Elser judgments where the ECJ held that the way in which an entity is financed is irrelevant for its classification as an undertaking. The paper argues in favour of the thesis that the debt write-off must be considered as affecting trade between Member States and competition. Consequently, and contrary to the official position of the Polish government, the measure in question is classified as State aid.

Résumé

Le but de cet article est de vérifier l’hypothèse selon laquelle l’amortissement total des dettes effectué récemment par les autorités polonaises en faveur des hôpitaux publiques constitue une aide publique au sens de l’Article 107(1) TFUE. L’article contient une description détaillée de la nature de cette mesure – son histoire, contexte législatif aussi que sa construction. Il présente une analyse profonde de l’accomplissement par cette mesure des conditions indiquées par l’Article 107(1) TFUE. Comme question préliminaire, l’analyse a pour objectif de vérifier si les hôpitaux publiques polonais peuvent être considérés comme entreprises au sens de la loi de concurrence de l’EU par rapport à son activité financée par le fonds de maladie organisé en accord avec le principe de la solidarité sociale.

Classifications and key words: Poland; healthcare services; hospital services; state aid; notion of state aid; write-off of the debts of an undertaking; notion of undertaking in the EU competition law; public undertakings; social solidarity; cross-subsidization; effect on trade between Member States; adverse effect on competition; notification of state aid; services of general economic interest.

I. Introductory remarks

The Polish healthcare system has been experiencing serious difficulties for many years. Independent Public Healthcare Facilities (hereafter, IPHF), which form the backbone of the Polish hospital services sector, are in a particularly difficult financial situation. According to data provided by the Ministry of Health, the amount of overdue debt of Polish IPHF’s has reached 2,372,282 thousand zlotys (approximately 550,000 thousand EUR)\(^1\) at the end of the first quarter of 2011. This situation results not only in high costs of healthcare

\(^1\) http://www.mz.gov.pl/wwwfiles/ma_struktura/docs/zal_zobowiazania_04072011.pdf
provision by these entities, but it is also a threat to their provision in the future. The bad diagnosis of the situation of Polish hospitals has prompted the government to develop a new concept of healthcare reform. The resulting Act of 15 April 2011 on healthcare activities (hereafter, Act) came into force on 1 July 2011. The new legal framework refers to the fundamental causes of the difficulties of the Polish healthcare system as identified by the government. According to the authors of the Act, these causes include:

1) imperfect, inefficient legal form in which healthcare facilities operate,
2) inadequate qualifications of managers of public healthcare units,
3) limited liability of its establishing entities for the obligations of IPHF.

The reform of the Polish healthcare system puts emphasis not on the modification of the manner in which healthcare activities are financed but instead, on a change in the legal form of those providing healthcare as well as on establishing new legal framework for providing healthcare activity. The basic principle of the reform is to change the current status quo in which IPHFs constitute the dominant legal form for conducting healthcare activities, particularly so in hospital services. The crucial expected result of the reform is to replace IPHFs by commercial companies controlled by those public bodies, which had previously had the status of IPHFs’ establishing entities. The Act introduces strong incentives for the transformation of IPHFs into commercial companies overturning at the same time their current status whereby they are not subject to Polish bankruptcy law. This in turn should contribute to enhancing their economic efficiency. Freeing the newly created companies from debt is, however, fundamental for the success of the reform because the ballast of debts incurred in the past by IPHFs would inevitably put into question the long-term viability of the new companies. Consequently, the Act introduces the possibility to waiver the overdue debt of existing IPHFs in the course of their transformation process into commercial companies.

The Act lays down a new list of legal forms for the provision of healthcare services in Poland renouncing the dichotomy, which has so far divided all healthcare providers into: Non-Public Healthcare Facilities and IPHFs. In the new organizational framework, healthcare is to be undertaken by a number

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2 With the exception of certain provisions that will come into force on 1 January 2012.
4 So far, in accordance with the Act of 30 August 1992 on Healthcare Facilities (Journal of Laws 1991 No. 91, item 408) healthcare activity could be conducted in the form of a Healthcare Facility – Independent Public (IPHF) and Non-Public (NPHF). IPHFs are facilities established by public bodies, NPHFs are entities which may be established by private law bodies including: companies, employers, churches, foundations and associations as well as other national and foreign legal and natural persons.
of enumerated categories of entities including: entrepreneurs within the meaning of the Act on the freedom of Economic Activity\textsuperscript{5}, IPHFs, budgetary units, research institutes and foundations. Healthcare services may also be provided by doctors or by nurses within the scope of their professional practice (individual or group). The legislator has not discarded the legal form of IPHFs. Nevertheless, the new Act does not provide the legal possibility of establishing new IPHFs and, with regard to existing ones, introduces strong incentives to transform them into commercial companies.

The Act specifies in detail the procedure to be followed in order to transform IPHFs into commercial companies. In the course of the transformation, a new commercial company enters into the rights and obligations of the original IPHF. The transformation is conducted by the governing body of the entity which originally established the IPHF in question (hereinafter: the establishing entity). The establishing entity must determine before the transformation process is commenced the debt ratio of the IPHF in question on the basis of its financial statements for the last year. This is the ratio of the total liabilities and short-term obligations of the given IPHF, less its short-term investments, to the sum of its revenues. If on the day before the transformation the ratio is more than 0.5, the establishing entity takes over, \textit{ex lege}, the obligations of that IPHF up to such value as to ensure that the debt ratio for the new commercial company does not exceed 0.5. If the IPHF’s debt ratio is from the outset 0.5 or lower, the new entity may acquire the obligations of the IPHF in question as they stand. At the same time, certain categories of obligations acquired by the establishing entity, which transformed the IPHF into a commercial company before 31 December 2013, shall be waived \textit{ex lege}. This rule applies to certain enumerated categories of liabilities (including interest) payable to the State budget, known on the 31 December 2009. They include, \textit{inter alia}, tax liabilities, social security contributions and environmental fees. Some other categories of public liabilities, including those resulting from local taxes, may be waived upon a resolution of the constituting organ of the relevant local government unit.

To repay other obligations taken over by the establishing entity, the latter may receive a grant directly from the State budget. This, however, requires the fulfilment of certain additional conditions including a settlement with private creditors. According to the Act, the total amount of 1.400.000 thousand zlotys (approximately 320.000 thousand EUR) has been provided in the State budget for such grants.

The following diagram presents the construction of the measure in question:

\textsuperscript{5} Act of 2 July 2004 (Journal of Laws 2004 No. 173, item 1807).
At this point, the question arises whether the aforementioned measure can be classified as State aid within the meaning of Article 107(1) TFEU. It must be noted in this context that the measure has not been notified to the European Commission pursuant to the Article 108(3) TFEU.

According to settled ECJ jurisprudence, the classification of a measure as State aid requires the fulfilment of the following criteria:

1. there must be an intervention by the State or through State resources,
2. the intervention must be liable to affect trade between Member States,
3. it must confer an advantage on the recipient; in other words – Article 107(1) TFEU covers measures which, whatever their form, are likely to directly or indirectly favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions,
4. it must distort or threaten to distort competition\(^6\).

A preliminary assessment of the measure in question leads to the conclusion that it confers an economic advantage upon IPHFs which they would not have obtained under normal market conditions. As a result of its implementation, the recipients will be in whole or in part freed from debt. As the ECJ expressed in one of its classic cases: ‘the concept of aid is (...) wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate

\(^6\) C-280/00 Altmark Trans, ECR [2003] I-07747, para. 75, 84.
the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect. The size of the benefit granted to a particular IPHF will depend on the amount of its outstanding liabilities as of 31 December 2009. It will also depend on the decision of its establishing entity, which can determine the takeover of all or part of those obligations.

There is no doubt that the measure in question fulfils the first condition of the EU notion of State aid. The advantage conferred on IPHFs as a result of the reduction of their debts is financed directly from the resources of public authorities and/or other public bodies. Depending on the type of obligation in question, public funding derives from:

1. State budget – in relation to public liabilities constituting budgetary revenues as well as in relation to liabilities subject to government subsidies;
2. Local Government Units (hereafter, LGUs) – in relation to liabilities taken over by the establishing entities and waived pursuant to a resolution of the constituting organs of the LGUs;
3. Establishing entities – in relation to repayable liabilities taken over by them which are not subject to budgetary grants.

Clearly therefore, the measure in question involves a transfer of State resources to IPHFs as they remain under the control of public authorities and/or other public bodies. As established in the legally binding act issued by the Polish parliament, the measure is as well, without any doubts, imputable to the State. The fulfilment by the measure in question of the remaining three conditions of the EU notion of State aid requires an in-depth analysis.

The Explanatory Memorandum attached to the Draft Act provides for a very laconic assessment of the compliance of the measure with State aid rules: ‘the proposed solutions (...) do not breach State aid provisions. This statement is justified by the assumption that these entities (debt-waived independent public healthcare facilities and resulting from their transformation commercial

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8 IPHF establishing entities are all public bodies: ministers and governing bodies of central authorities, voivodes, LGUs, public medical schools or public universities engaged in teaching and research in medical science as well as the Medical Centre of Postgraduate Education.
companies) will provide healthcare services financed from public funds, [while they will provide] other services only incidentally. Therefore, there is no threat of distortion of competition rules.\footnote{C-368/98 Abdon Vanbraekel, ECR [2001] I-5363.}

It is clear from the above statement that the concept adopted by the Polish legislator is based on two assumptions. First, that medical services financed from public funds are not conducted under the conditions of market competition. What is not clear, however, is if this statement amounts to depriving healthcare activity of the status of an economic activity. Second, the statement assumes that aid granted to an undertaking conducting simultaneously commercial activities and an activity not performed under the conditions of market competition, does not constitute State aid if the former is merely incidental to the latter.

A different standpoint can be found in the Comments submitted to the draft Act (hereafter, Comments on the Draft Act) by the President of the Polish Office for Competition and Consumer Protection (in Polish: \textit{Urząd Ochrony Konkurencji i Konsumentów}; hereafter, UOKiK). According to the UOKiK President, IPHFs are undertakings within the meaning of EU Competition Law – this conclusion arises inevitably from the ECJ judgements in \textit{Vanbraekel}\footnote{C-157/99 B.S.M. Geraets-Smits and Peerbooms, ECR [2001] I-5363.} and \textit{Smits}\footnote{C-368/98 Abdon Vanbraekel, ECR [2001] I-5363.}. The UOKiK President noted that the funding provided to IPHFs does not, as a general rule, satisfy the requirement to distort or threaten to distort competition nor does it normally affect trade between Member States. According to the UOKiK President, this conclusion is valid insofar as IPHFs, within the public healthcare system, are not entitled to ‘charge insured persons for the provided services, if such services are vested under health insurance and are free.’ This observation does not apply, therefore, to a relatively small range of services which IPHFs provide wholly or partly for remuneration. Moreover, recipients of healthcare services provided by IPHFs within the public healthcare system are generally Polish citizens. Providing them to citizens of other Member States is an exception and takes place only in strictly defined situations (life threatening conditions or with the consent of a competent body of another Member State). Thus, as the UOKiK President pointed out, ‘the principal objective of public healthcare facilities is to meet the needs of Polish citizens in healthcare within healthcare services guaranteed by the State in a continuous and permanent way.’ Notwithstanding the above, and as emphasized by the UOKiK President, it cannot be excluded that the measure in question will affect competition. This is a consequence of the legal possibility of providing, by the newly created commercial companies, of healthcare services for remuneration to not insured patients alongside its publicly funded activities. Hence, in the opinion of the UOKiK President, the
measure in question should be classified as State aid within the meaning of Article 107(1) TFEU and notified to the European Commission.

The opinions expressed in the Explanatory Memorandum to the Draft Act and in the Comments submitted by the UOKiK President must be verified in the light of European jurisprudence. The starting, and indeed crucial point of this assessment should be on the evaluation of whether, and if so, to what an extent, do the healthcare activities provided by the beneficiaries of the measure have an economic nature. In other words, it is necessary to determine first whether the commercial companies created from the transformation of IPHFs will have the status of an ‘undertaking’. This issue is subject of an analysis conducted in section II below, in which two basic juridical concepts of the EU notion of an undertaking are confronted: the wide definition developed by the ECJ in *Hoefner and Elser* and the narrow one, related to the concept of the so called ‘social exclusion’.

Section III contains the evaluation of the effect of the measure on competition. This analysis is preceded by a description of the types of activity normally conducted by IPHFs and the manner of their financing by patients and the Polish public sickness fund. Finally, section IV addresses the question whether the analysed debt write-off has an effect on trade between Member States.

II. The nature of the activities performed by the commercial companies created from the transformation of IPHFs

1. Types of activity pursued by IPHFs and companies created from their transformation

Both IPHFs and the companies created as a result of their transformation can potentially provide two types of healthcare activities: those within the public healthcare system and those outside of its scope. Healthcare services conducted within the former are provided with universal coverage. As a general rule, they are provided without remuneration to those insured by the sickness fund, organized under the principle of social solidarity, and to certain categories of other entitled persons. These types of services are financed from the resources of the National Health Fund (hereafter, NHF) – a State fund established specifically to manage national healthcare contributions. The NHF, acting pursuant to the Act on healthcare services financed from public funds\(^{11}\), contracts out the provision of healthcare services to a variety of healthcare service providers.

\(^{11}\) The Act of 27 August 2004 (Journal of Laws 2004 No. 210, item 2135).
providers, both private and public. Specific procedures for the conclusion of such contracts are set out in this Act and applied instead of general public procurement rules. The Act on healthcare services financed from public funds generally provides for the selection of healthcare providers in public tenders. In their course, the NHF is obliged to ensure equal treatment and fair competition between the participants of the tender. The contract is ultimately concluded with the candidate with the best offer, irrespective of its legal form and status.

An entity that has concluded a contract with the NHF may also provide medical services for remuneration, alongside those covered by that contract. However, charging insured patients for service covered by a contract concluded with the NHF is subject to a fine. This rule applies equally to all categories of healthcare providers. Typically therefore, in terms of hospital services, IPHFs conduct both types of activities: those provided to patients free of charge (covered by a contract with the NHF) and healthcare services provided for remuneration (not covered by such contract). The vast majority of IPHFs derive most of their revenues from their activities within the public healthcare system; revenue from commercial healthcare services tends to be of marginal importance. This situation may, however, vary significantly from one IPHF to another. It is also likely that the revenue structure of the companies created from the transformation of IPHFs will, at least in the short run, remain unchanged. In the longer perspective, however, the range of healthcare activities provided for remuneration by the new entities should grow alongside the efforts placed into increasing their efficiency.

The economic nature of healthcare activities provided by IPHFs for remuneration does not raise objections. This position is confirmed by numerous judgments of European courts, including the Pavlov case. This concept is also widely commented on in literature even though the commentators have yet to reach a unified position on the nature of such activities within the overall public healthcare system.

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12 According to the Report on the financial situation of public hospitals in Poland of 2010 prepared by Magellan S.A. approximately 92.10% of the revenues of Polish public hospitals comes from NHF payments.


2. The notion of economic activity in the jurisprudence of European courts

Assessing the nature of the activities conducted by the IPHFs within the Polish public healthcare system must begin with quoting the classic definition formulated in the landmark Hoefner case\textsuperscript{15}. Accordingly, ‘every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed’\textsuperscript{16} should be seen as an undertaking. At the same time, according to settled ECJ case law ‘any activity consisting in offering goods and services on a given market is an economic activity’\textsuperscript{17}.

This ‘functional’ concept of an undertaking has been perfectly illustrated by the words of Advocate General F. Jacobs: ‘the Court’s general approach to whether a given entity is an undertaking within the meaning of the Community competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it, the social objectives associated with it, or the regulatory or funding arrangements to which it is subject in a particular Member State’\textsuperscript{18}.

The concept of an undertaking has not, however, been interpreted uniformly in the entire course of the development of European case law. As pointed out by Advocate General Poiares Maduro in his opinion to the \textit{FENIN} case, European courts have generally applied two different criteria for the classification of an entity’s activity as an economic one – a comparative and a market criterion\textsuperscript{19}. The comparative criterion derives directly from the concept of an undertaking formulated in \textit{Hoefner}\textsuperscript{20}. The ECJ based its conclusion therein on the economic nature of the activity of German public recruitment agencies because of the argument that such activity ‘has not always been and not necessarily is conducted by public entities’\textsuperscript{21}. This statement became the grounds for a number of instances where the comparative criterion was adopted by the ECJ\textsuperscript{22}. According to this approach, the fact that the activity

\textsuperscript{15} C-41/90 \textit{Hoefner and Elser} v Macrotron, ECR [1991] I-1979.
\textsuperscript{18} Opinion of AG Jacobs in joint cases C-264/01, C-306/01, C-354/01 and C-355/01 \textit{AOK Bundesverband}, ECR [2004] I-2493.
\textsuperscript{19} Opinion of AG Poiares Maduro in case C-205/03P \textit{FENIN}, ECR [2006] II-6295, para. 11–15.
\textsuperscript{20} C-41/90 \textit{Hoefner and Elser}.
\textsuperscript{21} Ibidem, para. 22.
in question is also provided by private entities (more precisely: private profit entities), or even the mere possibility of its provision by such entities, determines its economic nature.\textsuperscript{23} Moreover, decisive here is not so much the potential profitability of that activity in a specific legal regime, but rather that mere possibility resulting from the nature of the activity in question.\textsuperscript{24}

The market criterion, on the other hand, tends to associate the economic nature of an activity with the participation in a market. As pointed out by Poiares Maduro in this context, in recognising the economic nature of an activity it is not ‘the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on under market conditions’.\textsuperscript{25} Hence, the status of an economic activity should be associated with an activity the results of which, in the form of goods or services, may be subject to a market exchange. Some authors equate this relation with the possibility of obtaining, in exchange for goods or services, remuneration that at least covers their costs.\textsuperscript{26} Alternatively, they equate it with the profit-making potential of the service or product in question seeing as the mere possibility of making such profit presupposes the emergence of a market in economic terms. However, the fact that the specific entity operates at a profit or for profit remains irrelevant to the question of the nature of a given activity.\textsuperscript{28} Accordingly, the existence of competition among market players, or even the mere possibility of its existence (disregarding any possible exclusive rights), is an important indicator of the economic nature of an activity. This view corresponds with the well known statement expressed by AG Jacobs that ‘the underlying question is whether that entity is in a position to generate the effects which the competition rules seek to prevent’\textsuperscript{29}.

\textsuperscript{23} C-475/99 Ambulanz Glöckner, para. 20; T-128/98 Aéroports de Paris, para. 124.


\textsuperscript{25} Opinion of AG Poiares Maduro in C-205/03P \textit{FENIN}, para. 13.

\textsuperscript{26} M. Kleis, P. Nicolaides, \textit{The Concept…}, p. 505.

\textsuperscript{27} O. Odudu, \textit{Are State-owned…}, p. 235.


\textsuperscript{29} Opinion of AG Jacobs in C-218/00 \textit{Cisal}, ECR [2002] I-691, para. 71.
EU jurisprudence takes a different view of undertakings operating on the principles of social solidarity. European courts have recognised the activities of so-organised health or social insurance funds as not fulfilling the criteria of an economic activity in a series of judgments. In AOK, the Court held that the activities of German sickness funds do not carry the characteristics of an economic activity because they are conducted within the public health insurance system, subject to the principle of social solidarity. As a result, they have an exclusively social nature. The ECJ took into consideration: the non-profit purpose of their activity and the lack of a relationship between the costs of the services provided to the insured and the amount of their insurance contributions. Amazingly, this conclusion was not influenced by the significant level of discretion available to German sickness funds with respect to the determination of the value of healthcare contributions, nor by the existing, albeit small, degree of competition between the funds. Following the approach developed in AOK, the General Court found in FENIN the activity of the Spanish sickness fund to be deprived of an economic nature.

Some commentators considered the aforementioned approach as inconsistent with the purely functional concept of an economic activity, based on the criterion of the existence of a market and competition. Some authors took the view that EU courts have developed a sui generis sectorial exemption from EU competition rules with respect to undertakings whose activity is subject to the principle of social solidarity. M. Krajewski and M. Farley went even further in their assessments by claiming that EU courts have in the FENIN case virtually excluded the entire public healthcare sector from the application of EU competition rules.

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30 C-159/91 and C-160/91 Poucet, ECR [1993] I-637; C-218/00 Cisal; C-264/01, C-306/01, C-354-355/01 AOK; T-319/99 FENIN and C-205/03P FENIN.
31 C-264/01, C-306/01, C-354/01 and C-355/01 AOK; C-205/03P FENIN, para. 54.
32 T-319/99 FENIN.
European jurisprudence on internal market rules does not, however, confirm this view. In the Smits case, the ECJ rejected the claim of the German government that the 'structural principles governing the provision of medical care are inherent in the organisation of the social security systems and do not come within the sphere of the fundamental economic freedoms guaranteed by the EC Treaty, since the persons concerned are unable to decide for themselves the content, type and extent of a service and the price they will pay'\textsuperscript{36}. The Court confirmed that healthcare services (including those financed by universal health insurance) are covered by Article 56 TFEU and ‘there is no need for diversification in this regard between care provided in a hospital environment and outside it’\textsuperscript{37}. The ECJ pointed out to the fact that for the classification of that activity as a service within the meaning of Article 56 TFEU (thus as an economic activity), it is not relevant whether the costs of these services are covered directly by patients, public authorities or health funds\textsuperscript{38}. The same approach was used in Vanbraekel\textsuperscript{39}.

What is clear is that the concept of services within the meaning of Article 56 TFEU is not equivalent to the analogous notion used on the grounds of EU competition rules. For Article 56 TFEU to apply, the classification of activities as services within the economic meaning is not sufficient, but must be complemented by an element of remuneration received in exchange for the activity in question. The latter aspect is not necessary to classify the provision of services as an economic activity on the grounds of competition rules\textsuperscript{40}. The classification of a service as falling within Article 56 TFEU should, therefore, be all the more decisive to consider them a manifestation of an economic activity under competition rules.

3. The nature of the activity of Polish public hospitals

The question arises of how to classify, in light of the aforementioned case law, the nature of those activities of Polish public hospitals which are financed by the NHF. The application of the comparative approach, as developed in Hoefner, would inevitably lead to the conclusion that such activities have an economic nature. It is apparent that under the Polish legal regime, private entities can provide, and indeed do provide, the same healthcare services as public ones. This refers both to the activity within the public healthcare

\textsuperscript{36} C-157/99 Smits and Peerbooms, para. 53.
\textsuperscript{37} Ibidem, para. 51.
\textsuperscript{38} Ibidem, para. 55.
\textsuperscript{39} C-368/98 Vanbraekel, ECR [2001] I-5363.
\textsuperscript{40} C-41/90 Hoefner and Elser, para. 21; T -155/04 SELEX.
system and to services provided for remuneration. The comparative approach was applied by the ECJ in the Ambulanz Glöckner case that concerned the application of competition rules to ambulance transport services\textsuperscript{41}. The ECJ held therein that both emergency transport services and patient transport services constitute an economic activity given that they ‘have not always been, and are not necessarily, carried on by such organisations (i.e. non-profit medical aid organizations) or by public authorities\textsuperscript{42}’.

The application of the market based approach will not lead to such clear conclusions. Some authors expressed the opinion that EU jurisprudence on sickness funds should be applied per analogiam to healthcare providers. According to their view, services provided by public hospitals without remuneration should be covered by a ‘social exclusion’ from competition rules. P. Nicolaides and M. Kleis claimed, on the basis of an analogy to FENIN, that ‘a public hospital that fulfils a social function (the implementation of a public health system belongs to an obligation which the State has towards its citizen) cannot be considered to be an undertaking because its operation is based on the principle of solidarity (...) and operates on a non-profit basis.’ They stipulated, however, that ‘we must be very careful not to over-generalise here because the case law is still evolving\textsuperscript{43}’. Similarly, J. Temple Lang indicated that: ‘Hospitals, clinic, ambulance services and self-employed doctors are all (undertakings) for the purpose of the competition rules. However, public hospitals which provide all their services free and which are financed by the State are not\textsuperscript{44}’.

Other authors took an opposite view. V. Hatzopoulos stressed that: ‘The position is less clear with regard to public hospitals, where health services are genuinely offered for free, being financed directly from the State budget and where the personnel has the status of civil servant. According to the broad definition of “undertaking” put forward by the Court, whereby any activity pursued or susceptible of being pursued for profit is to be considered as an economic activity, even these public hospitals should be treated as undertakings’. However, he pointed out that ‘this is not an unquestionable conclusion\textsuperscript{45}’.

E. Szyszczak reached a more straightforward conclusion: ‘the Court appears to assume, without much discussion, that healthcare services are economic in character focusing attention upon the possible justifications for the Member

\textsuperscript{41} C-475/99 Ambulanz Glöckner.
\textsuperscript{42} Ibidem, para. 20.
\textsuperscript{43} M. Kleis, P. Nicolaides, The Concept…, p. 508.
\textsuperscript{44} J. Temple Lang, Privatisation of…, p. 65.
\textsuperscript{45} V. Hatzopoulos, Killing National…, p. 707.
States to evade the full force of the Internal Market rules. J. W. van de Gronden took a similar position emphasizing the differences between the situation of sickness funds and healthcare providers: ‘[I]t appears from the analysis of this case law [i.e. case law on State welfare schemes] that the ECJ uses the concept of undertaking as flexible jurisdictional tool to exclude solidarity-based health care systems from the ambit of European competition law, when it comes to managing bodies. Conversely, the role of this tool is neglected if the competition rules are applied to health care providers’. Consequently ‘the ECJ almost automatically regards health care providers as undertakings within the meaning of European competition law’.

Ch. Koenig and J. Paul stressed as well that ‘based on settled case law, health care providers do unequivocally fall under the scope of Article 107(1) TFEU. Therefore, public funding of hospitals is clearly subject to State aid law – with special privileges issued by the Courts’ decisions in *Altmark Trans* and *BUPA Ireland* and by the provisions of the Commission’s SGEI package*. These authors have based their views on ECJ jurisprudential on the rules of the internal market.

According to O. Odudu: ‘Rarely will medical service providers fall outside the scope of the concept of undertaking’. This could take place, fundamentally, only with regard to contractors of such healthcare services that, by their very nature, are not economically viable, that is, cannot generate profits. This concerns in particular the so called non-excludable services, i.e. when there is no possibility of preventing non-payers from enjoying the benefits of a good or service once it is produced. As stated by the author, ‘Recognition of State-operated and financed hospitals as undertakings is implicit in Commission action taken in the fields of State aids’.

An analysis of the accumulated EU case law and doctrine leads to the conclusion that strong arguments exist speaking in favour of associating an economic nature to the activities of public hospitals, regardless of whether they provide healthcare services for remuneration or free of charge (wholly financed by sickness funds). EU jurisprudence does not confirm, however, the view that its approach to the classification of the nature of the activity of health insurance funds could be applied *per analogiam* to healthcare providers. It would be also difficult to argue against the application in the

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area of competition rules of ECJ findings expressed in free movement cases.

The European Commission undoubtedly considers public hospital services financed by sickness funds as an economic activity on the basis of ECJ jurisprudence on free movement rules. In its 2009 State aid decision concerning the Brussels IRIS network of public hospitals, the Commission regarded their activities as economic. It stressed that the services provided by IRIS hospitals (i.e. healthcare, emergency and directly related ancillary services) are also provided by other types of organisations or institutions, including clinics, private hospitals and other specialized centres, including private hospitals of claimants. It noted that such classification cannot be undermined by the gratuitous character of the services provided by the recipient undertakings nor by the social solidarity principles, on which the activity of the Belgian healthcare system is based. It considered that it is appropriate to distinguish the activity within managing healthcare, pursued by public authorities in implementation of their prerogatives from the activity of hospital healthcare, which is economic in nature, even if its costs are partially or totally covered by the government. The Commission decisively stated that the measures in question constituted State aid. The aid was seen, however, as compatible with the internal market on the grounds of Article 106(2) TFEU.

In light of the above, the activities of the Polish IPHFs and the companies created from their transformation, either financed by the NHF or provided outside the scope of its contracts, should be regarded as economic in nature. EU competition law, and accordingly also its State aid rules, should thus be considered as fully applicable to the contested measure.

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52 Ibidem.
53 Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) [EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ [2005] L 312/67. It should be noted that the scope of Decision No 2005/842/EC covers SGEI compensations granted to hospitals. The decision makes no distinction between private and public hospitals nor between activities financed by medical health insurance funds or those financed by patients. The Decision on IRIS hospitals confirmed that compensations for the performance of SGEI addressed both to public and private hospitals fall under the scope of the application of Decision No. 2005/842/EC. This position, however, has already been expressed by the Commission in T-167/04 Asklepios Kliniken, ECR [2007] II-2379 at 69–74.
III. Waiver of debt of IPHFs and the distortion or threat of distortion of competition

The courts have so far been relatively reluctant to clarify the substance of the effect on competition condition. In the *Philip Morris* case, the ECJ has formulated a test for the two elements of Article 107(1) – effect on trade between Member States and effect on competition. The Court has explicitly called for the application of a wide approach to both of these conditions. It held that effect on competition within the meaning of Article 107(1) TFEU should be distinguished from competition violations resulting from anti-competitive practices. Assessment of the measure in terms of Article 107(1) TFEU does not require a relevant market definition nor an analysis of the real impact of the measure on the state of market competition. In fact, any measure which is capable of favouring the recipient with respect to its competitors almost automatically distorts potential or actual competition.

The ECJ has over the years established, in essence, the presumption of the fulfilment of the effect on competition condition when the contested measure favours its beneficiary as opposed to its competitors. The condition in question has thus been related to the concept of selectivity. As stated by the Court in *Het Vlaamse Gewest*, ‘Where a public authority favours an undertaking operating in a sector which is characterised by intense competition by granting it a benefit, there is a distortion of competition or a risk of such distortion’. Therefore, as pointed out by L. Hancher, under the ‘classic approach’ of the ECJ ‘as long as the measure is granted through State intervention or through State resources and has the effect of conferring a selective benefit, it falls prima facie within the scope of Art. 87(1) EC’. A merely grammatical interpretation of this provision leads to the conclusion that it refers to actual as well as potential

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56 T-214/95 *Het Vlaamse Gewest*, ECR [1998] II-717, para. 46, see also T-217/02 *Ter Lembeek*, ECR [2006] II-4483, para. 178, the Court did not provide here a detailed analysis of the state of competition in the textile sector indicating only that it was characterized by intense competition because the market is completely open to competition; see also: B. Willemot, ‘Assessment of an Aid granted under the Form of a Debt Waiver. Note on case T-217/02 *Ter Lembeek International NV v. the Commission*’ (2007) 2 *EStAL* 370-380, at 374 as well as J.-D. Braun, J. Kühling, ‘Article 87 EC and the Community Courts: from Revolution to Evolution’ (2008) 45 *C.M.L. Rev*. 465-498, at 482.
competition\textsuperscript{58}. Therefore, the assessment of possible distortions should focus not only on the current, but also future market situation. The competitors of the beneficiary of the measure, both present and likely to appear in the future, should thus be used as the reference point for this assessment\textsuperscript{59}.

In order to evaluate the planned debt write-off, it is necessary to consider whether IPHFs (as well as the companies created from their transformation) compete with each other, or indeed with any other market players, and if not, whether future market entry in possible.

Hospital services provided for remuneration are definitely provided under the conditions of market competition. This argument was challenged neither by the UOKiK President nor by the authors of the Explanatory Memorandum to the Draft Act. Both private and public entities active on the market for commercial medical services compete with each other as to their prices and service quality. The planned debt write-off, which would benefit only those healthcare providers that possess the status of an IPHF, would clearly lead to their preferential treatment, particularly with respect to private operators. This would create a serious distortion of competition in the market for healthcare services and affect the competitiveness of downstream and/or upstream markets. Contrary to the assertions contained in the Explanatory Memorandum, this conclusion is not negated by the fact that the revenues deriving from commercial activities represent a marginal share only of the overall revenue structure of Polish IPHFs. In fact, granting public funds to an IPHF that derives even only a small share of its revenue from commercial activities could result, in specific market situations, in a significant weakening of the position of its competitors.

Similarly unpersuasive seems the argument expressed in the Explanatory Memorandum that the public funding of IPHFs’ activities covered by NHF contracts had no impact on competition and the opinion expressed by the UOKiK President that the contested measure had, fundamentally, no such effect. It is indeed hard to agree with the aforementioned authorities that IPHFs do not compete with each other, as well as with private operators, within the scope of the activities covered by their contracts with the NHF.


\textsuperscript{59} See also the opinion of AG Tizzano in joined cases C-393/04 and C-41/05 Air Liquide, ECR [2006] I-5293. He held therein that a measure favoring undertakings in the distribution and marketing of natural gas sector distorts competition despite the fact that these entities operated on a monopoly basis. AG pointed out at para. 53 that they are not beneficiaries of exclusive rights and therefore the measure ‘at least potentially, can cause distortions of competition in sectors where there is the normal game of competition, both on national and international level’.
It must be noted that the Polish healthcare system is based on the NHF contracting universal healthcare services in compliance with the principles of fair competition and equal treatment. In this context, IPHFs most certainly compete with private providers for NHF contracts and, more precisely, for the resulting payments. Granting significant economic benefits to those entities that possess the status of an IPHP only, would result in a substantial improvement of their competitive position as opposed to private operators in tenders organized by the NHF. Merely the conviction that its debts will be covered by public funds could persuade any given IPHF to cut its tender prices, even to a predatory level. This in turn would result in a distortion of competition in the market upstream to healthcare services.

This very reasoning was applied by the Commission in the IRIS decision where, however, a joint assessment of the selective nature of the measure in question and its effect on competition was performed. The Commission stressed therein that the retroactive coverage of losses accumulated by public hospitals will bring an effect of mitigating the charges which are normally included in the budget of an undertaking. Thus, such measures are selective and, as a general rule, distort competition.

To sum up, the Polish measure under consideration here should undoubtedly be classified as fulfilling the condition of distorting or threatening to distort competition. It is irrelevant which of the two types of healthcare activity typically pursued by IPHFs would the measure concern. In other words, the condition in question would be satisfied even by the waiver of debt of an IPHF that only provides healthcare activities financed by the NHF.

Considered surprising must therefore be the position expressed by the UOKiK President in the Comments on the Draft Act that the public financing supporting the activities of the IPHFs conducted within the public healthcare system does not, in general, affect competition. This view seems to be based on an approach to the condition in question which is inconsistent with ECJ jurisprudence. As previously shown, the possibility of conducting a specific activity under the conditions of competition implies its economic nature. Amazingly, the concept used by the UOKiK President presupposes an

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60 As the Commission held in its Green Paper on SGEI of 21 May 2003, COM(2003)270 final at p. 44: ‘Furthermore, while there may be no market for the provision of particular services to the public, there may nevertheless be an upstream market where undertakings contract with the public authorities to provide these services. The internal market, competition and state aid rules apply to such upstream markets’.


63 Ibidem, para. 125.
economic nature of the activities of IPHFs but considers, at the same time, that they are not performed under the conditions of market competition.

The views expressed in this context by the UOKiK President are the more surprising that the Polish competition authority has repeatedly found the Polish NHF to have abused its dominant position\(^64\) in the relevant market defined as a national or local market for the organisation of healthcare services financed from public funds. In these decisions, the UOKiK President presented an in-depth analysis of the distortions of competition arising in the so-defined relevant markets. Moreover, in decisions on practices concerning the setting of tender criteria that favour current healthcare providers, the UOKiK President pointed out that such practices caused serious distortions of competition between tender participants\(^65\). It is hard to understand why did the UOKiK President, while applying Polish antitrust law, recognise the distortion of competition resulting from the NHF favouring certain healthcare providers over others, while it did not, in general, see such effects on the grounds of State aid rules where the planned debt write-off would give preferential treatment to another group of services providers.

IV. Waiver of debt of the IPHF and effect on trade between Member States

The condition of the effect on trade between Member States is consistently being interpreted widely by EU courts. In *Philip Morris*, the ECJ held that it is satisfied ‘when the state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade\(^66\)’. Crucial in this context is the existence of intra-European trade in goods or services offered by the recipient undertaking. In subsequent judgments, the courts emphasized that ‘the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected\(^67\)’. In *Hytasa*, the


\(^66\) 730/79 *Philip Morris*, para. 11.

Court concluded that ‘where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State’.68

In *Altmark*, the ECJ pointed out that the condition in question ‘does not (...) depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned’.69 A given measure may constitute State aid even if it is granted to an undertaking which provides only local or regional services. The granting of a public subsidy to such an undertaking may, nevertheless, maintain or increase its service supply capacity to the detriment of undertakings established in other Member States. Such measure could therefore diminish their chances to provide services in the market of the Member State where the aid was granted.70 The ECJ concluded that ‘according to ECJ case law there is no threshold or percentage below which it may be considered that trade between Member States is not affected’.71

In *Heiser*, the ECJ upheld a Commission decision establishing that the aid granted to Austrian dentists may affect trade between Member States. The Court held therein that the effect on EU trade condition was met, given that local dentists might be in competition with their colleagues established in another Member State.72

A different approach was, nevertheless, applied by the Commission in numerous cases on certain types of services of a purely local nature. In the famous decision concerning aid to a swimming pool located in the German city of Dorsten,73 the Commission focused not on the possibility of new market entry, but on the territorial radius of potential customers of the beneficiary. The Commission considered therein that public funding granted to the scrutinised pool did not affect trade between Member States because only local residents were to be its users (residents of Dorsten and the surrounding area within 50km from the city). Thus, territorial impact of the measure did not go beyond German borders.

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68 C-278-280/92 *Hytasa*, para. 40; 102/87 *France v Commission*, ECR [1988] 4067, para. 19; this approach has been confirmed in *Maribel*, in which the Court indicated that it is not necessary for the beneficiary to provide export activity to fulfill the condition of effect on trade; see: C-75/97 *Maribel*, ECR [1999] I-3671, para. 47.
69 C-280/00 *Altmark Trans*, para. 82.
70 Ibidem, para. 77, 78
71 Ibidem, para. 81.
72 Ibidem, para. 35.
73 Decision N 258/00 – *Deutschland Freizeitbad Dorsten*.
The same approach was applied in subsequent decisions on recreational facilities\textsuperscript{74}, museums\textsuperscript{75} and cultural activity\textsuperscript{76}. It has, however, never been applied to healthcare services. On the contrary, in the aforementioned Belgian hospitals decision, the Commission concluded that trade between Member States could indeed be affected by the aid given to the IRIS network\textsuperscript{77}. It stressed that the activity of public hospitals is subject to intra-Community trade as their public funding could result in the maintenance or improvement of their market position. It could, therefore, restrict the opportunities to develop a competing activity by operators from other Member States. Admittedly, the Commission noted that the limited extent of trans-border mobility of European patients, and the resulting small number of patients from other Member States using the services of the IRIS hospital network, meant that the impact of the measure in question on EU trade was very limited. Its existence could not, however, be ruled out\textsuperscript{78}.

Similarly, J. W. van de Gronden pointed out that due to the arrangements for cross-border provision of healthcare services made on the basis of ECJ jurisprudence on free movement rules, ‘it is risky to assume that the trade between Member States is not influenced’\textsuperscript{79}. The author recognised at the same time the key role which the recently adopted Directive on patient mobility will have in opening national healthcare services markets to competition in the European dimension\textsuperscript{80}.

The analysis of the effect of the Polish measure on trade between Member States does not lead to straightforward conclusions. With respect to some public hospitals, in particular the very small ones and those in remote locations, the impact on EU trade of their debt write-off will be definitely small. Indeed, it cannot be excluded that EU trade will not be affected at all in some cases. It is difficult to expect that patients from other Member States would choose to use the services of small or remote Polish hospitals to the detriment of their own healthcare providers. Language and cultural barriers remain an effective obstacle to the use of healthcare services in other Member States.

However, such obstacles do not affect the activities of highly specialised hospitals including clinical ones and those located in metropolitan areas with

\textsuperscript{74} Decision in case - Funds for non-profit marinas in Poland, OJ [2004] L 34/63.
\textsuperscript{76} Decision N 448/2005 – Spain, aid for theatric, music and dance productions.
\textsuperscript{77} Decision NN 54/2009 (ex- CP 244/2005) – Aide d’État Belgique Financement des hôpitaux publics du réseau IRIS de la Région Bruxelles-Capitale.
\textsuperscript{78} Ibidem, at 129-130.
\textsuperscript{79} J. W. van de Gronden, Financing Health..., p. 21.
well developed transport inter-connections. In their case, medical tourism
definitely exists. The same refers to hospitals located near national borders.
In their case, State aid would definitely result in a distortion of trade between
neighbouring Member States.

The assessment of the effect on EU trade condition made from the supply
side point of view leads to slightly different conclusions. There is no legal
barrier to enter the Polish healthcare services market, hospitals included.
Due to the relatively small funds allocated to healthcare, there are currently
no strong incentives to enter the market for services financed by the NHF.
However, even such development cannot be excluded, in particular, in relation
to the so-called high-point medical procedures, that is to say, those for which
the NHF is willing to pay relatively high rates. In this context, the measure
in question could distort trade between Member States by weakening the
incentives of potential foreign competitors to enter the Polish market for
healthcare services.

It can still be argued that, as the UOKiK President pointed out, financing
granted to some of the Polish public hospitals would not affect trade between
Member States due to the completely localized nature of their activity.
This argument loses its importance, however, as the measure in question is
potentially directed to all IPHFs (specified in a general and abstract manner).
Thus, the Act must be classified as establishing an aid scheme within the
meaning of Article 1(d) of the procedural regulation 81. Even if the localised
effects argument remains valid for certain kinds of hospitals (small and/
or rural ones), the measure in question does not differentiate between the
different types of its beneficiaries. Thus, its implementation would inevitably
cause an effect on EU trade with respect to a significant part of Polish public
hospitals.

V. Conclusions

The above analysis leads to the clear conclusion that the measure in question
should be classified as State aid within the meaning of Article 107(1) TFEU.
It satisfies all the conditions of the EU notion of State aid and is thus subject
to the notification obligation to the European Commission under Article
108(3) TFEU. Due to the failure to notify the contested measure, the debt
write-off in question should be classified as unlawful aid within the meaning
of Article 1(f) of the procedural regulation. Under the Commission’s current

81 Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the
enforcement practice, state financing granted to public hospitals is, generally, considered as State aid, as illustrated by the Belgian decision.

The views expressed in the Explanatory Memorandum to the Draft Act find support neither in ECJ jurisprudence nor in the opinions of the doctrine. Moreover, in agreement with the prevailing views of the commentators and as confirmed by EU jurisprudence, providers of healthcare services, unlike public sickness funds, are not subject to a ‘social exclusion’. This refers to the situation of Polish healthcare services operators as well. Clearly, they must be considered as being subject to the functional definition of an undertaking as developed in the Hoefner and Elser judgments. It follows from the above that Mr. Hoefner’s and Mr. Elser’s visit to Poland would definitely undermine the fundamentals of the recent Polish healthcare reform.

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Polish Telecom Regulator’s Decisions Regarding Mobile Termination Rates and the Standpoint of the European Commission

by

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Abstract

The article presents key issues relating to the methods of mobile termination rates calculation by the Polish National Regulatory Agency (NRA): the UKE President. It analyses the provisions of Polish telecommunications law of 2004 with respect to the rights and obligations of the UKE President. It invokes specific cases showing how problematic rates calculation is for mobile operators. The Polkomtel, PTK Centertel, PTC sp. z o.o. cases clearly show how unclear the calculation process may be in practice and illustrate how broad the discretionary powers of the UKE President are in this respect on the grounds of Polish telecommunications law. Highlighted is also the dispute between the Polish NRA and the European Commission. Even though the UKE President acts on the grounds of Polish law, its actions have to be compliant with the European telecoms package and take into utmost account the recommendations and comments issued by the European Commission.

I. Introduction

Mobile Termination Rates (hereafter, MTRs) are systematically reduced by the Polish National Regulatory Authority (hereafter, NRA), which should, in the opinion of the telecoms regulator, decrease customer prices. The reductions in the MTRs influence the incomes of telecoms operators and their financial results. The European Commission has criticized the Polish NRA a number of times in 2010 and 2011 for its very slow and largely unjustified approach to

1 Act of 16/07/04 on Telecommunication Law, Journal of Laws No. 171, item 1800, as amended.
the MTRs, which is meant to ensure symmetry and cost-oriented calculation in particular with respect to newcomers. In the Commission’s opinion, the approach of the Polish NRA is on occasion not compliant with the principles of the Access and Framework Directive.

Mobile termination rates are defined as the wholesale prices which mobile operators charge to other mobile or fixed operators for terminating calls on their respective networks. Mobile termination rates fall under the competences of the Polish National Regulatory Agency (hereafter, NRA) – President of the Electronic Communications Office (in Polish: Urząd Komunikacji Elektronicznej; hereafter, UKE). The UKE President has in the past imposed remedies for regulating MTRs on three mobile operators active on the Polish market: Polkomtel S.A. (Polkomtel), Polska Telefonia Cyfrowa sp. z o.o. (PTC) and Polska Telefonia Komórkowa Centertel sp. z o.o. (PTK Centertel). These remedies included obligations to provide access on a transparent and non-discriminatory basis and the use of rates based on actual costs incurred by these operators. The European Commission stressed however that MTRs should be set according to the costs of an efficient operator providing the relevant service. Pursuant to the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in EU2 (hereafter, the Termination Rates Recommendation), the setting of a common approach based on an efficient cost standard and the application of symmetrical termination rates would promote efficiency, sustainable competition and maximize consumer benefits in terms of price and service offerings. The Commission recognizes also that, in a competitive environment, operators would compete on the basis of current costs and would not be compensated for costs which have been incurred through inefficiencies. Historical cost figures need to be adjusted therefore to current ones in order to reflect the costs of an efficient operator employing modern technology. They must then be adjusted to the bottom up Long Run Incremental Cost mode (LRIC bottom-up model) that will be used by the Polish NRA from 2013.


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2002/21/EC (hereafter, Framework Directive), the NRAs should also contribute to the development of the common market by cooperating with each other and with the Commission in order to ensure consistent regulatory practice in the telecoms field.

II. Legal basis

There are two possible scenarios for regulation regarding telecommunication access: at the request and ex officio. These two ways of concluding the access agreement are described in details below.

1. On request intervention as to the telecommunications access agreement

Pursuant to Article 26 of the Polish telecommunications law (in Polish: Prawo Telekomunikacyjne; hereafter, PT), a public telecoms network operator should conduct negotiations regarding the conclusion of an access agreement at the request of another telecoms operator. The purpose of such telecoms access agreements is to provide publicly available telecoms services and ensure their interoperability. The UKE President may interfere with civil law relationships between the parties involved or undertake actions ex officio in that respect only in situations clearly specified by the law.

Under Article 27 PT, the UKE President may specify, on a written request submitted by any of the parties to the negotiations (for the conclusion of a telecoms access agreement) or ex officio by means of a resolution, a time limit within which the negotiations must be closed. This period cannot be longer than 90 days from the day of the submission of the request for the conclusion of a telecoms access agreement. Where negotiations were not taken up, the party obliged to grant telecoms access refuses to do so, or the agreement is not concluded within the time limit set by the UKE President, any of the parties may submit to the NRA a request for the issuance of a decision on any of the contentious issues or to determine the conditions of cooperation. Such request should include a draft of the telecoms access agreement and mark the areas in the agreement upon which the parties were not able to agree.

Pursuant to Article 28 PT, the Polish NRA should make its telecoms access decision within 90 days of the date of the submission of the written request by any of the parties to the contested negotiations, taking account of the following criteria:

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i. interest of telecoms network users;
ii. obligations imposed on telecoms undertakings;
iii. promotion of modern telecoms services;
iv. nature of the contentious issues that arose during the negotiations and the practical possibility of implementing solutions related to the technical and economic aspects of telecoms access, both those proposed by the negotiating telecoms undertakings and those constituting alternative solutions;
v. ensuring:
   – integrity of the network and interoperability of services,
   – non-discriminatory conditions of telecoms access,
   – development of a competitive market for telecoms services;
vi. market power of those telecoms undertakings whose networks are being interconnected;
vii. public interest, including environmental protection;
viii. maintaining the uninterrupted provision of universal services.

The UKE President has the right to interfere with the parties’ negotiations in order to facilitate them and the time limit set to finalize them. Nevertheless, this right should not be understood broadly and thus should be used only as an exception to the general freedom of contracts rule. Additionally, pursuant to Article 28(5) PT, in cases where the parties conclude a telecoms agreement, the regulatory decision on telecoms access expires by virtue of the law in parts covered by the agreement ultimately concluded.

According to Article 43a PT which came into force at the end of 2010, operators holding Significant Market Power (hereafter, SMP), and thus forced to fulfil certain regulatory obligations relating to telecoms access, may request the UKE President to approve further conditions and details of the remedies that can support the main obligations imposed on the operator by the Polish NRA. These entities are also authorised to propose other conditions of their telecoms activity and negotiate them with the UKE President, whereby the latter can request any further information subject to that entity’s proposal. The NRA will assess whether the proposition will have a positive impact on market competition, development and efficient use of modern telecoms infrastructure, and whether it improves the quality of services for end-users. The UKE President is obliged to issue such a decision within 90 days of receiving an appropriate submission. An administrative decision which accepts such (negotiated) provisions is binding on the requesting party5 and the NRA

5 By contrast, previously negotiated agreement between the NRA and the incumbent fixed operator (TP S.A.) on the details and conditions of implementation of its regulatory obligations is non-binding, based on voluntary commitments. The UKE President cannot thus enforce it by way of fines. Its implementation is based on mutual undertakings: TPSA’s agreement.
is authorised to impose a fine if the latter fails to perform or improperly performs the obligations assigned to it during this procedure and confirmed in the form of a regulatory decision issued by the UKE President.

2. UKE decisions issued *ex officio*

As was mentioned above there are two different grounds for commencing a regulatory procedure in the Polish telecoms field: a request submitted by an interested party or *ex officio*. In the first situation, the NRA may take actions on a party’s request either if the opposing party fails to start the negotiations or if the sides fail to reach an agreement within the time frame indicated by the UKE President. In the second situation, the NRA is entitled on the grounds of Article 29 PT to modify *ex officio*, by means of an administrative decision, the content of a telecoms access agreement or to oblige the parties to the agreement to modify it themselves. Changes of that type can be forced upon the parties in cases justified by the need to protect end-user interests and to ensure effective competition or interoperability. This particular competence of the UKE President limits therefore the freedom of contract normally enjoyed by private parties. As a result, it should be exercised with restraint, that is, only in the aforementioned situations specified in the provisions of the Polish telecommunications law.

The two aforementioned proceedings are conducted for different reasons. Decisions based on Articles 27 and 28 PT are issued in order to lead to the conclusion of a telecoms access agreement or its modification; decisions based on Article 29 PT focus on the protection of the public interests.

3. Consultation requirement and exceptions thereto

According to Article 15 PT, the UKE President should, prior to taking a regulatory decision, and in particular those concerning telecoms access, carry out consultation proceedings which allow the parties concerned to express in writing their opinions about the draft within a specified time frame. The UKE President may issue a decision concerning telecoms access without carrying out a consultation only in exceptional cases, which require urgent actions to be taken by the NRA due to a direct and serious threat to competition or to end-user interests. Such decision cannot however apply for more than 6

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... to introduce a range of behavioural commitments, and NRA's withholding from a functional separation of the incumbent.
months (an ‘interim’ decision). The issuance of other decisions in the same case shall be preceded by consultation proceedings.

III. Facts of the case

1. The first round of UKE decisions

The UKE President identified in 2006 three leading Mobile Network Operators (hereafter, MNOs): Polkomtel, PTK Centernel and PTC as holding SMP. The NRA proceeded to impose on all three of those MNOs the following regulatory obligations: transparency, non-discrimination, network access and price control (prices based on costs incurred). Subsequently, the UKE President questioned the justification for the levels of the cost-based fees as presented by the MNOs and their auditors. As a result, the NRA imposed on the aforementioned operators another regulatory obligation: to adjust their MTRs to the level determined in the glide path formulated by the Polish NRA for the years 2007–2010.

The UKE President imposed therefore on the three MNOs an obligation deriving from Article 40 PT in relation to the calculation of access fees based on the costs actually incurred by the operators. In the decisions issued in 2007, the UKE President determined a 3 year schedule for the lowering of the rates to last until 1 May 2010 (MTRs 2007 Decisions6). Cost reductions were planned to be spread over time so the MNOs could modify appropriately their respective retail and wholesale offers. As a result of the MTRs 2007 Decisions, the three key Polish mobile operators were obliged to present annually to the NRA a cost justification for the MTRs used in their networks.

In 2008, in other words only one year after the issuance of the original decisions, the UKE President changed the aforementioned glide path which was originally supposed to be binding until 2010. The new decisions was issued (MTRs 2008 Decisions7) which set the rates as follows: between 01 January


2009 and 30 June 2009 – 0,2162 PLN (ca. 0,05 EUR), from 01 July 2009 onwards – 0,1677 PLN (ca. 0,04 EUR).

The UKE President did not claim in the MTRs 2008 Decisions that the lowering of the rates previously set was motivated by a change in the factual situation on Polish telecoms markets, a situation that would make it necessary to introduce lower rates than those set out in the MTRs 2007 Decisions. The NRA pointed instead to the need to protect the interests of end-users and effective market competition as the main reason for the issuance of the MTRs 2008 Decisions. According to the NRA, these objectives would be achieved by ensuring maximum benefits with respect to diversity, price and quality of telecoms services, by further decreasing the MTRs and thus by creating the conditions necessary for effective competition. The UKE President stated also that this would lead to an elimination or reduction of fixed-to-mobile substitution whereby users resign from the use of fixed-line services in favour of mobile services.

Interestingly, according to another document published on the NRA’s website, the decrease of the use of fixed-line services was reported to be caused by a high market penetration level of mobile operators. According to the respondents of a survey conducted by the Polish NRA, mobile services are better matched to the needs of their clients than fixed-lines services. The UKE President emphasised in this context that lowering the MTRs was beneficial to fixed-line operators but only on the condition that they would decrease their retail charges for fixed-to-mobile network connections.

According to Article 15 PT, the UKE President should conduct a consultation procedure with the parties concerned prior to taking of a regulatory decision on MTRs. However, neither the 2007 nor the 2008 MTRs Decisions were preceded by consultations despite the fact that, the obligation to conduct them can be disregarded pursuant to Article 17 PT only in exceptional cases that require urgent actions. The decisions issued without a consultation cannot be binding for a period of time exceeding 6 months. Moreover, Article 17 PT implements in fact Article 7(9)\textsuperscript{8} of the Framework Directive and thus the adoption of such interim decisions should therefore not only be fully justified but also notified to the Commission.

Despite having an immediate effect, the MTRs 2008 Decisions decreasing the rates was not actually applied by the three aforementioned MNOs in their existing access and interconnection agreements, giving rise to disputes between mobile and fix operators. The UKE President issued therefore several ‘interim’ decisions at the beginning of 2009 for the period of 6 months as defined in the PT and these decisions were subject to immediate executability.

\textsuperscript{8} Previously Article 7(6) of the Framework Directive.
Such decisions modified telecoms access agreements between the individual operators as to MTR rate. For example, in the Netia and GTS Energis cases, according to the UKE President, Netia and GTS Energis requested Polkomtel to amend their telecoms access agreements with respect to its MTR. At the request of these entities, the UKE President issued under Article 27 PT the requested decisions indicating a time limit for the conclusion of the necessary negotiations. Since the parties failed to reach an agreement in the specified time frame, Netia and GTS Energis applied for a separate regulatory decision to be issued by the UKE President amending their access agreements according to the annex attached to these applications. The UKE did not initially notify the Commission of its individual dispute settlement decisions but ultimately changed its approach in June 2009 and notified its decisions which set the MTRs level.

The three MNOs appealed some of the interim decisions issued by the NRA to the Polish Court of Competition and Consumers Protection (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK) and to the Administrative Courts. The judgments were inconsistent however and went into two directions. Some of the contested regulatory decisions were repealed by Polish courts; SOKiK stressed for instance that Article 17 PT

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9 In particular with regard to Polkomtel, among others the following decisions were issued: a) decision of 21 January 2009 amending the agreement between GTS Energis sp. z o.o. and Polkomtel with respect to the change of MTR in public, mobile telephone network owned by Polkomtel; b) decision of 21 January 2009 amending the Network Integration Agreement between Netia S.A. and Polkomtel with respect to the change of MTR in public, mobile telephone network owned by Polkomtel; c) decision of 9 January 2009 amending the agreement between Polska Telefonia Cyfrowa sp. z o.o. (PTC) and Polkomtel with respect to the change of MTR; d) decision of 24 February 2009 amending Network Connection Agreement and the settlements rules concluded between Polska Telefonia Komórkowa Centertel sp. z o.o. (PTK Centertel) and Polkomtel with respect to the settlements conditions for MTR both in the PTK Centertel’s mobile network and Polkomtel’s mobile network.

10 Article 7 procedure under the Framework Directive of the EU telecoms rules (MEMO/09/539) requires NRAs to notify the Commission of their draft regulatory decisions in the telecoms markets.

11 See for example PL/2010/1027 by which UKE notified an individual dispute settlement of yet another new entrant MNO – AERO2.

12 Example: PTK Centertel sp. z o.o. appealed from MTR 2008 decision.

13 Order of the Supreme Administrative Court of 6 April 2011, II GSK 477/10; judgment of the Supreme Administrative Court of 3 February 2011, II GSK 59/10; judgment of the Regional Administrative Court in Warsaw of 2 Decembr 2009, VI SA/Wa 591/09; judgment of the Court of Appeals in Warsaw of 12 January 2011, VI ACa 591/10.

14 Example: judgment of the Regional Administrative Court in Warsaw of 25 January 2011, VI SA/Wa 2359/10 (Polkomtel); judgment of the Regional Administrative Court in Warsaw of 28 April 2011, VI SA/Wa 478/11; judgment of the Regional Administrative Court in Warsaw of 30 March 2011, VI SA/Wa 1538/10; judgment of the Regional Administrative Court in Warsaw...
has an exceptional character and cannot be overused. This provision makes it possible to issue a regulatory decision without prior consultation but only in exceptional cases where immediate actions are required by the direct threat to market competition or consumer interests. SOKiK judged that this was not the case in relation to the contested interim decisions. On the other hand however, some of the interim decisions issued in 2009 were in fact upheld.

2. Consultation proceedings with respect to the drafts of UKE decisions

In March 2009, the UKE President informed relevant telecoms operators about the commencement of administrative proceedings in order to issue a regulatory decision (not ‘interim’ but ‘standard’ one) amending their telecoms access agreements. The NRA requested each of the parties to provide their standpoint on the draft regulatory decisions. The UKE President announced afterwards, under Article 16(1) PT, the commencement of consultation proceedings with respect to the draft decisions amending the agreements concluded between the MNOs and, among others, Multimedia Polska, GTS Energis, TP S.A. The drafts concerned the change in the MTRs to be applied in the mobile, public telephone network. These decisions were to be issued under Article 29 PT and Article 104(1) of the Act of 14 June 1960 on the Administrative Procedure Code\(^\text{15}\) (in Polish: Kodeks Postępowania Administracyjnego; hereafter, KPA) and were immediately effective.

Under Article 61(4) KPA, the UKE President notified the parties about issuing a decision amending their access agreement with respect to MTRs 2008 Decisions and asked them to provide their standpoints concerning the draft. In the opinion of the NRA, ex officio proceedings are a consequence of the above-mentioned interim decisions issued at the beginning of 2009, under Article 17 PT. They thus expire after July, August or September 2009 (depending on the decision). The Polish NRA indicated also that it has decided ex officio to change the content of access agreements in order to protect from a threat to consumer interests and due to the need to establish effective market competition.

None of these draft decisions were notified to the Commission. The UKE President was of the opinion that the setting of concrete MTRs does not constitute a new remedy but merely clarifies the implementation details of a previously imposed regulatory obligation. The NRA claimed additionally

\(^{15}\) Journal of Laws 2000 No. 98, item 1071, as amended.
that a decision relating to the setting of specific MTRs is not a regulatory
decision subject to the EU notification duty. However, pursuant to the ruling
of the Polish Supreme Administration Court of 31 May 2009, regarding
the setting of MTRs, a decision of the UKE President issued on the basis
of Article 40(4) PT is in fact a decision related to regulatory obligations\textsuperscript{16}. Therefore, pursuant to Article 6 and 7 of the Framework Directive, the UKE
President was indeed obliged to conduct a consultation procedure prior to its
issuance as well as notify the draft to the Commission. The aforementioned
judgment is consistent with the standpoint of the Commission according to
which, the setting of MTRs (including the details or amendments to the glide
path formulated by a NRA) constitutes a regulatory obligation as set forth in
Article 18 PT and affects trade between EU Member States. With respect to
the above, drafts of MTRs amendments should thus be notified to the NRAs
of other Member States as well as to the European Commission.

3. The second round review of the relevant market

In the second round review of the relevant market\textsuperscript{17}, the UKE President
identified the same three mobile operators (Polkomtel, PTC and PTK) as having
SMP in the wholesale markets for voice call termination on their individual mobile
networks\textsuperscript{18}. Remedies were thus imposed on all three, including price control\textsuperscript{19}. According to these decisions, the MTRs are set by the NRA on a yearly basis
and based on the (actual) costs incurred by the individual operators. The UKE
President proposed that from 1 January 2010, the rates previously determined
in the MTR 2008 Decisions (0.1677 PLN, ca. EUR 0.04) shall continue to be
used by all three MNOs. In its comments, the Commission highlighted the need
to set MTRs with respect to efficient, rather than actual, costs and invited the
Polish NRA to take account of its Termination Rates Recommendation. The
Commission further invited the UKE President to define the MTRs applicable
beyond 2010 sufficiently in advance so as to ensure transparency and legal
certainty for the market. The UKE President imposed in decisions applied to P4\textsuperscript{20}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{16} Order of the Regional Administrative Court in Warsaw of 6 May 2008, VI SA/Wa 266/08.
\item \textsuperscript{17} Case PL/2009/0904.
\item \textsuperscript{18} SMP decisions 2009: decisions of the UKE President of 29 September 2009: DART-
\textsuperscript{SMP-6043-9/08(26) (Polkomtel)}; DART-SMP-6040-4/09(33) (PTC); DART-SMP-6040-3/09(26)
(PTK Centertel).
\item \textsuperscript{19} Case PL/2009/0991.
\item \textsuperscript{20} SMP decision of the UKE President of 18 December 2008, DART-SMP-6043-10/07(34)
(P4 SMP Decision); furthermore P4 requested to change individual cooperation agreements
with operators and at a request UKE issued on 26 June 2009 particular decisions: amending
the MTR in cooperation agreement between P4 and PTC, DHRT-WWM-6080-29/09(35);
\end{itemize}
\end{footnotesize}
and CenterNet\textsuperscript{21} a glide path towards cost orientation on two further market entrants in the Polish mobile market: P4\textsuperscript{22} and CenterNet\textsuperscript{23}. However, in the case of CenterNet it was not based on a market analysis and a determination of CenterNet’s SMP.

4. Asymmetric vs. symmetric MTRs oriented towards the costs of an efficient operator

The Polish NRA’s determination of the MTRs for small operators was not preceded\textsuperscript{24} by the establishment of their SMP but formulated within dispute resolution procedures conducted pursuant to the Article 27 PT. According to the comments submitted in this respect by the European Commission, the MTRs should be set in a general manner and applicable to interconnections between all operators, and not only those covered by the dispute settlements\textsuperscript{25}. In fact, the UKE President did not regulate the MTRs charged by new entrants for calls originating in the networks of fixed operators in Poland as well as those from international fixed and mobile operators. National regulatory authorities, when carrying out their tasks, should ensure that no discrimination occurs in similar circumstances in the treatment of undertakings providing electronic communications networks and services. The costs of market entry and infrastructure roll out must, in any event, not be borne by competitors (by way of excessive termination rates) and ultimately their consumers. In the opinion of the UKE President, allowing new entrants to use higher MTRs enables them to build or develop their own infrastructure and catching up to operators with significant market power. New entrants could thus become able in the near future to render telecoms services through their own networks.

\textsuperscript{21} The UKE issued SMP decision for CenterNet dated 28 February 2011, DART-SMP-6040-14/09(19) (CenterNet SMP Decision); moreover for example UKE issued decision on 30 October 2009 amending the MTR in cooperation agreement between CenterNet and Polkomtel, DHRT-WWM-6080-129/09 (26). See: European Commission decision dated 22 December 2010 as to case PL/2009/1021 and case PL/2010/1162.

\textsuperscript{22} See cases PL/2008/0794 and PL/2009/0996.

\textsuperscript{23} See case PL/2009/1021. The Commission invited UKE to impose cost orientation, and to revise the level of the asymmetry and recalled the need to notify the price levels under the consultation procedure.

\textsuperscript{24} Normally remedies are preceded by market analysis/SMP.

\textsuperscript{25} See comment made in case PL/2010/0961 in relation to price setting in dispute settlement.
According to the Polish NRA, MTRs asymmetry helps new entrants and small operators to build up their own infrastructure.

In 2008, the UKE President identified another MNO, P4, as having SMP and imposed on it the following regulatory obligations: network access, non-discrimination, transparency and non-excessive pricing. The NRA did not however impose on P4 the cost calculation obligation and thus, it is difficult to assess the meaning of ‘non-excessive’ pricing seeing as the UKE President is unlikely to have the necessary data on the costs of P4. In October 2009, the NRA notified the European Commission its draft decision proposing a glide path for P4 from asymmetric towards symmetric rates to be reached by 1 January 2014. The Commission invited the regulator to revise its price control methodology and the margin allowed for P4. It also recommended for a new glide path to be set for P4 which would result in lower MTRs, taking into account the need for P4 to become efficient over time.

The gradual decreasing of the MTRs has generally had a positive impact on the development of market competition and users in Poland. The regulatory aim was to decrease MTRs in order to lower retail tariffs. Ultimately, retail tariffs are lower thanks to strong competition between operators and MTRs asymmetry, which allows new entrants to cross-subsidise outgoing calls and/or handsets to attract customers. The question arises, however, whether the additional financial resources made available to new entrants thanks to asymmetric MTRs are not only spend on ‘price war’ or whether they are actually also allocated to infrastructure developments. The first situation could be recognised as a cross-subsidy and could easily lead to potential frauds.

MTR asymmetry influenced the development of competition and decreased the concentration level of Polish mobile telephone markets. It allowed new infrastructural operators, especially P4, to enter the market and rapidly gain subscribers despite the fact that the market was already saturated. The negative consequence of the use of MTR asymmetry was a possible cross-subsidisation that could result in frauds and confusions in retail tariffs. Moreover, because of the competition between the MNOs, it is necessary to carefully consider if, and for how long, should new entrants benefit from rates asymmetry. Preferential treatment in this respect should certainly not be automatically granted.

CenterNet, Mobyland, Cyfrowy Polsat and Sferia, Aero2 are all new entrants on the Polish mobile market (the first three entered the market in 2008 and 2009). Some of these operators are planning to build up their own infrastructure and provide retail services in the near future based on commercial agreements for national roaming with one of the MNOs. However,

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26 Please see footnote 18 above.
27 The costs analyses of new entrants MTRs are based on data being in the UKE possession concerning the other comparable operator.
CenterNet’s operations are based on Mobyland’s infrastructure. The UKE President decided to impose asymmetric MTRs so that new entrants may adopt higher prices than the MNOs - the latter must impose cost-oriented prices. However, market analysis has lead the UKE President to decide that operators that do not have their own access network infrastructure (full MVNOs) will charge (from 1 July 2011) equal rates as operator who offers them national roaming service (host MNOs).

On 6 January 2011, the European Commission issued its decision, urging the Polish NRA to reconsider its approach. It is not the first time that the Commission criticized the UKE President for her actions regarding MTRs. The Commission questioned the automatism in assigning a four year asymmetry period and requested a rational assessment of the transitional period when asymmetry is in force. After the transitional period, MTRs of all operators should be symmetric and their level should mirror the costs of an efficient operator in line with the Termination Rates Recommendation. The Commission urged the UKE President to impose a cost-orientation obligation (cost-based prices) on new entrants and invited the NRA to carefully assess the level and duration of MTRs asymmetry granted to them in its forthcoming decisions.

As stated in the Termination Rates Recommendation, MTRs applicable to new entrants may be subject to a higher unit cost for a transitional period, before the new entrants reach minimum efficiency, but only in justified situations based on a market analysis and cost calculation. Asymmetry should thus not be automatic. The Commission stated that four years might be a maximum reasonable time for new operators to recoup their set-up costs. Based on the dates when the new entrants became operational, MTRs asymmetry should thus come to an end in Poland in June 2012 in the case of Mobyland and CenterNet for instance. The Commission wants the UKE President to set cost-oriented MTRs for new entrants. In this respect, the NRA should demonstrate that the proposed level and duration of asymmetry corresponds to higher costs incurred by those operators.

In the case of Aero2’s, an operator which was preparing its market entry but could not agree with other operators on MTRs level, the UKE President issued a dispute settlement decision based on Article 27 PT (instead of a regulatory decision assessing whether Aero2 holds SMP). The NRA argued that it could not analyze the market for call termination in Aero2’s network because the latter was not yet providing such services. The Commission commented that the measures proposed by the UKE President should be based on a forward-looking analysis anticipating Aero2’s market entry. Therefore, the Commission urged the NRA to fix Aero2’s MTRs for a short, transitional period only and carry out a full market analysis for the termination of voice calls on Aero2’s
mobile network without delay. The Commission noted also that the UKE President intends to set the MTRs to be charged by Aero2 at 0.57 PLN/min (ca. 0.226 EUR), as requested by Aero2. This level is however well above the MTRs charged across Europe\(^{28}\) and would create a substantial asymmetry in comparison to other operators in Poland\(^{29}\). The NRA justifies its approach by Aero2’s need to finance the roll-out of its infrastructure and by the advantages for users linked to a further market entrant. However, the costs of market entry and infrastructure roll-out must not be borne by the competitors of the new entrant, by way of excessive termination rates, and thus ultimately, they should not burden consumers.

It is worth mentioning that the actual level of Aero2’s termination rate is not only asymmetric but also significantly above the MTRs set for established MNOs in Poland. In some cases, it exceeds them by 170%.

5. Two proposals notified by the UKE President to the Commission. Investment settlements between operators and the UKE President

In March and April 2011, the Polish NRA notified the European Commission of two sets of draft decisions referring to the same subject. The first notification (first proposal) was assessed by the Commission between 3 March and 4 April 2011. The UKE President notified therein its draft measures concerning the details of price control obligations imposed on the three aforementioned operators: Polkomtel, PTC and PTK Centertel which hold SMP in the markets for voice call termination on their individual mobile networks. On 5 April 2011, the Commission registered another notification (second proposal) by the Polish NRA concerning the UKE President’s approval of voluntary commitments submitted by four MNOs: Polkomtel, PTC, PTK Centertel as well as P4. The four operators committed themselves to make infrastructure invests in those Polish regions which were lacking mobile network coverage (white spots) due to an alleged lack of economic feasibility\(^{30}\). In exchange for the investment commitments, the four mobile

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\(^{28}\) Nevertheless this comment applies to all other aforementioned cases related to new entrance asymmetry.


\(^{30}\) Based on data provided by local authorities, the NRA estimates that ca. 300 000 people live in white spot areas in Poland. The areas not covered by mobile networks have been divided by the four operators so each operator is obliged to invest in specific areas – see C(2011) 3199, Brussels, 05 May 2011.
operators were due to receive higher MTRs than those originally proposed under the first (recently submitted) notification.31

In the first proposal, the MTRs for the original three MNOs were based on the costs actually incurred by PTK Centertel and Polkomtel in 2009 (the cost justification provided by PTC was rejected because the data was in the opinion of the NRA inaccurate and could not be used for price calculation purposes). On this basis, the UKE President established a symmetric termination rate of PLN 0.0966/min (ca. 0.025 EUR) applicable to all of the three major MNOs.32 This tariff was supposed to be valid until the next approval of cost calculations submitted by these operators. If the NRA rejects the operators’ proposal, a new price decision would be issued by the UKE President.33 Despite the Commission’s earlier comments, the Polish NRA’s approach was still based on costs actually incurred by individual operators (MNOs), or some not specified assumptions in the case of new entrants. However, the UKE President explained in response to the information request submitted by the Commission in line with the Termination Rates Recommendation, that a model that reflects the costs of an efficient operator will be adopted from 1 January 2013.

In its comments to the draft decisions, the Commission said that the UKE President’s first proposal will lead to rates that seem to be getting closer to the cost of an efficient operator but are still based on the actual costs of individual operators. The Commission appreciated, however, that the Polish NRA proposes to adopt from 1 January 2013 a bottom up Long Run Incremental Cost model (BU-LRIC), in line with the Termination Rates Recommendation. The fact was also acknowledged that the UKE President plans to adopt consulted draft measures only where on-going negotiations with mobile operators concerning infrastructure investments would fail. The Commission stated in its comments that the NRA did not take into consideration the fact that the MTRs should be oriented towards the costs of an efficient operator. The use of actual costs incurred by the three MNOs, as well as the recovery of costs which are not incremental to the provision of wholesale termination

31 Case PL/2011/1195.
32 The proposed rate for all three MNOs was calculated as an arithmetic average of the prices calculated for PTK and Polkomtel. PTC data was seen as inaccurate; see C(2011) 2477, Brussels, 4 April 2011.
33 MNOs are obliged to submit (every year) a justification of their MTRs level based on costs incurred, on the basis of data for the last year, not later than 120 calendar days from the end of the relevant year. If the UKE President considers that the MNOs’ calculations are incorrect, it may set the level of MTR, adjusting the cost calculations provided by the operators. Thus, the UKE President will issue price decisions only as a result of incorrect calculations submitted by operators.
services, can lead to distorted investment signals and higher prices for the originating operators and, consequently, their consumers.

*Investment settlements between operators and the UKE President*

In parallel to the abovementioned first consultation procedure, the UKE President discussed with the MNOs whether, in exchange for a softer glide path for their MTRs, they would carry out infrastructural investments in those Polish regions where mobile network roll-out is seen as economically not feasible. The NRA stressed here that any draft measures concerning amendments of their regulatory obligations resulting from those discussions will be consulted at EU level prior to their adoption. Therefore, between January and June 2011, a number of meetings took place between the representatives of the Polish NRA, MNOs (Polkomtel, PTC, PTK Centertel, P4) and the representatives of the National Chamber of Commerce comprised mostly of fixed-line operators (KIGEiT). The purpose of these meetings was the drafting of a precise investment plan for Polish white spots and 3G network investments in unfeasible areas. Then, pursuant to Article 43a PT, the operators requested the NRA to issue appropriate investment decisions.

The UKE President notified the draft decisions to the Commission on 5 April 2011 (second proposal). According to the NRA, the difference between the prices currently proposed and those previously consulted (first proposal), results from the additional costs to be incurred by the MNOs due to the roll-out of new infrastructure in Polish white spots. Therefore, also for the second notification, the UKE President considered that its proposed prices are cost-oriented. The Commission observes however that the prices proposed in the second notification for the period until 1 July 2012 were in fact 57% higher than the MTRs proposed by NRA only a month earlier. Despite that fact, the UKE President still argued that the proposed MTRs are cost-based in both cases.

In the Commission’s opinion the measures proposed by the Polish NRA are not in line with the Access Directive and fail to lead to MTRs that would be in line with the Termination Rates Recommendation34. According to the provisions of the Access Directive, obligations imposed on operators with SMP should be based on the nature of the identified problem, justified and proportionate in the light of the regulatory objectives expressed in Article 8 of the Framework Directive. In its notification submitted in 200935, the UKE President did not explain the problem of insufficient network coverage in

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Poland. In the draft presented most recently, the NRA also failed to provide the Commission with evidence why it considers the change of the previously proposed MTRs justified and proportionate.

The Commission pointed out that its Recommendation does not allow for the granting of higher MTRs to a select number of MNOs in return for any sort of commitments in particular, if this leads to a rate asymmetry in favour of such operators. It seems especially difficult to justify higher rates than the ones currently proposed, with objective cost differences outside the control of the operators concerned, which is one of the requirements for higher rates set in the Termination Rates Recommendation. It would appear that a commitment to invest in rural areas is within the control of the operators concerned.\footnote{C(2011) 2477, Brussels, 4 April 2011.}

Upon the request based on Article 43a PT and with regard to the second proposal notified to the Commission, the UKE President ultimately issued a new set of MTRs decisions for PTK Centertel and Polkomtel setting their MTR at 0.1520 PLN (ca. 0.038 EUR). These decisions were issued upon their declaration to invest in telecoms infrastructure in Polish white spots (rural areas). The KIGEiT’s approval of such investment decisions was also needed and subjected to the withdrawal of pending appeals against previous MTRs decisions. The new decisions were thus eventually issued based upon the operators’ commitment to withdraw their appeals against earlier UKE decisions, which questioned the MTRs previously set by the NRA. Nevertheless, PTC did not agree to such a conditional decision. Therefore, on 27 May 2011, the UKE President directed to it a decision based on the first proposal notified to the Commission and set PTC’s MTRs on the level of 0.0966 PLN/min (ca. 0.025 EUR) with effect from 1 July 2011. PTC strongly opposed that decision as it would lead to a massive asymmetry between the three largest MNOs – asymmetry not supported by any mandatory cost calculation or regulatory justification. After further negotiations, a settlement between the NRA and PTC was finally reached and the UKE President issued on 29 June 2011 yet another new decision, subsequently withdrawing its earlier decision.

The MTR decision for PTC is now consistent with those issued for the two largest Polish mobile operators – PTK Centertel and Polkomtel. They all set their MTRs at 0.1520 PLN/min between 1 July 2011 and 30 June 2012 and 0.1223 PLN/min from 1 July 2012. It is worth noting that the Commission clearly stated that its MTR Recommendation does not allow for the granting of higher MTRs to a select number of MNOs in return for any sort of commitments (e.g. infrastructure investments), in particular if this leads to asymmetry in rates in favor of such operators. Moreover, NRA, when
carrying out their tasks, should ensure that in similar circumstances there is no discrimination in the treatment of undertakings providing electronic communications networks and services.

Approximately four weeks have passed since the issue of the asymmetric MTRs decisions concerning the three largest MNOs in Poland. Apparently, the UKE President was both willing and able to establish different MTRs among almost equal competitors, which would cause massive market disturbances. Moreover, the NRA notified the Commission two different regulatory proposals concerning the very same subject but with different MTRs each: (i) 0.0966 PLN and (ii) 0.1520 PLN. Not only that, the decisions ultimately issued by the Polish NRA were based on a mixed approach that related to both notifications. It means that the UKE President had notified the Commission two sets of hypothetical decisions with the purpose to ultimately choose, upon its own discretion, one or two of them simultaneously and apply to operators. As a result, the hybrid decisions ultimately issued were never notified to the Commission. More importantly, in none of its two sets of notifications did the Polish NRA consult with the Commission, or in fact with other NRAs, its intention to impose asymmetric MTRs among equal operators. Such situation could be considered a potential infringement of Article 7 of the Framework Directive.

IV. Consequences of calculating MTR in European law

The European Commission issued an opinion to the UKE President commenting on its MTRs calculating methods. Pursuant to the Termination Rates Recommendation of 2009, termination rates should be set at the cost level which would be faced by an efficient operator providing the relevant service. The Commission recommended furthermore that the NRAs apply a long run incremental costs (LRIC) methodology for setting termination rates by the end of 2012.

In its opinion sent to the UKE President, the Commission indicated that the methodology chosen by the Polish NRA (charges based on costs incurred) does not promote efficiency and therefore could only be considered a short-term solution. The Commission invited the UKE President to follow the costing approach recommended by the Commission so as to apply (from 31 December 2012) MTRs set according to the methodology set out in the Recommendation.

The Commission also reminded the Polish NRA that if it did decide to impose price regulation on the basis of a comparison with the pricing structure
found in other countries, it should carefully select the objective criteria and clearly justify the reasons for which it believes that the relevant market(s) in the chosen countries are most suited as the basis for such comparison, taking into account the differences between the conditions prevailing on the relevant market(s) in these countries and its home market.

The Commission indicated also that pursuant to the Framework Directive, when a NRA considers a change to the current MTRs level, it is required to notify that fact to the Commission and the NRAs of other Member States in order to ensure that regulatory decisions taken at national level do not have an adverse effect on the single market. Moreover, under Commission Recommendation 2008/850/EC\textsuperscript{37}, price levels, amendments to the methodology used to calculate costs or prices as well as the determination of glide-paths are all considered to be material changes to the nature or scope of a regulatory remedy that have an appreciable impact on the market and should therefore be notified following the standard notification procedure.

V. Conclusions

1. Calculating MTRs internationally

There is no single approach towards MTRs among the countries. Some only regulate MTRs for fixed-to-mobile calls. In others, mobile networks are required to apply a single regulated termination charge regardless of where the call terminates. In many countries, there is still much debate about the appropriate level of interconnection rates. In the United States for example, MTRs are generally much lower than in the EU. Operators are free to negotiate rates as long as they are symmetric. Moreover, fixed-line incumbents are required to set cost-based termination rates. This system results in low or even non-existent (zero) termination rates. In such a case however, users usually pay for incoming calls.

Looking at the situation in the EU market, it is interesting to analyze the case of Slovakia. Its NRA has issued its methodology for calculating MTRs whereby operators are obliged to calculate their interconnection charges based on the fully allocated historical cost model proposed by the regulator, which by the way is subject to numerous appeals by Slovak mobile operators.

The European Commission has welcomed the Slovenian NRA's revision of its MTRs regulation, eliminating asymmetries therein, adopting an appropriate benchmarking method, and developing a forward-looking cost model of its own for setting regulated prices to be used in the future. The European Commission has criticised on the other hand a German proposal for the regulation of call termination rates until November 2012. The Commission objected here to the use of: asymmetric rates, the inclusion of the spectrum into the cost methodology and the exclusion of MVNOs. The UK telecoms regulator, Ofcom, has launched a consultation on MTRs. The proposal aims to cut the rates by close to 90% by 2015, to as low as 0.5 pence per minute, while applying symmetric rates across all five active market operators from 2012.

2. Conduct contrary to EU regulations

The UKE President’s conduct may, for various reasons, be treated as not compliant with the Commission Termination Rates Recommendation. First, MTRs should be set according to the costs of an efficient operator and not cost actually incurred by the regulated operators. In addition, the convergence of MTRs should be finished by the end of 2012, henceforth symmetric rates should apply. It is also worth remembering that according to the Access Directive, exceptions to the obligation to conduct consultation proceedings before issuing a regulatory decision should be used in limited and justified situations only. Finally, market entry and infrastructure roll-out costs must never be borne by competitors (by way of excessive termination rates) and ultimately their consumers.

Directives and Recommendations


Estimation of Losses Due to the Existence of Monopolies in Urban Bus Transport in Poland

by

Michał Wolanński*

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Abstract

The aim of this paper is to present the different approaches to demonopolisation used in Polish and European urban public transport, compare the efficiency of these models which have proven popular in Poland as well as to estimate the total losses

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incurred due to the high monopolisation of Polish public transport. The methodology of the research is based on econometric modelling (Stochastic Frontier Analysis) and on a survey conducted by the author among Public Transport Authorities. The author proves that the modern London model (competition for the market) is more efficient in Polish conditions than the classic German one (communal monopoly). The very popular in Poland combination of the two above formulas – the co-existence of a Public Transport Authority with a monopolistic publicly owned operator – is surprisingly the least efficient. Total losses due to the existence of monopolies in Polish urban bus transport are estimated for the year 2007 at the level of 10-14% of its total budget (ca. 117-149 m EURO/year). In some cities, the losses can be as high as 20-25% of the total remuneration to the public bus operator. In others, public monopolists can be as efficient as private operators in the competitive model.

Résumé

Le but de cet article est de présenter les approches différentes vers la demonopolisation du transport en commun urbain polonais et européen, comparer l’efficacité de ces modèles, populaires en Pologne, aussi qu’estimer les pertes totales résultant de la monopolisation du transport en commun en Pologne. La méthode de l’analyse est fondée sur la modélisation économétrique (Stochastic Frontier Analysis) et sur l’enquête réalisée par l’auteur parmi les autorités responsable de transport. L’auteur prouve que le modèle moderne de Londres (concurrence pour le marché) est plus efficace dans les conditions polonaises que le modèle allemand (monopole communal). La combinaison de deux modèles, très populaire en Pologne, reposant sur la coexistence d’une autorité responsable de transport avec un opérateur publique, est une solution la moindre efficace.

Classifications and key words: public transport; demonopolisation; Stochastic Frontier Analysis.

I. Introduction

Polish public transport has become in 1990 one of the duties of the newly created communes (local councils) that have generally become the owners of public transport operators\(^1\). Since then, each of the communes has the freedom to choose how to organise its public transport services in order to ensure their high quality and efficiency.

This approach created a great variety of organisational models in Polish public transport – from a fully communal monopoly to fully competitive models.

\(^1\) Act of 8 March 1990 on Communal Government (Journal of Laws 1990 No. 16, item 95, as amended).
– their presentation is the first of the aims of this paper. Presented also will be international experiences which have clearly inspired the chosen solutions.

The variety of urban transport models used in Poland makes it possible to compare the efficiency of particular systems implemented in similar circumstances – the subject matter of the Author’s doctoral dissertation entitled ‘Economic efficiency of urban transport demonopolization in Poland’\(^2\). The presentation of the outcomes of this comparison is the second aim of this paper.

The de-monopolization process has currently stopped because of political reasons hence monopolies – at least in parts of the network – still exist in the majority of Polish cities. This paper’s third aim is to estimate the losses incurred due to the existence of monopolies on the basis of three detailed case studies of Polish metropolises. Nationwide losses will also be estimated.

The paper is divided into five parts, including this one. Key international model of public transport organisation are presented in part two. The Polish approach, which in many cases differs from the original model and is also often based on a number of hybrid solutions, is described in details in part three.

The fourth part presents the applicable method of econometric modeling, created for the purpose of the aforementioned dissertation, based on Stochastic Frontier Analysis – a state-of-the-art method of efficiency measurement. This part presents also the general assessment results focusing on the comparison between different organizational schemes.

Part five aims to estimate current loses associated with the existence of communal monopolies which still are the dominant form of public transport in Poland.

II. Regulatory concepts in public transport

1. German model

The German regulatory model of public transport represents the most ‘classical’ solution in this field. It is based on the monopoly of a publicly owned operator (called ‘internal operators’\(^3\) by EU law, referred to in this paper also


as the ‘communal operators’). Such a company is responsible for network planning as well as the execution of transport services. Its supervision by local authorities is based on very general performance indicators although the current trend is to tighten controls over such monopolies because of, among other things, the influence exercised in this field by EU law that demands a higher precision of service contracts4.

The German model has been popular since the beginning of the 20th century after the nationalisation of the initially privately owned tramway operators. Between the 1950’s and 1980’s, it was the only model of public transport used in Europe in practice.

Until now, this model is widespread in Germany (with some exceptions, e.g. Frankfurt) as well as Spain, Hungary, Italy, Czech Republic etc. In some cases, private companies are used by the monopolists as sub-contractors who execute a proportion of the services or provide drivers. This model is very popular in bigger German cities, such as Berlin, Dresden and Düsseldorf because it helps decrease personnel costs seeing as different labour law regimes apply there to public and private sectors.

More about the newest developments with respect to the German model can be found, among other things, in an extensive study of world experiences in public transport organisation prepared by van der Velde5. German authors focus recently more on describing newer developments than on the classic yet still mainstream model6.

2. French model

The French model is based on ‘competition for the market’ whereby the subject of the tender usually concerns both: the management of the entire network as well as the provision of transport services – for a limited period of time. In many cases, the successful operator uses publicly owned depots and buses, a solution that aims to decrease costs (local government is usually able to get cheaper financing) and increase competition by lowering market entry barriers.

This model is widespread mainly in France but a similar formula is also used in Dutch regional bus transport.

Theoretically, the French model can be called a monopoly (one operator per city). In practice however, both in France and in the Netherlands, the

5 D. van der Velde et al., Contracting in urban public transport, inno-V, Amsterdam 2008.
French model is much closer to an oligopoly than to a monopoly because of the limited number of companies operating nationwide that take part in each tender (Transdev, Veolia and Keolis in France – Connexion, Arriva and Veolia in the Netherlands). With proper anti-monopoly solutions that decrease market entrance barriers (such as a limit on buses covered by one tendering lot), the French model can even resemble competition, as shown by the experiences of New Zealand. Nevertheless, competition is difficult to achieve in this framework because small and medium enterprises (SMEs) might find it hard to survive after they fail to win a contract.

More detailed, up-to-date study of the French model is provided among others by D’arcier7.

3. London model

The London model is popular since the late 1980’s/early 1990’s. It is based on the division of the network into a number of bundles, tendered separately between operators. The network is coordinated by a Public Transport Authority (PTA) with a varying scope of responsibilities depending on the city in question. Usually, PTA supervision over the operators is much stricter than that exercised by public bodies in other public transport models. A PTA is responsible also for lines tendering and sometimes, it even retains infrastructure ownership (for example: the Stockholm PTA owns bus and rail transport infrastructure as well as underground and light railway rolling stock).

The London model is common in the metropolises of Northern Europe such as London, Stockholm and Copenhagen but it is also used in Frankfurt. A very similar model is in operation in regional railway transport of some European countries, especially Germany and the UK.

The London model is potentially much closer to competition than any of the other organisational solutions. The high number of tenders in each city as well as the relatively small size of the tendering lots makes it possible for a number of smaller companies to co-exist. Still, the structure of the market is often closer to an oligopoly than competition because of the existence of 3–5 big transport companies dominating the national market. From another point of view, potential or actual competition from SMEs forces even multinationals to behave as if the market was fully competitive, rather than oligopolistic.

That is so especially if the PTA continues to ensure that entry barriers remain low.

4. British model

The classic British model is widespread since the mid 1980’s in the UK, except London. Unlike all of the aforementioned formulas, it is based on pure ‘in the market’ competition (‘on the road’). As a result, there can be more than one operator in each city (usually two but their number is not prescribed by law), usually serving similar networks of lines.

The operators are partially co-ordinated by local authorities. It is the role of the latter to contract public service routes (i.e. those that are not profitable for the operators), take care of fare integration (the operators can apply their own fares, cheaper than the integrated ones) and social discounts.

In practice, the British model does not lead to perfect competition but to the creation of local duopolies instead. Entry barriers remain relatively high because in order to remain competitive for ‘season’ tickets buyers, a new operator needs to be able to offer a full network of bus routes, rather than a single line only.

Wider description of both the British and the London model can be found in the work of White⁸ for instance.

III. Public transport regulatory solutions in Poland

Before 1990, public transport companies were government-owned in Poland as there were no local authorities. Shortly after the creation of the communes between 1990 and 1993, three main organizational concepts of public transport were developed across the country:

- in most cities, former state-owned enterprises were converted into budget enterprises⁹ that managed and provided transport services in a comprehensive way in line with the German model;
- in some cities, those budget enterprises were quickly transformed into commercial law companies with the same scope of powers as their predecessors;

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⁹ Budget enterprise (in Polish: zakładow budżetowy) forms a part of a local authority (without its own legal personality) with its own income and expense budget.
• as early as 1992-1993, a few local authorities established a Public Transport Authority (PTA) based on the London model; similarly to the initial restructuring stage in London or Copenhagen, PTAs were initially contracting services mainly with their municipal operators that received a fixed fee for serving given bus routes according to a given timetable; soon after, PTAs began to outsource some lines to private companies also.

Private carriers were permitted to operate independent lines with their own fares (including discounts) and timetables. Usually, they had their own buses although in Katowice, for example, the city rented 5 public buses to an independent entrepreneur who could freely choose the routes which he wished to serve.

Subsequently, two main trends were observed dating back to the beginning of the transformation era:
• some cities preserved the municipal monopoly according to the German model, usually restructuring their transport companies and transforming them from budget enterprises into commercial law companies;
• other cities decided to create a PTA, generally in the form of a budget entity\(^\text{10}\) and to contract-out to private operators (via a tender) usually a minor part of the network, divided into a number of separate tendering lots (usually between 1 and 50 lots), according to the city and particularities of a given tender.

Depending on tender specifics and market entry barriers, the particular segments of the Polish urban bus transport market became either competitive or oligopolistic. In general, the market is relatively competitive because it is not dominated by multinationals. A number of SMEs (e.g. Warbus Warszawa, DLA Wroclaw, GRYF Kartuzy, IREX Sosnowiec, ITS Michalczewski Radom, PKS Grodzisk Mazowiecki) compete with the multinationals (mostly Veolia and Israeli Egged) as well as with each other in a number of tenders not limited to ‘home cities’ only.

In Poland, PTAs usually fulfill the following tasks:
• managing the network (including full time-tabling);
• line tendering, quality control and rewarding the operators;
• the issue, control and sales of tickets;
• marketing.

A growing number of local authorities including Cracow, Poznan, Olsztyn or Rzeszow have recently decided (in particular since 2008) to create a PTA, moving away from the earlier use of the classic German model. However, the

\(^{10}\) Budget entity (in Polish: \textit{jednostka budżetowa}) forms a part of a local authority (without its own legal personality) \textit{without} its own income or expense budget (it works within the general budget of the local authority).
responsibilities of the new PTAs often do not include time-tabling or ticket sales; they usually co-operate with the internal operator only or tender a very small part of the network only.

Many of the older PTAs have also recently decided to stop tendering and to increase the use and role of their internal operators. There are three main reasons for this:

- the great strength of the labor unions of internal operators, in connection with the wealthy financial situation of local authorities;
- the ease with which EU projects can be implemented by internal operators\(^1\);  
- EC Regulation No. 1370/2007\(^1\)\(^2\) and the later Polish Act on Public Transport\(^1\)\(^3\), which were often understood as a special ‘permission’ for not tendering public transport services as well as an obligation to create PTAs (the latter is especially a misinterpretation).

In some Polish cities, usually small towns, urban public transport was served over the last two decades entirely by a private company, the winner of a tender. Although this solution resembles the French model, buses, their depots and other infrastructure are not supplied by the local authority – the operator must provide them independently.

Aside from the aforementioned solutions, some Polish cities also tried to implement a fully deregulated and competitive public transport system, partially inspired by the British model and partially by liberal thoughts. A very radical example of such an approach is delivered by the city of Zakopane where public transport is provided by small, independent buses; lines run usually on demand only and solely in the daytime; and there are no monthly tickets. In fact, this formula is closer to the Russian or Ukrainian solutions than to the British model. In other cities, commercial lines play an auxiliary role. Nowadays however, many such enterprises are being eliminated due to rising labor and fuel costs.

The table below shows the main organizational models of urban bus transport in Poland.

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Table 1. Main organizational models of urban bus transport in Poland

<table>
<thead>
<tr>
<th>Model</th>
<th>City / Metropolitan Area</th>
<th>Authority</th>
<th>Bus operators</th>
<th>Strategy of contracting services</th>
<th>Selected cities with a similar model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Warsaw</td>
<td>Public Transport Authority (ZTM) – budget entity</td>
<td>One internal operator – a municipal company (other municipal companies for trams and tube); 3 private bus operators (at least 100 buses each), private companies with core business in Warsaw public transport</td>
<td>Tendered contracts for 8-10 years, and 50 buses each, low-floor, new buses required (ca. 25% of the network); the rest gets an internal operator under a directly awarded contract</td>
<td>Kraków (but the same internal operator for buses and trams, only one private operator)</td>
<td></td>
</tr>
<tr>
<td>Elbląg</td>
<td>Public Transport Authority (ZKM sp. z o.o.) – a limited liability company</td>
<td>Only private bus operators (3 firms) – one of them is part of the former internal operator</td>
<td>3 tenders organized at the same time, lowering of an average age of fleet during the contract is required</td>
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<td></td>
</tr>
<tr>
<td>Gdynia</td>
<td>Public Transport Authority (ZKM) – budget entity</td>
<td>2 internal bus operators (and one trolleybus); a number of private carriers for whom public urban transport is not a core business</td>
<td>Usually short-term (up to 3-4 years) contracts for one or a few buses on a given route; used fleet is usually accepted but quality requirements are rather high; internal operators have both – direct awards and contracts won in a tender</td>
<td>Białystok, Szczecin (a split of an internal operator into a number of bus companies), Gdańsk, Bydgoszcz, Wrocław (PTA functions directly exercised by the municipal authority)</td>
<td></td>
</tr>
<tr>
<td>Upper Silesia</td>
<td>Komunalny Związek Komunikacyjny GOP</td>
<td>A number of municipal operators, owned by members of the union (often supported by direct owners’ help), as well as local, private companies.</td>
<td>Short-term contracts, different size of bundles (usually single lines), low quality requirements, some carriers have old direct awards but now have to take part in a tender</td>
<td>Gdańsk – Gdynia – Sopot – Węgorzewo Metropolitan Area (planned)</td>
<td></td>
</tr>
<tr>
<td>Model</td>
<td>City / Metropolitan Area</td>
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<td>Bus operators</td>
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<tr>
<td>Hybrid model - internal operator + PTA</td>
<td>Częstochowa</td>
<td>Road and Public Transport Authority (ZTM) – budget entity</td>
<td>One internal operator</td>
<td>Directly awarded contract with an internal operator without a tender</td>
<td>Rzeszów, Olsztyn</td>
</tr>
<tr>
<td>‘German model’ (internal operator, no authority)</td>
<td>Legnica</td>
<td>Municipal authority</td>
<td>One internal operator for trams and buses – a limited company or a budget enterprise</td>
<td>Long-term contract with extensive powers and low operational control over the company</td>
<td>Toruń, Zielona Góra, Bielsko Biała, Siedlce (some of the operators are companies, others – budget enterprises)</td>
</tr>
<tr>
<td>Monopoly of a public-private company (before 2010)</td>
<td>Kalisz</td>
<td>Municipal authority</td>
<td>A municipal company with a minority shareholding in a private partner</td>
<td></td>
<td>Chelm</td>
</tr>
<tr>
<td>‘French model’ (monopoly of a private company, limited by contract)</td>
<td>Tczew</td>
<td>Municipal authority</td>
<td>One municipal company – a privatized internal operator</td>
<td>A contract for serving the network for a long period (8 years), requires gradual renewal of the fleet; in case of choosing a new operator there will be a problem with current assets (infrastructure and employees)</td>
<td>Lubin, Tarnobrzeg, Swarzędz, Murowana Goślina</td>
</tr>
<tr>
<td>‘British model’</td>
<td>Zakopane</td>
<td>No</td>
<td>Many private entrepreneurs</td>
<td>No contract – only a permit needed</td>
<td>Single lines in Lublin, Katowice</td>
</tr>
</tbody>
</table>
IV. Efficiency comparison of different solutions

1. Method

The efficiency measurement model used in this paper is based on an analysis of the cost of purchase or production of a ‘bus-kilometre’ in different towns. It is consistent with other Polish research, among others, the work of R. Tomanek\textsuperscript{14}. The most important novel aspect of the method used in this analysis is the consideration of the fact that cost differentiation may result from many other factors besides the organizational model used in any given city including determinants such as vehicle type, its size, age and equipment.

The cost-based approach is reasonable because in the majority of Polish towns it is the public side that determines qualitative aspects of the carriage offer, preparing at least a time-table outline, putting forward specific quality requirements and finally, shaping the pricing policy. Therefore, a public body usually ‘buys’ bus-kilometres and makes its own decisions concerning their use. The quality of this use, that is, adapting the offer to the needs of the market, does not directly result from the operator’s ownership issues.

The disadvantage of this analytical approach is the impossibility to take into account those Polish cities where local governments settle the accounts with their transport operators on a net basis (the operator gets actual income from ticket sales and a fixed subsidy). Nevertheless, only very few cities use the latter solution and it is thus possible to assume that their exclusion from this analysis would not lead to statistically significant results.

Using the cost-based approach, it is appropriate within the scope of modeling to use Stochastic Frontier Analysis (hereafter: SFA). This is a state-of-the art parametric method of efficiency analysis that has been used before in transport for benchmarking of the performance of British railways\textsuperscript{15}. This method has also been used in Poland for efficiency benchmarking of libraries\textsuperscript{16} and electricity distribution sector\textsuperscript{17}. Nevertheless, SFA has not been

\textsuperscript{14} R. Tomanek, \textit{Konkurencyjność transportu miejskiego}, Katowice 2002.
used in urban public transport before\textsuperscript{18}. Wider review of economic efficiency measurement methods is given by Coelli et al\textsuperscript{19}.

SFA is based on the assumption that the cost function may be defined by an equation:

\[ y_i = \beta' x_i + v_i + u_i \]

where in this case:

- \( y \) – the cost of a bus-kilometre for given services;
- \( \beta' x \) – parameters of a given transport service (such as bus length, age, etc.), multiplied by their estimated influence on costs (negative or positive);
- \( v \) – random variable with normal distribution, showing different kinds of objective cost deviations, not providing for inefficiency but resulting from factors not included in the model;
- \( u \) – inefficiency, a random variable with half-normal distribution, thus accepting only non-negative values.

The first element denotes the deterministic part of the cost, which together with \( v \), creates the so-called cost frontier (an ideal minimum cost). After its deduction, each observation is characterized by non-negative inefficiency \( u \).

The variable \( u \) in this paper is defined as ‘absolute inefficiency’ in contrast to ‘relative inefficiency’ denoted by:

\[ \frac{u_i}{\beta' x_i} \]

Therefore \( u \) itself illustrates the value of inefficiency expressed in currency (PLN – Polish zloty). On the other hand, ‘relative inefficiency’ is a non-dimensional value showing inefficiency in relation to the deterministic element of the cost frontier. As a result, relative inefficiency amounting to 24% means that – excluding the random element \( v \) – the real remuneration paid to the operator equals 124% of the deterministic element of the cost frontier, while relative inefficiency equaling 50% means that the remuneration equals 150% of this element.

\textsuperscript{18} Some similar studies has been conducted at the same time, especially in Germany, but did not consider such a complex sample containing both tendered and directly awarded services – for example M. Walter, Some Determinants of Cost Efficiency in German Public Transport, 11th Conference on Competition and Ownership in Land Passenger Transport Proceedings, Delft 2009.


\textsuperscript{20} Ibidem.
W. Greene\textsuperscript{21} stresses that as a rule, especially in the case of the classic Cobb-Douglas’s production function, particular explanatory variables ($x_i$) may denote logarithms of particular inputs. The choice of parameters of vector $\beta$ is estimated by using the method of maximum likelihood, so that the most probable set of values has been chosen. For a simplification maximum log-likelihood formula has been used:

$$\ln L(\beta \mid y) = \sum_{i=1}^{n} \ln f(y_i \mid \beta) \rightarrow \text{max}$$

An essential advantage of using SFA is the possibility of taking into account that not each variation from the forecasted value means inefficiency, which is ensured by the random variable $v$. It should be remembered however when using SFA that defined coefficients $\beta$ do not mean average dependence, because the deterministic element of the equation is closer to the ‘ideal’ than to a ‘typical case’, as for example in the case of linear regression.

In order to carry out the research, first set out was a list of potential variables explaining the price of a bus-kilometre or the ability to differentiate the effectiveness of transport contracts, such as the vehicle’s age or size, the period of the contract, average speed on given routes etc.

The necessary data that made it possible to create a database for the model was then collected later. Some data was taken from a statistical journal published by the Polish Chamber of Urban Transport (IGKM)\textsuperscript{22} – this information was available only in the case of carriers operating without the PTAs. The remaining data was collected from a questionnaire conducted in the first half of 2008 and directed to all Polish PTAs that were members of IGKM as well as to some other smaller transport authorities.

The database record was a single value of dependent variable, that is, a gross price expressed in PLN per kilometer, paid to the operator by its PTA (adjusted by the municipal company’s profit or loss), or an average cost of performing a service in a municipal company acting in an organizational model without a PTA (German model). This value might refer to the whole network or even to a single service. Therefore, it was necessary to weight the data implicitly using the number of services that the given rate concerned. The term service is in principle understood as one bus in motion, although in some cases, it is possible for one vehicle to perform two services obtained in different bids (e.g. daytime and night lines) but this is a very rare occurrence.

A database was created covering 281 transport service rates – therein, transport services were provided for 12 PTAs by 4002 buses. The above

\textsuperscript{21} W. Greene, op. cit., pp. E33-4.

\textsuperscript{22} (2007) 2 Komunikacja miejska w liczbach.
information was complemented by secondary data for operators acting without
a PTA in 18 additional towns that together run 1546 buses on an average
working day. The difference of scale was unavoidable as it resulted from the
specifics of the Polish de-monopolization process of urban transport.

An assumption of creating two models has been adopted on account of
the diversity of the dependent variables in the case of towns where transport
services are performed directly by public companies (without PTAs) and towns
where transport authorities exist (with PTAs). Accordingly:

- the first general model concerns all towns irrespective of whether a
  transport authority exists or not;
- the second model relates solely to contracts concluded within tenders by
  operators and transport authorities (irrespective of their organizational
  form – this criterion should be treated as functional), where a set of
  potential dependent variables may be somewhat larger.

In practice, these two models emerged as much more similar than expected.
Nevertheless, their separation was maintained in order to obtain more precise
results.

2. Results

2.1. Created models

Three statistically significant models were ultimately created: one concerned
the whole scope of the scrutinized services; the remaining two referred only to
transportation tasks granted in the course of a tender (not covered by this paper).

<table>
<thead>
<tr>
<th>Variable</th>
<th>Value</th>
<th>Standard deviation / error</th>
<th>Significance level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost / price of vehiclekm [PLN]</td>
<td>5.448</td>
<td>1.272</td>
<td>-</td>
</tr>
<tr>
<td>(dependent variable)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>3.750</td>
<td>0.536</td>
<td>0.0000</td>
</tr>
<tr>
<td>Average length of a bus [m]</td>
<td>0.130</td>
<td>0.016</td>
<td>0.0000</td>
</tr>
<tr>
<td>Average log of bus age [years]</td>
<td>−1.038</td>
<td>0.302</td>
<td>0.0146</td>
</tr>
<tr>
<td>Annual bus mileage [km/year]</td>
<td>−0.007</td>
<td>0.002</td>
<td>0.0006</td>
</tr>
<tr>
<td>Share of low floor buses [%]</td>
<td>0.641</td>
<td>0.153</td>
<td>0.0016</td>
</tr>
<tr>
<td>Average speed (incl. stops) [km/h]</td>
<td>−0.027</td>
<td>0.015</td>
<td>0.0000</td>
</tr>
</tbody>
</table>

Model paramters

Log-likelihood value  
−405.45

Likelihood ratio test result (λ)  
3.296

0.479

0.0000
The obtained general model is presented in the following table. All shown relations are significant at 0.0146 level or less, what means reliability level of 98.54% or more. The Likelihood test ratio shows, that the model itself is statically significant with reliability of over 99.9% (compared with a null model).

Trials with both linear and logarithmic dependence were simultaneously conducted for some variables – the chosen ones guaranteed higher reliability. Logically correct and statistically significant dependencies were not found in any of the models between cost and, among other things:

- the size of an order granted to a given operator – in this case, an inverse proportionality was even observed in a parallel linear regression model potentially at least because the setting of the cost frontier was obstructed by the existence of groups of big and inefficient public operators; it must be stressed however that a similar proportionality was already observed by D. Miller\textsuperscript{23};
- the amount of the average wage in a given region – this is logical, as the average wage can vary more between regions than between the wages of the drivers because of differences in the professional structures of the inhabitants of various regions (for example, the average wage is high in Katowice because of the high pay in the mining industry; the average pay is also high in Warsaw because of high wages in private corporations accumulated therein, this does not greatly influence labour costs of drivers or generally workers);

In order to get statistically significant models, it was also necessary to give up the assumed weights in the form of the number of services and to substitute them by a logarithm of the same value.

2.2. An analysis of efficiency of organizational models

The created models make it possible to draw a number of important conclusions. First of all, the comparison of relative efficiency depending on the organizational scheme employed in different regions with respect to the ownership structure of the operator and award type (compare graph 1) indicates a much higher efficiency of private entities and those public operators that gain contracts by way of a tender than of the remaining public companies.

It must be kept in mind though that in the following graph:
- a scheme with a PTA, public (internal) operator and the direct award of transport services contracts – refers to a Polish hybrid model, a

communal monopoly as in the German model with a separated PTA as in the London model;

- a scheme with a PTA, a public operator and the tender – can mean a very similar situation as the above (when the tendering requirements are from the start more favourable to the internal operator and usually only one bid is placed), as well as (in minor cases) a system resembling the London model, in which the communal operator succeeds; initially, the Author wanted to differentiate those two cases but within the surveys very few PTAs answered the questions concerning the number of bids placed;

- both schemes with private operators – refers to the London model (direct awards of transport services contracts for the private operators were possible before 1997 according to the old Public Procurement Act);

- the last scheme means a pure German model.

As mentioned above, other schemes couldn’t be included, as they occur very rarely.

It can be concluded that if a public operator gains a contract by way of a tender in areas supervised by a PTA, the cost is 12% lower than the cost of a direct award of a transport contract (an average cost equalling 129% of the cost frontier instead of 146% of the cost frontier).

Graph 1. Relative inefficiency according to the organizational scheme, operator ownership & award type
If a private operator wins the tender, the cost is on average lower again by another 2%. In the case of private operators who received contracts under the direct award procedure, attention should be drawn to the small number of their services. Also relevant here is the fact that these orders were placed in the mid 1990’s, when the Public Procurement Act was not yet in force. Still, those contracts were preceded by negotiations. Hence, the efficiency of private operators should be considered jointly, on the assumption that they were chosen in a competitive manner in both cases.

Surprisingly, public companies operating without a PTA are much more efficient than those operating within a PTA direct award procedure despite the fact that a part of the competences and costs are taken over by PTAs. This means that the most popular form of transport organization in Poland is the least efficient one as it results from an ‘artificial’ establishment of PTAs, which are anyway forced to outsource the transport services of a particular operator and have limited influence on them. Clearly, this is merely a confirmation of how things are in most cases. In theory, and in some practical cases, it is possible to establish healthy relations between a PTA and the operator, as between a normal customer and a seller – the possibility of external quality control is an essential advantage in such cases.

**Graph 2. Absolute inefficiency according to organizational scheme, operator ownership & award type**

![Graph showing absolute inefficiency](image-url)
The situation looks somewhat different if absolute efficiency expressed in Polish zlotys is considered (comp. graph 2, 1 PLN ≈ 4.0 EUR). In this case, the difference between efficiency of private and public operators receiving contracts by way of a tender becomes more pronounced. This discrepancy may be the result of a number of issues:

- private operators provide services with a lower cost frontier and thus of lower quality (e.g. older bus fleet) or on more advantageous conditions (e.g. longer-term contracts or higher yearly mileage);
- public operators provide twice as many services won in the course of a tender than private operators, a realisation that can be attributed to the fact that private operators can find it difficult to satisfy the criteria of a certain number of tenders (e.g. bus fleet ownership requirement applicable at the moment of the tender); this causes an ‘overvaluing’ of the cost frontier in case of specific contracts for public operators.

Also of relevance is the fact that some municipal operators provide services both on the basis of direct awards and tenders – in this case, higher incomes from direct awards may allow them to offer lower prices in tenders, a practice that creates an illusory efficiency of the latter. This realisation has been proven by an analysis of single operators.

It is also worth paying attention to the fact that the shown bus-kilometre cost of public operators does not illustrate the entire costs incurred by local authorities, including costs of lost opportunities to which the author had no access. For example, private operators purchase or lease land on their own while municipal operators may use plots contributed to the company by the relevant town.

Some interesting data is also provided by comparing the efficiency of private and public operators within the range of individual towns (comp. graph 3). It clearly shows the diversity of absolute inefficiency between the scrutinised cities as well as local differences between private and public operators.

Graph 3. Relative inefficiency in subsequent cities
Private operators were more expensive than the public one in one town only (No: 13). However, the former held a mere 0.5% of the market share in this town at the time and serviced a very specific segment of the market. Their market presence has now significantly increased since they clearly won against the public operator in two big tenders, conducted in 2008.

Graph 4. Distribution of relative inefficiency – private vs. public

Graph 4 conveys well the diversity in the efficiency level of private as opposed to public operators. It shows that: if in the case of private operators over 75% of their tasks reach an inefficiency level not exceeding 30%, almost 70% of public operators exceed this value. Still, there is a group of communal operators who maintain very high efficiency, a fact worth stressing especially because in some cases, they have a wider scope of tasks (there is no separate PTA).

V. Estimation of losses nationwide and in selected cities

1. City X

It is possible on the basis of the above research to estimate the losses resulting from the monopolisation of public transport in selected Polish cities. The first case study concerns City X24 where the majority of the bus transport market is restricted to the internal operator, in other words, a typical case of a monopoly.

24 The names of the cities are not stated in this paper because the estimations are based on confidential data; City X, Y and Z are however among 5 biggest Polish cities.
The rest of the market is tendered according to the *London* model – over 5 bids are usually placed in each tender also by companies that do not already operate in city X seeing as entry barriers remain low (no excessive tender requirements). This makes this market segment closer to perfect competition than to an oligopoly, which is typical for the sector.

In City X, the difference in efficiency between the public and private operators easily shows the losses of the monopoly because all of the operators act in very similar conditions.

The relative inefficiency of the public operator amounts to 60% while private entities reach a mere 27%. This indicates that if the services that are delivered by the public bus operator were to be subject to a tender, a saving of over 26% would be possible. In other words: 26% of the total bus transport budget in City X remains a monopoly premium for the internal operator.

Considering absolute inefficiencies – the difference amounts to 1.52 PLN/vehicle-km (0.38 EUR/vehicle-km – 2.53 PLN/0.63 EUR for public, 1.01 PLN/0.25 EUR for private). Compared with the price of a vehicle-km paid to the public operator (ca. 7.40 PLN/vehicle-km, so 3.70 EUR/vehicle-km), this leads to the conclusion that the cost level of this particular internal operator is over 20% higher than the cost of private operators in the same region.

Moreover, the aforementioned losses are somewhat underestimated because of a number of considerations that separate the public and private operators in this city:

- the public operator uses bus depots free of charge from the city while private entities must buy/rent them under normal market conditions;
- only the employees, and their families, of the public operator can use public transport free of charge;
- the share of dead runs is higher for private operators than for the public one.

Therefore, if it is impossible to restructure the internal operator in City X, the market should be tendered as soon as possible because of excessive costs for the community.\(^{25}\)

2. City Y

The internal operators in the following two cities – City Y and City Z – had a full monopoly in 2007 (a pure *German* model). Both operators were at that time responsible for network planning as well as the execution of transport services.

\(^{25}\) The legal aspects of this situation are not the subject of this paper.
In the city Y – the rate per vehicle-km equalled ca. 5.80 PLN (1.45 EUR) with an inefficiency of 1.52 PLN (0.38 EUR). This gives a relative inefficiency of 36%.

Thus, the relative inefficiency of the internal operator in City Y is not much higher than the relative inefficiency of private operators in City of X (27%). In fact, it is not much higher than the average inefficiency of public transport operators nationwide (25% see graph 2). The difference of 8% is fully justified because City Y has no PTA. Its costs (e.g. time-tabling, bus stops maintenance etc.) usually amount to 5-8% of the public transport budget, are in this case included in the operator’s costs.

This example proves that public monopolies are not always worse than private operators. A detailed analysis can show that monopolists have on the one hand slightly higher administration and labour costs than private operators, but on the other hand, they can save money thanks to efficient network planning.

These include measures such as shorter stops at terminals, e.g. the PTA of City X (previous example) can plan a timetable for a bus running 60 minutes with a waiting time of 30 minutes at the bus terminal – totally unnecessary rule especially during the weekends with their lesser traffic. Seeing as a PTA does not cover the additional costs of long stops and only pays the operator a fixed fee for each vehicle-kilometer, this approach is neutral for the operators short term but obviously generates additional costs in the system long term. This problem does not arise in City Y (this case) where real costs – rather than a lump sum – are considered at the stage of time-tabling.

3. City Z

City Z was in 2007 very similar to city Y but its absolute inefficiency equalled 2.125 PLN/vehicle-km (0.53 EUR/vehicle-km) and its relative inefficiency was 51%. This is an example of one of the least efficient internal operators in the German model. This means, that the costs of the public operator in City Z are 20%-25% higher than the costs of the purchase of the same services from a private operator.

Taking into account the higher scope of the competences of the internal operator in City Z, the above difference is overestimated and is in fact probably between 15% and 20% - still a relatively high difference.

A detailed analysis showed that the internal operator of City Z has a much lower budget discipline than its counterpart in City Y. It also does not benefit from integrated services planning (e.g. as opposed to City Y) whereby one bus usually serves only one line per day – making City Z similar to City X.
The Cities Y and Z show two different starting points to the potential process of de-monopolisation – while it can be potentially successful in City Z, private operators probably will not bring great savings for City Y.

In fact, both of these cities created a PTA after 2007 but have not tendered many of their routes – a fact that could have a negative influence on the economic efficiency of the public transport system especially in City Y. Simple observation of cost changes in these cities proves that the costs seem to increase faster than the quality of services but this hypothesis needs further research.

4. Nationwide

The nationwide estimation of loss will be based on the average between weighted absolute inefficiencies of private (0.643) and monopolistic public operators (i.e. direct award – 1.678). This difference amounts to 1.035 [PLN/vehicle-km], so 0.259 [EUR/vehicle-km].

According to the data available from the main Polish statistical office GUS (in Polish Glowny Urzad Statystyczny), at least 782 million bus-kilometres were driven in 2007 in Polish urban public transport\(^{26}\). Assuming that its communal monopolies had a 67.5% market share – the loss associated with their existence can be estimated at ca. 466 million PLN (ca. 115 million EUR).

Compared with the general budget of Polish public bus transport of 4,250 m PLN or 1,063 m EUR (782 m vehicle-km multiplied by 5.45 PLN or 1.36 EUR/vehicle-km), this equates to over 10% of the entire Polish public transport budget.

The overall losses can be even higher seeing as the above estimates do not include communal operators which won contracts by way of a tender. In fact, the communal operator was often the only participant of these tenders because their requirements included the need to own a bus depot in the given city or a precisely described bus fleet. Alternatively, public operators could win the bid because they were able to offer lower prices since their fixed costs were covered by other contracts.

Taking into account the difference between all public and private operators, the former have an 86% market share and a cost difference of 0.883 PLN or 0.221 EUR/vehicle-km (1.526 - 0.643 in PLN). That gives a total loss of almost 595 m PLN/ year (it equals to almost 149 m EUR and 14% of the entire bus public transport budget).

It should be stressed however that the above estimation covers urban bus transport only. Other kinds of collective passenger transport in Poland (urban

and regional rail transport, regional bus) are also highly monopolised and similar monopoly losses can occur also there.

VI. Conclusions

The conducted analysis leads to the following conclusions:
• the efficiency of monopolistic public bus operators is highly differentiated – some of them are as efficient as private operators acting in a pro-competitive model – others have costs of up to 25% higher than similar private entities;
• the hybrid model (a PTA with an internal operator, that is, vertical disintegration with no competition between operators), despite its great popularity in Poland, even growing since 2007, has generally proven to be the least efficient model of urban public transport seeing as it disintegrates the planning process and does not bring any benefits for competition;
• nationwide losses due to the existence of monopolies in Polish public bus transport in 2007 are estimated at the level of 10-14% of its total budget (ca. 466-595 m PLN/year or 117-149 m EUR/year); this number might have even risen since this date because of the popularity growth of the least efficient organisational model as well as the generally increasing budgets in public transport.

Literature

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Wolański M., *Efektywność ekonomiczna demonopolizacji komunikacji miejskiej w Polsce* [Efficiency of demonopolisation of urban public transport in Poland], Warszawa 2011.
Polish Antitrust Legislation and Case Law Review 2010

by

Agata Jurkowska-Gomulka*

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The article presents key developments in Polish antitrust legislation and case law of 2010. Regarding legislation, the article focuses on a new group exemption for agreements on motor vehicle distribution; also provided is a general characterisation of antitrust jurisprudence, mainly the judgments of the Supreme Court and the Court of Appeals in Warsaw. The presented rulings are divided according to their subject matter referring to particular types of restrictive practices, relevant market definition, relationships between the Competition Act and other national legislation as well as problems related to the UOKiK President’s decision-making process and juridical control of antitrust decisions.

Résumé

L'article présent les développements clés de la loi polonaise d'ententes et la jurisprudence en 2010. Par rapport a la législation, l'article se concentre sur un nouveau règlement d'exemption les d'accords verticaux et de pratiques concertées dans le secteur automobile.

L'article présent 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 pratiques restreignant la concurrence, identification des marches, relations entre le Droit de la compétition et les autres actes et problèmes relatifs a 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; common competition rule of the EU; group exemption; fines; motor vehicle distribution; relevant market.

I. Antitrust legislation. Group exemption on motor vehicle distribution

The only legal act issued in 2010 in the field of Polish competition law is the Council of Ministers’ Regulation of 8 October 2010 on the exemption of certain vertical agreements in the motor vehicle sector from the prohibition of competition restricting agreements¹. The new act replaced its predecessor:

¹ Journal of Laws 2010 No. 198, item 1315.
Council of Ministers’ Regulation of 28 January 2003 on the exemption of certain vertical agreements in the motor vehicle sector from the prohibition of competition restricting agreements. The old block exemption was adopted on the basis of Article 7 of the Act on Competition and Consumer Protection of 15 December 2000 (hereafter, Competition Act 2000) and expired on 31 May 2010. It was expected that the new block exemption adopted in 2010 on the basis of Article 8(3) of the Act on Competition and Consumer Protection of 17 February 2007 (hereafter, Competition Act) would resemble Commission Regulation of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector. However, the Polish legislator did not follow the EU line. The new Polish exemption copies instead the legal solutions of the earlier national act of 2003. Except for general exemption conditions (among them: a standard threshold of 30% market share and a higher threshold of 40% for quantitative selective distribution of new cars), the regulation lists both white clauses (those that do not violate the prohibition of competition restricting agreements – Chapter 3 of the regulation, para. 15-16) and black clauses (those that infringe the prohibition – Chapter 4, para. 17-23). Moreover, unlike the new EU exemption that specifies in its Article 3 that from 1 June 2013 ‘Regulation (EU) No 330/2010 [general block exemption for vertical agreements - AJG] shall apply to vertical agreements relating to the purchase, sale or resale of new motor vehicles’, the new Polish group exemption does not contain provisions of this kind. However, the new act will be in force only until 31 May 2013. It is thus likely that the Polish legislator will after that date, following the EU, not adopt any more special block exemptions for agreements in the motor vehicle sector. It is thus possible that from then on, motor vehicle agreements will be treated as ‘standard’ vertical agreements also under Polish legislation and become subject to the Regulation of the Council of Ministers of 30 March 2011 on the exemption of certain vertical agreements from the prohibition of competition-restricting agreements.

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3 Journal of Laws 2000 No. 122, item 1319, as amended.
4 Journal of Laws 2007 No. 50, item 331, as amended.
6 Journal of Laws 2011 No. 81, item 441.
II. Antitrust case law

1. General characteristics of 2010 jurisprudence

This article covers the judgments delivered in 2010 by three Polish courts engaged in antitrust cases: the Supreme Court, the Court of Appeals in Warsaw and the Court of Competition and Consumer Protection. All the judgments subject to this analysis are based on the Competition Act. The article focuses on rulings delivered by higher instance courts, that is, the Supreme Court and the Court of Appeals. Far less attention is paid to first instance judgments since are usually subject to a revision by higher instance courts, especially if they concern controversial issues.

No general database exists for Polish jurisprudence that would make it possible to identify all judgments delivered in any given timeframe by a particular court. As a result, the choice of the rulings to be assessed in this article has been made on the basis of the resources collected by CARS. Nineteen judgments delivered by SOKiK (in Polish: Sąd Ochrony Konkurencji i Konsumentow; hereafter; SOKiK), thirteen rulings by the Court of Appeals in Warsaw (in Polish: Sąd Apelacyjny w Warszawie; hereafter, SA) and seven by the Supreme Court (in Polish: Sąd Najwyższy; hereafter, SN) were ultimately identified and scrutinized.

A few rulings of the higher instance courts referred to practices that infringed, or at least had been declared to have done so, the old Competition Act 2000. In some cases resulting from an earlier intervention by the higher instance courts, SOKiK and/or the Court of Appeals have ruled on the same case twice (e.g. judgment of SOKiK of 20 September 2010, XVII Ama 210/09, PKP Cargo).

Not unlike previous years, the jurisprudence of 2010 shows a clear predominance of cases dedicated to competition restricting practices – most of all, cases concerning the abuse of dominance. Abuses assessed by courts took the form of: the imposition of unfair prices (e.g. SN judgment of 18 February 2010, III SK 24/09, RPWiK w Tychach; SA judgment of 14 July 2010, VI Aca 651/10, Telekomunikacja Polska); the imposition of onerous contractual terms yielding unjustified profits to the dominant undertaking (e.g. SA judgment of 7 May 2010, VI Aca 1084/09, PWiK; SOKiK judgment of 2 May 2010, XVII Ama 71/09, Dolnośląska Spółka Gazownictwa); discriminatory practices (e.g. SN judgment of 17 March 2010, III SK 33/09, Sped-Pro; SA judgment of 13 May 2010, VI Aca 126/10, TP EMITEL; SA judgment of 17 December 2010, VI Aca 427/10, Przedsiębiorstwo Państwowe ‘Porty Lotnicze’); tying (SA judgment of 17 March 2010, III SK 41/09, Telekomunikacja Polska (Tele 2));
counteracting the formation of the conditions necessary for the emergence or development of competition (e.g. SN judgment of 18 February 2010, III SK 28/09, Telekomunikacja Polska (Netia); SN judgment of 3 March 2010, III SK 37/09, Katowice Commune; SOKiK judgment of 8 December 2010, XVII Ama 199/09, ZAIKS).

The majority of the scrutinised abuses took place on local, municipal markets including: a local market for the provision of water and/or for sewage collection (e.g. SN judgment of 18 February 2010, III SK 24/09, RPWiK w Tychach; SOKiK judgment of 15 July 2010, XVII Ama 61/09, ZWiK w Strzelinie; SOKiK judgment of 9 June 2010, XVII Ama 152/09, Rychwał Commune); a local market for waste management (SN judgment of 3 March 2010, III SK 37/09, Zgorzelec Commune; SOKiK judgment of 22 October 2010, XVII Ama 151/09, Zgorzelec Commune); a local market for waste storage (SOKiK judgment of 26 May 2010, XVII Ama 57/09, Przedsiębiorstwo Usług Komunalnych in Grajewo). An energy distribution market was also considered ‘local’, even though it covered the territory of three Polish regions (SOKiK judgment of 23 March 2010, XVII Ama 22/09, ENEA). The same character can be attributed to a market for the distribution of gas covering communes from three regions, even if in this case the actual market was described as ‘regional’ rather than local (SOKiK judgment of 2 May 2010, XVII Ama 71/09, Dolnośląska Spółka Gazownictwa). Considered ‘local’ were even markets for payable services of providing airport infrastructure (SA judgment of 17 December 2010, VI Aca 427/10, Przedsiębiorstwo Państwowe ‘Porty Lotnicze’). A few abuse cases, mainly those assessed by the Supreme Court, concerned practices employed on national markets such as: a market for the access to services of national and international telecoms connections on numbers starting from 0708 1xx xxx (SN judgment of 18 February 2010, III SK 28/09, Telekomunikacja Polska (Netia)); a market for the provision of telecoms services in public telecommunications network (SN judgment of 17 March 2010, III SK 41/09, Telekomunikacja Polska (Tele 2)); a market for the rail transport of goods (SN judgment of 17 March 2010, III SK 33/09, Sped-Pro; SOKiK judgment of 20 September 2010, XVII Ama 210/09 PKP Cargo); a market for terrestrial broadcasting services of radio and television programmes (SA judgment of 13 May 2010, VI Aca 126/10, TP EMITEL); a market for the collective management of copyright for musical compositions and lyrics (SOKiK judgment of 8 December 2010, XVII Ama 199/09, ZAIKS).

Most of the agreements subject to juridical review in 2010 were price-related (e.g. SOKiK judgment of 10 November 2010, XVII Ama 11/09, PKS Zielona Góra). One of the judgments concerned exclusive purchase resulting in an alleged market access limitation (SA judgment of 25 February 2010, VI Aca 61/09, Lessafre-bio); another concerned bid rigging (SOKiK judgment of
Competition restricting agreements were scrutinised mainly with respect to markets of a national dimension, for instance: a market for the wholesales of baking yeast (SA judgment of 25 February 2010, VI Aca 61/09, Lessafre-bio); markets related to interchange fees in a payment cards system (SA judgment of 2 April 2010, VI Aca 607/09, Interchange fee); a market for the wholesale distribution of the ‘Harry Potter and the Order of the Phoenix’ book (SA judgment of 12 May 2010, VI Aca 983/09, Harry Potter); a market for the sale of ceramic roof tiles (SA judgment of 22 July 2010, VI Aca 1105/09, Röben) and; a market for drainpipes distribution (SOKiK judgment of 15 November 2010, XVII Ama 231/09, Gamrat).

Among the agreements that were subject to judicial review in 2010 only a few occurred on local markets including: a market of bus transport on a certain route (SOKiK judgment of 10 Noveember 2010, XVII Ama 11/09, PKS Zielona Góra) and; a market for maintenance services of municipal greeneries in Lublin (SOKiK judgment of 1 April 2010, XVII Ama 39/09, Miejskie Przedsiębiorstwo Zieleni w Lublinie).

Two judgments referred indirectly to the control of concentrations. One of them focused on the imposition of a fine for the non-fulfilment of the obligation to notify the intent to concentrate (SOKiK judgment of 29 October 2010, XVII Ama 153/09, Port Lotniczy w Jasionce). The other considered the correctness of the discontinuation of the proceedings before the UOKiK President (SOKiK judgment of 9 August 2010, XVII Ama 83/09, Farmacol).

2. Appreciability of a competition restricting practice on the Polish market

The Competition Act applies to practices and concentrations that ‘have or may have an impact in the territory of Poland’ [Article 1(2)]. A comment on this issue can be found in the Supreme Court judgment of 18 February 2010, III SK 28/09, Telekomunikacja Polska (0-708 1xx xxx). The Court confirmed therein that the appreciability of an impact of a competition restricting practice on a Polish market is one of the jurisdictional conditions for an intervention by the UOKiK President. The appreciability condition is evidently met, and thus does not require any further proof in the Court’s opinion, if the practice was undertaken by a Polish entrepreneur operating on a Polish market, if it was directed at other Polish entrepreneurs operating on a Polish market and if it was felt by Polish consumers.
3. Agreements restricting competition

3.1. Price agreements

Ruling on a vertical price agreement on the market of roof tiles (judgment of 22 July 2010, VI Aca 1105/09, Röben), the Court of Appeals stated that offering the same promotional price to distributors not party to the contested agreement did not make the agreement legal. The fact that the products in question were sold to all distributors for the same price, regardless of whether they participate in the agreement or not, did not make the price applied by the manufacturer to the participating distributors into a ‘recommended price’ only.

Seeing as concerted practices are not often the object of antitrust jurisprudence, it is worth mentioning here a judgment delivered by SOKiK which is primarily dedicate to this very problem (judgment of 10 November 2010, XVII Ama 11/09, PKS Zielona Góra). The Court confirmed here a UOKiK President’s decision on a price agreement concluded by way of an information exchange between bus companies. SOKiK identified a number of factors proving in its opinion the existence of price collusion: the fact that the price increases introduced by both companies coincided in time; the fact that the price rise was identical without any economic justification and concerned all types of tickets (single and monthly tickets); the fact that neither of the companies conducted an economic market analysis before the increases and; the possibilities of direct and indirect communication between the two companies.

3.2. Exclusive purchase clause

In the judgment of 25 February 2010, VI ACa 61/097, the Court of Appeals did not share the views of the Lesaffre-Bio Corporation that an exclusive purchase clause belonged to the category of clauses that could not be qualified as restricting competition by their very object according to the Competition Act 2000. The justification of an antitrust decision cannot be limited to stating that the sole presence of such clause proves the anticompetitiveness of its goal, such approach is also unfounded in light of the Competition Act in the Court’s view. If the scrutinised company denies the use of an anticompetitive practice, refers to circumstances that justify a different evaluation of the object and effect of a given clause, and even refers to market data proving that the

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parties did not intend to restrict market access, then the UOKiK President bears the burden of proof regarding the assessment of the facts of the case in the justification of his/her decision. Merely denying the views of Lesaffre-bio was not sufficient, in the opinion of the Court – the antitrust authority should have fully justified its own approach.

At the same time however, the Court stated that it is still not sufficient to simply claim that an anticompetitive object can be associated with a given agreement solely because of the use of an exclusive purchase clause, the market power of the participating manufacturer and the number of participating distributors as well as their share in the market for the sale of Lesaffre-bio’s yeast. Such statements are unfounded without proof of actual real market circumstances at the time of the conclusion of the contract. A high market share of the producer does not make such proof unnecessary because the Competition Act does not prohibit the conclusion of vertical agreements by manufacturers with market shares exceeding 30%. Agreements containing an exclusive purchase clause, concluded by producers with a market share over 30%, are also not prohibited in light of the block exemption for vertical agreements (Council of Ministers’ Regulation of 13 August 2002 on the exemption of certain vertical agreements from the prohibition of competition restricting agreements8).

In the Court’s opinion, the fact that the scrutinised company manufacturing 50% of the available yeast tends to sell it primarily by way of its own distribution network covering a relatively small number of distributors (around 23% of the market), does not make it anticompetitive by nature. Another factor that may disprove the anticompetitive character of the contested contract is the fact that each distributor was free to conclude the agreement and could quit it with relative ease, without serious negative consequences. It is also worth mentioning that yeast constituted such a small part of the range of products offered by the participating distributors that their economic results could not depend on an exclusive cooperation with Lesaffre-bio.

The Lessaffre-bio case is an excellent example of the implementation of an economic approach in an antitrust analysis. In the Court of Appeals’ view, the economic approach means that the antitrust authority is required to conduct a thorough market analysis and, at least with regard to agreements other than those prohibited per se, the UOKiK President cannot rely on market shares as the only factor determining the anticompetitive nature of a practice. Although the Court of Appeals did not conduct such an economic analysis of

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8 Journal of Laws 2002 No. 142, item 1198, as amended. The regulation is not longer in force; it was replaced by the Council of Ministers’ Regulation of 30 March 2011 on the exemption of certain vertical agreements from the prohibition of competition-restricting agreements.
the contested clause, it at least indicated what factors should be taken into account by the antitrust authority while assessing exclusive purchase clauses.

4. Abuse of a dominant position

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

In the judgment of 17 December 2010, VI Aca 427/10, Przedsiębiorstwo Państwowe ‘Porty Lotnicze’, the Court of Appeals presented an exhaustive interpretation of the concept of the ‘public interest’. In its view, public interest (a general social interest) is connected with the conditions of the functioning of the market. Public interest should be considered as ‘a value attributed to a broader scope of entities’. Usually, it has an economic dimension and is associated with benefits, profits, or something resulting in a material gain. The Court stressed that ‘preventing a general economic damage to consumers (or increasing its size) should be treated as a value constituting a public interest in the light of Article 1 of the 2000 Competition Act’.

4.2. Imposition of unfair prices and trading conditions

In the judgment of 18 February 2010, III SK 24/09, RPWiK w Tychach, the Supreme Court ruled that an unfair, excessive price should be understood as a price that ‘was objectively too high’ for a certain good in given market circumstances. In the Court’s view, a glaringly excessive price can be associated with an infringement of the equivalence of benefits principle because every excessive price is a non-equivalent price. The Court stressed that Article 8(2) (1) of the Competition Act 2000 (currently Article 9(2)(1) of the Competition Act 2007) used to treat a ‘glaringly excessive’ price (not just ‘excessive’ but an exceptionally excessive one) as a competition restricting practice. Excessive prices cannot be associated with profit margins or profitability of the given company because even a glaringly excessive price can on occasion generate small profits only for the undertaking that applies it if, for example, the latter has exceptionally high costs. Such situation took indeed place in the scrutinized case where the contested price included huge costs incurred by the scrutinised undertaking due to water losses in its transport system. The Court confirmed that a price that was slightly higher than that of competitors could not be qualified as a competition restricting practice. An assessment whether a price is glaringly excessive should be based on: the costs-based method (comparing prices to production costs) and the comparative method (verifying whether price calculation covers reasonable costs). In the Court’s view, the imposition
of a glaringly excessive price is very rare in a free market although it can be used by undertakings in network monopolies.

4.3. Counteracting the formation of the conditions necessary for the emergence or development of competition

In the judgment of 18 February 2010, III SK 28/09, Telekomunikacja Polska (0-708 1xx xxx), the Supreme Court admitted that ‘neither increasing nor decreasing prices can be qualified in itself as an abuse of a dominant position and it is necessary to affirm other circumstances that make it possible to identify such a behaviour as anticompetitive’. In the analyzed case, the Court found that, for instance, a sudden increase (by 100%) of prices for telecoms connections for numbers starting with 0-708 could be considered as one of the factors indicating abuse in the form of counteracting the formation of the conditions necessary for the emergence or development of competition. In this case, entrepreneurs providing services of domestic and international connections had to face a sudden decrease of income, resulting in a loss of confidence in those companies by consumers that were unaware that a dominant undertaking has caused a price increase.

In the judgment of 3 March 2010, III SK 37/09, Katowice Commune, the Supreme Court upheld its position expressed in an earlier ruling of 19 February 2009, III SK 31/08 (DROP). Accordingly, an abuse of a dominant position through ‘counteracting the formation of the conditions necessary for the emergence or development of competition’ (Article 9(2)(5) of the Competition Act) takes place not only when the behaviour of the dominant company makes it impossible or difficult for its competitors to act, but also when it creates barriers fundamental for the effective entry onto the market or that market’s development. In order to establish that a practice listed in Article 9(2)(5) took place, it is not enough to prove that the freedom of another company was restricted. It is also necessary to show that the limitation can actually or potentially influence the parameters of competition on the relevant market.

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9 The Court of Appeals followed the reasoning of the Supreme Court and thus the appeal was dismissed – judgment of 25 June 2010, VI Aca 613/06, Katowice Commune.

2010 saw the continuation of the *Telekomunikacja Polska/Tele 2 (Netia)* case after SOKiK modified in 2009 the decision of the UOKiK President issued in 2007 and by doing so, denied the existence of an abuse originally established by the antitrust authority. The Court of Appeals shared SOKiK’s position and dismissed the appeal in the judgment of 16 June 2010, VI Aca 1343/09. In the Court’s opinion, in order to recognize a company’s behaviour as abusive, in the form of counteracting the formation of the conditions necessary for the emergence or development of competition, ‘the scale of the practice must have been significant enough to have a real impact on the existing conditions of competition’. The answer to the question whether the practice was intentional (meant to be anticompetitive), or if its restrictive effects were merely a result of ‘objective difficulties’, is totally meaningless for establishing an infringement of the abuse prohibition. Following SOKiK’s reasoning, the Court of Appeals stressed also that the UOKiK President had not unequivocally proven the existence of an abuse because the number of pre-selection orders analyzed by the authority was proportionally far too small (999 orders out of total of 1,000,000 orders for pre-selection). The Court of Appeals suggested that an analysis of several thousands of such orders could have justified a final conclusion on the existence or non-existence of abuse. Incidentally, SOKiK was far more radical excepting an analysis of between ten and twenty thousand of orders but the Court of Appeals conceded that such a demand was too much even for the UOKiK President.

In the judgment of 8 December 2010, XVII Ama 199/09, **ZAIKS**, SOKiK confirmed that the practice listed in Article 9(2)(5) of the Competition Act, ‘counteracting the formation of the conditions necessary for the emergence or development of competition’, could be enforced by an entrepreneur who, as a copyright collecting society such as ZAIKS, holds a monopoly on the relevant market. In SOKiK’s opinion, even if on a monopolistic market no practice can counteract the formation of the conditions necessary for the development of competition because the latter does not exist, an actual monopolist can still counteract the formation of the conditions necessary for its emergence. The Court stated that even if there is presently no other collective rights management organization for music in Poland, there are still foreign entities that can potentially enter the market. The Court shared also an opinion expressed by the doctrine\(^\text{11}\) that applying Article 9(2)(5) of the Competition Act does not require the affirmation of a discrimination between entrepreneurs.

\(^{11}\) K. Kohutek, ‘Glosa do wyroku SN z dnia 14 listopada 2008 r., sygn. akt III SK 9/08’[‘Comment to the judgment of the Supreme Court of 14 November 2008, ref. no. III SK 9/08’], LEX/el.2009.
4.4. Imposition of onerous agreement terms and conditions

The Court of Appeals assessed the fact that Przedsiębiorstwo Państwowe Porty Lotnicze (hereafter: PPL) applied different charges for airport services and navigation services with respect to domestic and international flights. In its judgment of 17 December 2010, VI Aca 427/10, PPL, the Court shared the views of both the UOKiK President and SOKiK that such a practice constituted an abuse prohibited by Article 9(2)(3) of the Competition Act in the form of an ‘application to equivalent transactions with third parties of onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition’. The Court rejected the argument of the plaintiff that the different charges ‘had no impact on the assessment of the competitiveness of the services’. In the Court’s opinion, applying dissimilar contract prices cannot be approved aside from cases when price differentiation can be economically justified (mainly by different service provision costs). Lower charges allow their beneficiaries to offer their clients services cheaper than those contractors who do not enjoy the privilege. The latter cannot therefore pass similar benefits on their clients.

In the judgment of 17 March 2010, III SK 33/09, SPED-PRO, the Supreme Court approved the opinion of the lower instance courts that the use of onerous and dissimilar contractual terms (an abuse in the meaning of Article 8(2)(3) of the Competition Act 2000) cannot be automatically qualified as an abuse in the form of a refusal to deal (here, a refusal to conclude a multiannual contract) in the meaning of Article 8(2)(5) of the Competition Act 2000. Facts totally different to those that became the basis for establishing the use of onerous and dissimilar terms must be found to justify the qualification of a restrictive practice also as a refusal to deal.

The Court of Appeals in the judgment of 7 May 2010, VI Aca 1084/09, PWiK, ruled that an abuse of a dominant position by way of the imposition of onerous and unjustified contract terms (in the meaning of Article 9(2)(6) of the Competition Act) on a given contractor could not be justified by the necessity to protect the interests of other contractors. The Court claimed regarding the nature of such restrictive practice, which yields unjustified profits to this undertaking, that an abuse can exist if a water supply company imposes a contractual clause that excludes its liability for interruptions in water supply and sewage collection caused by any reason, including that company’s own activity. The fact that a company does not have to pay damages to its clients, where it gets damages from an energy company for instance that caused the disturbance in water provision, was considered by the Court of Appeals as ‘a source of unjustified profits’.
4.5. Tying

An abuse of a dominant position in the form of tying has not often been confirmed by Polish jurisprudence. In the judgment of 17 March 2010, III SK 41/09 (Telekomunikacja Polska)\(^\text{12}\), the Supreme Court denied once again the existence of any customary relation (within the meaning of Article 8(2)(4) of the Competition Act 2000, currently Article 9(2)(4) of the Competition Act 2007) between broadband Internet access services and analogue telephone connection services. The Court stated that ‘such a relation may result from a market practice, excluding a situation when the source of the practice is exclusively the dominant’s behaviour’. The Supreme Court shared the views of lower instance courts that: ‘it is not sufficient to prove a customary relation by referring to practices applied on foreign markets because a custom relevant for Article 8(2)(4) of the Competition Act 2000 (currently Article 9(2)(4) of the Competition Act 2007) is a custom on a given relevant market where tying is being applied’.

5. Control of concentration

Judgments concerning the control of concentration are pretty rare and so it is worth noting even the rulings of the court of first instance. By the judgment of 9 August 2010, XVII Ama 83/09, Farmacol, SOKiK ruled on an appeal against the UOKiK President’s decision to discontinue concentration proceedings concerning the takeover of Cefarm (owned at that time by the Treasury). The decision was issued after the UOKiK President established that the negotiations between the plaintiff (Farmacol) and the acquired company (Cefarm) had failed resulting in the grant, by the Treasury Minister, of an exclusive right to negotiate with Cefarm to other companies. However, the UOKiK President adopted in 2009 a decision permitting the acquisition of Cefarm by Farmacol. In the Court’s view, if the plaintiff received a decision that was in accordance with its notification of an intention to concentrate, an appeal cannot be ruled on. Approving an appeal would result in conducting proceedings that cannot be continued because the UOKiK’s President had already adopted a decision on the issue covered by the notification that initiated them in the first place (permission to acquire Cefarm by Farmacol). The Court added that the UOKiK President was not allowed to assess any

\(^{12}\) See Sz. Syp, ‘Intersection between the activities of two regulators – shall prior actions taken by the National Telecoms Regulator exclude the ability to intervene by the Competition Authority?Case comments to the judgment of the Supreme Court of 17 March 2010 – Telekomunikacja Polska S.A. (Ref. No. III SK 41/09)’ (2011) 4(5) YARS.
possibilities to enforce an intention to concentrate e.g. on the basis of hitherto negotiations.

In the judgment of 29 October 2010, XVII Ama 153/09, Port Lotniczy ‘Jasionka’, SOKiK confirmed that in a case of a full-function joint venture, established in the form of a limited liability company, the very last moment when an intention to concentrate could be notified to the antitrust authority was the moment before the company was enrolled into the company registry. That moment is the point in time when the new company gets its legal personality with all its consequences and that means, the over-running of the notification period for concentration.

SOKiK stressed in the same judgment that imposing a fine for the failure to notify a concentration does not depend on the effects of the non-notified concentration for market competition. The lack of an impact on competition may be considered only in setting the level of the fine.

6. Identification of relevant markets

Inadequate relevant market definition became the main reason for the annulment of a judgment delivered by SOKiK in the Interchange fee case (judgment of 12 November 2008, XVII Ama 109/07); the case was sent back for a renewed assessment to SOKiK by the Court of Appeals (judgment of 22 April 2010, VI Aca 607/09)\(^{13}\). The UOKiK President identified originally a price agreement among banks on the relevant market for acquiring services. SOKiK alleged that while such market did in fact exist, there was however no interchange fee on it. This statement was the source of the conclusion that banks could not be the addressees of the original antitrust decision as they had not entered into the agreement on acquiring services. In other words, they had not concluded an agreement influencing the market for acquiring services. In SOKiK’s view, the relevant market in the case should have been identified as the market for payment cards. The Court of Appeals overruled SOKiK’s judgment. Referring to the Commission’s Visa decision\(^ {14}\), it stated that the relations between those engaged in the payment process are very complex – a horizontal agreement among banks and a vertical one with the participation of system operators (Visa and MasterCard). The agreement between banks could thus have had an impact on the market for acquiring services.

In the judgment of 12 May 2010, VI Aca 983/09, Harry Potter, the Court of Appeals confirmed that the book entitled ‘Harry Potter and the Order of

\(^{13}\) For more details see K. Tosza, ‘The very relevant market. Case comment to judgment of the Court of Appeals of 22 April 2010 – Interchange fee’ (2011) 4(5) YARS.

\(^{14}\) Visa decision of 24 July 2002, COMP/29.373.
Phoenix’ constitutes its own relevant market. Being a unique part of a very famous book series, the contested title cannot be replaced by any other fantasy books on offer and distributors cannot afford to not sell it.

The correctness of the relevant market definition was also scrutinized by the Court of Appeals in the Przedsiębiorstwo Państwowe ‘Porty Lotnicze’ case (judgment of 17 December 2010, VI Aca 427/10) concerning the activities of PPL, a state enterprise providing airport management services. The UOKiK President identified here a product market for ‘payable services of providing airport infrastructure’ that covered both airport and navigation services. PPL claimed unsuccessfully that separate product markets exited for airport services and navigational services. The Court of Appeals agreed with the UOKiK President and SOKiK also as far as the geographic delineation of the relevant market and confirmed that every single airport (Warsaw, Rzeszów and Zielona Góra) constituted a separate geographical market (such a position is justified in the context of EU case law).

7. Relationships between decisions of the UOKiK President and decisions of other regulatory authorities

In its judgment of 17 March 2010, III SK 41/09 (Telekomunikacja Polska)¹⁵, the Supreme Court sustained its previous opinion that an earlier activity of the telecoms regulator (in Polish: Urząd Komunikacji Elektronicznej; hereafter, UKE) precludes the UOKiK President from intervening in an area covered by a decision issued by the UKE President. As a result, the UOKiK President could not qualify tariff lists already approved by the UKE President as a competition restricting practice. However, the concerns of the antitrust authority were not on the existing tariff lists but the lack of a tariff plan exclusively for telephone access in the offer of the dominant telecoms operator. ‘If only a telecommunications operator is entitled to introduce the conditions and price list for its services, a regulatory authority cannot – within a price list approval procedure – demand from that operator to present a proposal for offers not included in the draft presented for approval. Therefore, an approval by the UKE President of a price list of services provided by an operator does not exclude the possibility of the UOKiK President to intervene (with respect to services not covered by the list approved by the telecoms regulator – AJG)’.

¹⁵ See Sz. Syp, ‘Intersection between the activities…’ (2011) 4(5) YARS.
8. Competition Act and other legislation

The Supreme Court analysed once again in the judgment of 3 March 2010, III SK 37/09, *Katowice Commune*\(^{16}\), the relationship between the Competition Act and Polish laws dealing with municipal waste collection\(^{17}\). The Supreme Court reaffirmed here that the Competition Act is applicable in areas where free market mechanisms operate. In partly regulated fields, such as waste management, these are the areas where the legislator gave companies the autonomy to shape their own market behaviour. The Court repeated its earlier opinion, expressed in the judgment of 15 July 2009, III SK 34/08, that legislation such as the Act on Maintaining Tidiness and Order in Municipalities\(^{18}\) or Act on Waste Management\(^{19}\), can either influence the range of competition restricting practices which can be contested by the UOKiK President or act as a justification for a given practice, excluding an abuse of a dominant position. The same problem was touched upon by the Court of Appeals in the judgment of 8 April 2010, VI Aca 1068/09, *Czarnków Commune* (the second appeal in the case was dismissed). Referring to Article 3 of the Competition Act, the Court of Appeals stated here that a ‘limitation or exclusion of the mechanisms of competition is permissible only on the basis of a legislative act (in Polish: *ustawa*)’.

In the judgment of 7 May 2010, VI Aca 1084/09, *PWIK*, the Court of Appeals ruled that if a legal act contained an exhaustive catalogue of reasons that justify a given practice (in this case: the cutting of water supplies), adding other reasons, not mentioned in the act, may be treated as an abuse of a dominant position by way of the imposition of onerous agreement terms and conditions, yielding unjustified profits to the offending undertaking (Article 9(2)(6) of the Competition Act).

In the judgment of 18 February 2010, III SK 24/09, *RPWiK w Tychach*, the Supreme Court affirmed that even if the Act of 7 June 2001 on Collective Water Provision and Sewage Collection\(^{20}\) stated in its Article 6(1a) that water provision and sewage collection contracts are subject to the Civil Code, this does not mean that the Competition Act is not applicable to such contracts.

\(^{19}\) Journal of Laws of 2007 No. 50 item 331, as amended
\(^{20}\) Consolidated text: Journal of Laws 2006 No. 13, item 858, as amended.
9. Competences of the UOKiK President to act

The competence to act of the UOKiK President was raised in the Lesaffre-Bio case considered first by SOKiK (judgment of 18 August 2008, XVII Ama 83/07) and then by the Court of Appeals (judgment of 25 February 2010, VI Aca 61/09). The applicant contested here the validity of a decision issued by the UOKiK President. In the applicants’ opinion, the decision was adopted by a person (Cezary Banasiński) whose competences to act as the UOKiK President expired on 27 October 2007, in other words, before the contested decision was issued on 29 December 2007. The Court of Appeal stated however that in the moment of adopting the said decision, the UOKiK President had been legally appointment to his position and not yet dismissed by the Prime Minister. Such a situation excludes the possibility to declare the contested decision null and void – a claim to do so is thus unjustified. The Court of Appeal shared here the views of SOKiK that competition courts are not entitled to rule on the time of the expiry of the UOKiK President’s competences resulting from an appointment act issued by an eligible body. Both courts referred to the resolution of the Supreme Court of 20 February 2008, III SZP 1/08 that stated, as a general rule, that general courts do not have the competence to control the procedural accuracy of formally correct acts of appointment and dismissal of public administration bodies. Even if the resolution concerned the UKE President rather than the antitrust authority, the Court of Appeal found it applicable to the UOKiK President also.

10. Immediate enforcement of the decisions of the UOKiK President

The Supreme Court, in the judgment of 17 March 2010, III SK 33/09, SPED-PRO, confirmed that the UOKiK President was justified for imposing an immediate enforceability condition on the contested decision in light of the onerous character of the restrictive practice at hand and its long duration. The Court confirmed that the conditions for immediate enforceability, prescribed in Article 90 of the Competition Act 2000, are met in a situation such as this case, where it is necessary to protect competition and important consumer interests. In the opinion of the Supreme Court, the lack of immediate enforceability, and thus possibility for the prohibited practice to continue until the decision enters into force, could cause further negative effects not only for the interests of the dominant company’s competitors, but also for the public interest. The weakening position of the scrutinised undertaking at the moment

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of the adoption of the antitrust decision cannot act as an argument against the duty of its immediate enforceability provided, that the restrictive practice in question is among those most dangerous for competition – only the gravest practices meet the conditions for immediate enforceability.

11. Juridical control over the decisions of the UOKiK President

The scope and character of judicial control over the decisions issued by the UOKiK President was assessed by the Court of Appeals in the judgment of 13 May 2009, VI Aca 126/10, *TP EMITEL*22. The appeal concerned a SOKiK judgment which in turn overruled a decision originally issued by the UOKiK President because of an incorrect relevant market definition. In SOKiK’s opinion, a national market for terrestrial broadcasting services for radio and television programmes did not actually exist as established by the antitrust authority. SOKiK found itself unable to scrutinize the alleged abuse of dominance held on a non-existing market and thus also unable, to adopt a judgment amending the antitrust decision. Ultimately, SOKiK annulled the decision firstly, because ‘an administrative proceeding has not been ‘exhausted’ with respect to an abuse of a dominant position on any other market’ and secondly, an incorrect identification of the relevant market caused the decision issued by the UOKiK President to be premature’. Thus, SOKiK stated that there were ‘no grounds to adopt it’ in the first place.

The Court of Appeals did not share this opinion and emphasised that as the court of first instance responsible for this matter, SOKiK ‘cannot limit itself to pointing out the incorrectness of the decision, but it is entitled, if this is justified by facts and law, to eliminate mistakes in that decision’. The ‘non-exhaustion’ of administrative procedures, identified by SOKiK as the key reason for its supposed lack of competence to solve the case, should be understood, in the opinion of the Court of Appeals, as a failure to complete the proceedings. The Court of Appeals referred also to the judgment of the Supreme Court of 13 May 2004, III SK 44/04, where the latter stressed that the goal of court proceedings is not to control administrative decisions but to resolve the case on its merits. In the opinion of the Court of Appeals, an antitrust decision can be annulled only when there was no ground to adopt it, for instance, it the UOKiK President incorrectly affirmed the existence of restrictive practices. Article 47934 of the Polish Civil Procedure Code does not offer the possibility to annul an antitrust decision and referring the case back

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for a renewed assessment by the UOKiK President. In the *TP EMITEL* case, SOKiK should therefore have delineated its own relevant market in order to change the UOKiK’s decision properly.

In the judgment of 18 February 2010, III SK 28/09, *Telekomunikacja Polska* (0-708 1xx xxx), the Supreme Court stated that ‘an annulment of the UOKiK President’s decision or its modification are forms of rulings by the court on the claims of the applicant. (...) An object of a claim in antitrust cases is the declaration that an undertaking did not infringe legal provisions [the Competition Act – AJG] or did it in a narrower way than it is declared in the UOKiK President’s decision’. The Supreme Court stressed that ‘an annulment of a decision does not end the proceeding in the given case, but it enables the UOKiK President to conduct new proceedings, to fill up the gaps pointed out by the court (e.g. completing evidence and reasoning on an impact of a company’s behaviour on a relevant market) and to issue a new decision confirming a competition restricting practice’. The Supreme Court affirmed then that ‘if an applicant claims that he/she did not violate competition rules in the scope declared in the UOKiK President’s decision, the assessment [of the court – AJG] concerns only facts that are essence of reconstruction of particular prerequisites of a competition restricting practice that in the UOKiK President’s view was committed by the entrepreneur’. Moreover, settled jurisprudence of the Supreme Court shows that a court may choose the legal basis of its ruling independently of the original decision if this new basis is justified by facts proven by parties. Thus, courts are entitled to change the legal qualification of restrictive practices from that adopted by the UOKiK President or proposed in the appeal (courts may qualify a practice as infringing a provision other than the one pointed by the competition body). However, courts delivering rulings on appeals from the decisions of the UOKiK President cannot charge the appellant with a practice other than the one established in the antitrust decision (for instance, if the UOKiK President found price discrimination, the court cannot establish also a refusal to deal). In the opinion of the Supreme Court, while delivering a ruling on an appeal, courts are free however to narrow down the scope of an entrepreneur’s behaviour qualified by the UOKiK President as anticompetitive.

12. Fines

In the judgment of 9 November 2010, VI Aca 383/10 (*Mariusz Sieradzki*), the Court of Appeals refers to the basis for calculating a fine for an antitrust infringement, a vertical price agreement in this case. The problem arises because while Article 106(1) of the Competition Act does state that fines are
based on revenue, it does not clarify what kind of income should be regarded as the basis for calculating the fine: the total income of the scrutinised entity or just the income from the sales of products/services covered by the restricting practice? The Court admitted that the Polish judicature had accepted the calculation of fines on the basis of the overall income. Such an interpretation of Article 106(1) is justified by the preventive nature of fines – otherwise they would be too low to prevent companies from anticompetitive behaviour.

In the Tikurilla case however, a decision of the UOKiK President appealed by Mariusz Sieradzki (a natural person conducting a business activity), fines were calculated on the basis of the income that corresponded to the market covered by the contested vertical agreement. Although the Court did not criticize such an approach in general, the UOKiK President calculated the fine for Mariusz Sieradzki on the basis of his overall income instead. The main reason for the dissimilar treatment was the incorrectness of data on the amount of income delivered by the punished entrepreneur. The Court of Appeals claimed that the UOKiK President, as a public administration body, should have established the real amount of the income during the antitrust proceedings and required the applicant in the commented case to indicate the correct amount. Since that was not the case, the difference in the respective fines imposed on various parties of the same prohibited agreement was unjustified. The Court stated that even if fines were calculated individually for each company, the rule of non-discrimination required the same, or at least a very similar part of the income to be used as the basis for fine calculation for the same or similar infringement.

By the judgment of 12 May 2010, VI Aca 983/09, Harry Potter, the Court of Appeals decreased the amount of the fine imposed on a given book distributor. The Court accepted here the argument that the penalty was calculated on the basis of an enormous annual income. Even if it was correct from a formal point view (the UOKiK President calculated the fine with reference to the income from 2004, the year preceding the year when the antitrust proceeding ended), that old of an income base was used only because the antitrust proceedings have not ended within the time limit prescribed by the Competition Act. That position of the Court of Appeals should be applauded. However, as a reason for decreasing the amount of the fine, the Court of Appeals mentioned the fact that even if a given company (a publisher) had a leading role in the vertical price agreement, ‘no agreement would have been made if distributors had protested against the conditions imposed upon them as they had enjoyed sufficient economic strength’ to protest against the proposed practice. Such a position of the Court is astonishing as it actually destroys the concept of a ‘ring-leader’ as an aggravating factor for fine setting. Clearly, without the consent of the other parties, there would have been no agreement at all.
13. Polish antitrust law and common competition rules of the European Union

In the Interchange fee case (SA judgment of 22 April 2008, VI Aca 607/09) the Court of Appeals dealt also with a claim submitted by the UOKiK President that SOKiK had in fact infringed EU law (Article 16 of the Regulation 1/2003) because it had adopted a judgment contrary to the European jurisprudence. The submission was dismissed because the uniformity requirement concerning national jurisprudence with respect to Commission decisions concerns the same cases only. The Polish Interchange fee case constituted, in the Court’s opinion, a different case however to that assessed by the Commission in the decision of 19 December 2007 (COMP/34.579). The Polish case was said to have referred to agreements on interchange fees concluded on the national market while the Commission decision concerns cross-border interchange fees.
2010 Legislative Developments in Telecommunications

by

Kamil Kosmala*

I. Amendments to the Polish Telecommunications law

The Act from 9 April 2010 on the amendment of the Telecommunications Law Act† (in Polish: Prawo Telekomunikacyjne; hereafter, PT) introduced a broad range of changes concerning the principles in accordance to which telecoms services are to be provided to end users in Poland. It is important to stress first the change in the definition of a ‘subscriber’ [Article 2(1) PT]. Accordingly, every entity that is party to an agreement for the provision of telecoms services concluded with a provider of publicly available telecoms services, irrespective of whether the agreement is concluded in a written or any other form, is now considered a ‘subscriber’. This amendment results from the ECJ judgment of 22 January 2009‡. The Court declared therein that the limitation of the definition of a ‘subscriber’ to entities that are party to written telecoms agreements only is incompatible with Article 2(k) of the Framework Directive. Its incorrect implementation led to the violation of a number of subscriber rights as set out in specific provisions of the EU telecoms package. Such rights include, in particular: the right to have their information entered into a publicly available directory service (required by Article 25 Directive 2002/22§); the right to receive non-itemized bills (required by Article 7 Directive 2002/58∥); the possibility, by

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† Journal of Laws 2010 No. 10, item 554.
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 Directive 2002/58); the possibility of preventing automatic call forwarding by a third party to the subscriber’s terminal (required by Article 11 Directive 2002/58); rights concerning the publication of subscriber directories (required by Article 12 Directive 2002/58); rights concerning unsolicited communications (required by Article 13 Directive 2002/58). The change in the definition of a ‘subscriber’ necessitated further amendments of the content of Polish Telecommunications Law including: provisions on the methods used to change contractual provisions by remote means (Article 56(6) PT); rules concerning general terms and conditions (Article 59, 60 and 60a PT); provisions on prices of services provided (Article 61 PT); and finally, rules concerning certain rights which, until now, applied exclusively to subscribers who had signed a written telecoms contract (Articles 80, 103 and 131 PT).

The aforementioned amendments should be appraised as appropriate and necessary in the light of the ECJ ruling. It is, however, difficult to explain why did it take the Polish legislator more than a whole year to complete the implementation of the judgment, particularly considering that the infringement procedure leading to the ruling was initiated as early as May 2005.

Among the key legislative development in Polish telecoms in 2010 are also the changes introduced by the Act of 29 October 2010 on the amendment of the Telecommunications law Act5 concerning the use of negotiated regulatory instruments. On its basis, a new legal framework was established that makes it possible to conclude an ‘understanding’ (settlement) between the Polish telecoms regulator, the President of the Electronic Communication Office (in Polish: Urząd Komunikacji Elektronicznej; hereafter, UKE), and specific telecoms undertakings. The first of such ‘understandings’, which was in fact concluded before the entry into force of these provisions and thus in the absence of a binding normative basis, was signed on 22 October 2009 by the UKE President and Telekomunikacja Polska S.A.6, the incumbent Polish telecoms operator.

At the same time, the Amendment Act of 29 October 2010 introduced a new Article 43a into the Polish Telecommunications Law Act. Accordingly, an operator with significant market power (SMP), which is subject to regulatory obligations, may request the UKE President to accept specific conditions for the performance of such regulatory obligations. The request may also concern the approval of other obligations provided they can lead to: the effective

5 Journal of Laws 2010 No. 229, item 1499.
6 Text of this Agreement available on the website of the UKE President: www.uke.gov.pl.
realization of regulatory obligations already imposed on that undertaking; the
development of fair and effective competition; or if they provide end users
with certain benefits (with respect to the variety, price and quality of telecoms
services). The benefits referred to in Article 43a(1)(2) must however have a
maximum dimension. The latter concept must be treated as an indication, or
a point of reference, for the comparison between different offers submitted
by one or several different telecoms undertakings.

Aside from typical tools of administrative procedure, the procedure for
the approval of a proposal submitted by a telecoms enterprise includes the
conduct of negotiations between the UKE President and the requesting party
as well as the consultation of experts. The approval of particular regulatory
conditions that are referred to above is undertaken by the UKE President in
the form of an administrative decision, which may be issued subject to specific
terms and conditions. A decision issued under Article 43a PT can be appealed
to the court for competition and consumer protection. A key consequence
of the determination by the UKE President of specific regulatory conditions
in accordance with Article 43a PT is the regulator’s ability to penalize the
requesting party for its failure to implement such decision. The UKE President
can impose in this context a fine of up to 3% of the income of the offender
on the basis of the newly inserted Article 209(1)(12a) PT.

This amendment has provided telecoms undertakings with a relatively
flexible tool for the formulation of regulatory obligations imposed upon
them. It is important to note however that telecoms undertakings might face
in its light onerous financial responsibilities similar to those relating to the
performance of regulatory obligations implemented in the usual manner. The
aforementioned sanction does not concern, however, every infringement of
a decision issued under Article 43a PT but only the failure to perform, or the
improper performance, of specific regulatory conditions as accepted by an
Article 43a PT decision (which corresponds to the scope of the norms under
Article 43a(1)(1). The possibility of a fine does not, therefore, concern the
acceptance of ‘other obligations’ (in accordance with Article 43a(1)(2), which
may be subject to a separate decision (or part of a decision) concerning the
performance of regulatory obligations. It is difficult to say if the Polish legislator
actually intended for a partial penalization of the failure to implement an
Article 43a PT decision. Still, experience with respect to the implementation
of this provision shows that the so-called ‘other obligations’ make up a very
important part of decisions taken under Article 43a PT.

2010 saw also the introduction of a number of minor amendments to the
Telecommunications law Act by the following legislation:

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7 See decisions issued on the request of mobile network operators, available on the website
– Act of 9 April 2010 on the making available of economic information and the exchange of economic information\(^8\),
– Act of 5 September 2010 on the protection of confidential information\(^9\),
– Act of 26 November 2010 on the amendment of certain Acts associated with the realization of the budgetary Act\(^10\).

II. Broadband Act

In 2010, the Polish telecoms market was also greatly influenced by the Act of 7 May 2010 on supporting the development of telecommunications networks and services\(^11\) (hereafter, Broadband Act). The Broadband Act established the principles for supporting telecoms investments (particularly with respect to broadband networks) most importantly in this context, those regarding the establishment of regional broadband networks. Set out therein were also the principles for the carrying out of telecoms activities by local government authorities.

The Broadband Act amended a large number of administrative law provisions including a number of rules on the activities of local governments and those concerning construction, real estate and other areas relating to the undertaking of telecoms-related investments. Due to the broad range of issues falling within its scope, the Broadband Act is certainly worthy of separate consideration. This discussion will focus on an analysis of the changes introduced by the Broadband Act into the Polish Telecommunications Law Act.

First, the Broadband Act expanded information-related obligations applicable to operators of telecoms networks. In compliance with the provisions of Article 6a and 6b PT, such operators are now obliged to submit, at the request of the UKE President, information on the location and type of infrastructure in their possession. That data is to be submitted in order to fulfill requirements concerning telecoms access applications by local governments, or to evaluate the merits of public intervention into the telecoms sector. The latter condition appears to be rather vague and should thus be interpreted as a need for a substantive analysis necessary in order for the telecoms regulator to perform its competences *ex officio*. With respect to the Broadband Act, these competences cover, for example, amendments to the decision on the co-use

\(^8\) Journal of Laws 2010 No. 81, item 530.
\(^9\) Journal of Laws 2010 No. 182, item 1228.
\(^10\) Journal of Laws 2010 No. 238, item 1578.
of, or access to, technical infrastructure in cases of a justified need to protect the interests of end users or effective competition (Article 22(4)).

Second, the Broadband Act set out registration requirements with respect to local government units performing telecoms activities that do not have the character of an economic activity. The appropriate register, as in the case of the register of telecoms undertakings, is maintained by the UKE President.

Third, in an effort to expand the competences of the UKE President with respect to the building of telecoms networks, the Broadband Act inserted a new Article 122a into the Polish Telecommunications Law Act. Therein, the regulator was given the ability to establish a schedule for the development of a network using radio frequencies and to identify the areas that should be excluded from its range. These powers concern situations where the subject in possession of a frequency reservation fails to comply with its commitments made in a tender or frequency-allocation competition, for the purposes of telecoms or broadcasting respectively. The granting of a decision under Article 122a PT must be preceded by a consultation procedure performed in accordance with Article 16 PT. The last requirement may, however, be overlooked in exceptional circumstances requiring immediate action in compliance with Article 17 PT. In such cases, the resulting regulatory decision can be granted for a maximum duration of 6 months.

Fourth, the Broadband Act formulated the principles for a local authority unit to carry out telecoms activities and set out relevant limitations. On the one hand, it established that the carrying out of telecoms activities is the task of local authorities (surprisingly, those on all three administrative levels, i.e. gmina, powiat, and województwo)\(^\text{12}\). On the other hand, it established that the provision of internet-access services to end-users under preferential conditions (free of charge or for a rate lower than the market price) is allowed exclusively if end-user requirements in this respect are not met by the market, and subject to the approval of the UKE President issued in the form of a decision. A decision to that end is granted on the basis of Article 7(2) of the Broadband Act. The UKE President shall define therein relevant conditions and parameters for the provision of internet-access services by local government units including, among other things, the area of their activity, the maximum bandwidth as well as certain other conditions.

Doubts certainly arise about such a far reaching interference by the telecoms regulator in the performance by local government units of their competences. This situation is all the more questionable because the clear objective of these new regulatory competences is the protection of the interests of telecoms enterprises. The interests of the latter are, incidentally, additionally

\(^{12}\) For more information see: A. Mednis, ‘Megaustawa z punktu widzenia samorządów’ (2010) 1 Prawo i Regulacje Świata Telekomunikacji i Mediów 27–31.
safeguarded on the basis of Articles 8 of the Broadband Act which gives them the right to make use of the infrastructure or telecoms networks belonging to local governments in exchange for a fee which is set below production costs.

Fifth, the Broadband Act was designed to regulate access to property and buildings in order to facilitate the installation of telecoms infrastructure — so-called right of way. Accordingly, Articles 58, 140 and 141 PT, which regulated this issue until now, were removed from the Telecommunications law Act. In comparison to the old provisions, the new rules contained in the Broadband Act broaden the range of entities entitled to the exercise of the ‘right of way’ with respect to local government authorities. At the same time, Chapter 3 of the Broadband Act entitled: ‘In-building wiring and the right of way’ contains more developed rules in this respect than those previously specified in the Telecommunications law Act.

Sixth, the Broadband Act formulated detailed provisions concerning the localization of telecoms investments and, in particular, the creation of regional broadband networks. Importantly in this respect, it precluded local space management plans created by individual municipal authorities from prohibiting (or rendering impossible) the localization therein of public investment in the electronic communications sector, provided that such investment is compatible with other binding legislation (e.g. rules regarding environmental protection and construction law). Without going into too much detail on this issue, it is worth noting that a relatively controversial procedural solution was applied here regarding the manner in which a decision issued by a voivod (representative of government administration at the regional level) in the above matters is verified. First of all, and in accordance with Article 58(5) of the Broadband Act, it is impossible to repeal a decision on the localization of a regional broadband network in its entirety. The invalidity of such a decision can also not be declared in cases where the fault or error concerns only part of the decision relating to the regional section of a broadband network. The final decision can also not be declared invalid where the application for a declaration of its invalidity is submitted more than 14 days after the day on which that decision became final and the investor has begun the construction process. In such cases, an administrative court may declare that the decision is unlawful by virtue of the reasons set out in Articles 145 and 156 of the Code of Administrative Procedure13 — without any consequences for the legal standing of the challenged decision however. It is fair to say therefore that in light of the potential social benefits of the creation of regional broadband networks, the legislator approved their operation on the basis of administrative

decisions defective by reasons of their invalidity or, under normal conditions, a prerequisite for the resumption of proceedings.

Seventh, the Broadband Act introduced procedural changes into the Telecommunications law Act by broadening the catalogue of regulatory decisions to be verified by means of an appeal to the court for competition and consumer protection on the basis of the Code of civil procedure (Article 206(2)(6) and Article 206(3) PT). This issue concerns decisions issued by the UKE President on the basis of the following provisions of the Broadband Act: Article 7(1) (consent for the provision of internet access services by a local government free of charge or for a fee that is below market price), Article 13(2) (decisions concerning telecoms access provided by a local government), Articles 20, 21(2) and Article 22 of the Broadband Act (decisions amending or replacing a contract on the co-use of, or access to, technical infrastructure concluded with an entity performing a public utilities activity).

At the same time, a completely new procedure was established for the appeal of decisions granted on the basis of Article 30 of the Broadband Act. Article 30 refers to the imposition on property owners, holders of a perpetual usufruct or property managers of an obligation to grant a ‘right of way’ to a telecoms undertaking. In accordance with the newly inserted Article 206(2a) PT, such decisions may be ‘appealed to a common court’. Unfortunately, the legislator did not specify which court the Act refers to: regional or district; civil or economic. This situation is additionally complicated because the provisions of the Polish Code of civil procedure in economic matters do not apply to such procedures (reference from Article 206(3) PT does not include Article 206(2a) PT). Notwithstanding the fact that this solution is difficult to apply in practice, it constitutes an unnecessary differentiation of appeal procedures applicable in ‘right of way’ cases. Pursuant to Article 30(5) of the Broadband Act, the relevant provisions of its Articles 19 – 24 apply with respect to real estate access. As a result, they form the basis of the granting of a decision by the UKE President and verified by an appeal to the court for competition and consumer protection. The use of identical standards of competences regarding the settlement by the UKE President of infrastructure access disputes and the use of the ‘rights of way’ is thus verified under two different procedures.
2010 Amendments to the Polish Energy Law

by

Filip Elżanowski*

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IV. Summary

I. General remarks

In 2010 the Polish Parliament passed just two amendments to the Act of April 10, 1997 – the Energy Law\(^1\) (hereafter, the Energy Law). The first of them is the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts\(^2\). The second change to the Energy Law was enacted by virtue of the Act of April 9, 2010 on making available economic information and exchanging economic data\(^3\). The first of the above amendments, the work into which had begun early in 2009, has significantly influenced the functioning of the electricity market in Poland. This amendment has a manifold character and in a comprehensive manner regulates a range of issues that will be discussed in this paper. However, the change enacted by virtue of the second of the two amendments herein referred to is minor and concerns one of the aspects of how energy undertakings operate.

Passage of the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts was the outcome not only of the necessity to adapt the provisions of the Energy Law to the demands of European legislation, but also stemmed from the practical needs of the market’s functioning. In the past years certain disadvantageous trends had become observable in the behavior of those participating on the market, including speculative activities when reserving the grid power of wind farms in the electricity system, and the sale of electricity by producers to a trade company in the framework of a single market group at a price substantially lower than the price which was determined outside the given group for users and end users (this practice

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\(^1\) Journal of Laws 2006 No. 89, item 625, as amended.
\(^2\) Journal of Laws 2010 No. 21, item 104.
\(^3\) Journal of Laws 2010 No. 81, item 530.
leads to an increase in the compensations received by producers through stranded costs, which will be described in detail below). It therefore became necessary to introduce appropriate changes to the Energy Law, ones aimed at eliminating phenomena having an unfavorable impact on the way the energy market functions in Poland.

Below I shall describe the extensive amendment to the Energy Law that was enacted by virtue of the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts. Beyond that, and in keeping with chronological order, I shall in brief describe the change enacted by virtue of the Act of April 9, 2010 on making available economic information and exchanging economic data.

II. The Act of January 8, 2010 on amending the Energy Law and on amending certain other acts

1. The amendment’s general aims and premises

The Act of January 8, 2010 on amending the Energy Law and on amending certain other acts is one of the most extensive and most comprehensive amendments to the Energy Law passed to date. The changes enacted by virtue of this Act have significantly influenced the functioning of the electricity market in Poland – indeed, in some areas in has altered its shape.


In regard to the implementation of the above directives and to the experiences with the functioning of hitherto applied solutions in the amending act, the following issues have been regulated:

– the enabling of operators of electricity systems to undertake efficient and effective measures in cases when there is a shortfall of electricity in the system;

4 OJ [2006] L 33/22.
6 OJ [2006] L 312.
the introduction of divided competencies and imposing responsibility for assuring the security of electricity supplies upon all essential users of the electricity system and organs of public administration;

– the guaranteeing of indicating the operator of the system for all networks and gas and electricity installations and assuring them independent functioning. Moreover, as indicated in the grounds for the act herein described, its purpose is also to:

– streamline the procedure for changing the seller of gas fuels and energy;

– curb speculative activities when reserving the grid power of wind farms in the electricity system;

– create the legal bases for connecting biogas facilities to low-pressure gas transmission systems, whether existing or being built at local initiative (this is to enable the supply of this energy provider for users in rural areas, especially regions where the supply of natural gas is not possible), and to introduce a system for supporting biogas based on a system of ‘tradeable certificates’ (in Polish: zbywalne świadectwa) on the origin of agricultural biogas generated in biogas facilities;

– embrace methane released from mines and the gas obtained from processing biomass with a system of support within the framework of high-efficient cogeneration;

– prevent the phenomenon of selling electricity by its generators to a trade company within the framework of a single market group at a price substantially lower than the price which was determined outside the given group. This phenomenon leads to reduction of revenues for the generator, which in turn have an impact on the amount of compensations paid to cover the stranded costs on the basis of the Act of June 29, 2007 on the bases for covering the costs arisen among producers in regard to premature dissolution of long-term contracts for selling power and electricity. In regard to such “vertically integrated” producers, the obligation was introduced to sell a defined portion of the generated electricity by auction or at goods markets.

2. The particulars of the procedure for changing the seller

The law on changing a seller (the right to choose a seller) is one of the most important powers recipients (buyers) of electricity possess, and it is the basis for the functioning of the liberalized market of electricity services. It creates the conditions for real competition between energy undertakings and gives consumers of electricity and gas fuels the opportunity to lower the costs that result from their use.
The right to change a seller was introduced to the Energy Law via an amendment from March 2005\(^7\) as an implementation of the obligation stemming from Directive 2003/54/EC of the European Parliament and of the Council of June 26, 2003, concerning the joint principles for the internal electricity market, lifting Directive 96/92/EC\(^8\) – that is, the electricity Directive. The right to choose a seller was included in Art. 4j, which awards recipients the right to purchase gas fuels or energy from a seller of their own free choice. This regulation in a scope embracing industrial recipients has been in effect since July 1, 2004, and has embraced household recipients since July 1, 2007.

Before this amendment was passed, the provision of Art. 4j of the Energy Law, stipulating the right to choose a seller, was quite laconic: ‘The recipients of gas fuels and/or energy have the right to purchase those fuels or energy from a seller of their own choosing’. In accord with the doctrine of energy law we note that this provision cannot stand alone in the sense that the legal aspects of making avail of the law on changing a seller are contained in other provisions of the Energy Law and executive acts\(^9\).

The amended version of art 4j of the Energy Law introduced the following new elements:

- the definition that the dissolution of a contract on the basis of which an energy undertaking supplies gas fuels or electricity to the recipient of such fuels or energy takes place without carrying additional costs;
- the definition of the maximum period for dissolving a contract, on the basis of which an energy undertaking supplies gas fuels or electricity to the recipient of such fuels or energy in a household;
- the introduction of additional obligations in regards to sellers of energy and system operators.

As mentioned, one of the fundamental elements introduced into the provision pertaining to the right to change a seller is that of stipulating explicitely that the final recipient may dissolve a contract on the basis of which an energy undertaking supplies said recipient with gas fuels or energy, without bearing other costs and compensations than those which result from the contents of the contract. As concerns the manner for changing a seller, the amendment was limited to stipulating that the final recipient may dissolve a contract on the basis of which an energy undertaking supplies said recipient with gas fuels or energy by submitting a written statement to the energy undertaking.


\(^8\) OJ [2003] L 176/37

Moreover, the act on amending the Energy Law and on amending certain other acts introduced a provision regarding the period for dissolving a contract with the seller to date. In accordance with Art. 4j(4) of the Energy Law said contract undergoes dissolution upon the final day of the month following the month in which the recipient’s statement reached the energy undertaking. The recipient may, however, indicate a later date for the contract’s dissolution.

Here it need ne stressed that the power to dissolve a contract with the hitherto seller of electricity without bearing additional costs and with keeping the above described period for dissolution was granted only to final recipients in households. This decision of the legislator was dictated by the fact that granting such power to all recipients of energy, including industrial recipients, would de facto entail granting them the right to dissolve long-term contracts with sellers of electricity, and this would create a dangerous breach of the principle pacta sunt servanda and destabilize the long-term contract market.

The manner for changing the seller as defined in Art. 4j of the Energy Law also finds application in regards to recipients embraced by DSOs, as per Art. Bb of the Energy Law – that is, the ones adopted in line with meeting the needs for unbundling, or separating distribution undertakings from the structure of undertakings that are vertically integrated.

In regards to the extension, by virtue of the amendment here described, of the principles concerning the right to change a seller, new obligations were introduced for grid undertakings (DSOs and the operator of the transmission system). By virtue of Art. 4j(2) of the Energy Law the energy undertaking dealing in the transmission or distribution of gas fuels or energy is obliged, in applying objective and transparent principles that assure equal treatment of system users, to enable the recipient of gas fuels or energy connected to its grid to change the seller of gas fuels or energy on terms and in a manner defined in the systemic electricity and gas regulation. Moreover, the seller of gas fuels carrying out the sale of such fuels to final recipients connected to the distribution or transmission grid, or the seller of energy carrying out its sale to final recipients connected to the distribution grid, is obliged to place on its website information on the prices for the sale of gas fuels or energy and the about the terms for their application, as well as to make the same available for public view at its headquarters.

In regards to the changes introduced by virtue of the provision of Art. 4j of the Energy Law, the catalogue of obligations resting on undertakings performing the role of distribution system operators (DSOs) was expanded – Art. 9c(3)(9a)(e)-(f) of the Energy Law. In accordance with this provision the DSO, in applying objective and transparent principles that assure equal treatment of system users and heeding the demands of environmental
protection, is responsible for enabling the performance of contracts for the sale of electricity agreed by recipients connected to the grid through:

- implementation of the terms and manner for changing a seller of electricity and heeding them in the instruction for such movement;
- placement on website and making available for public view at its headquarters the following: an up-to-date list of sellers of electricity with which the operator has concluded contracts on providing services of distributing electricity, information about the seller from the electricity office in the region where the DSO operates, and samples of contracts concluded with users of the system, particularly samples of contracts concluded with final recipients and with sellers of electricity.

The above described amendments to the law on changing a seller pose, however, but partial application of Poland’s legal status in this scope to EU requirements. Poland is obliged to carry out the implementation of provisions of the Third Energy Package, which contains further changes to the procedure described here.

3. Changes to the procedure for obtaining the terms for connecting a source to the electricity grid

The amendment described here to the Energy Law has introduced far-reaching changes in the procedure for obtaining the terms for connection to the electricity grid regulated in Art. 7 of the Energy Law.

As noted in the grounds for the acts on amending the Energy Law and on amending certain other acts, in regard to the introduced system of support for renewable energy sources a significant increase has been observed in issuance of terms for connecting wind farms, including by a significant number of subjects which do not possess the financial possibilities for realization of such. These subjects treat the obtained terms for connection as a trade good. And yet the reserving of a defined amount of power in a given location for a subject that is not carrying out investments blocks the capacity for connection to the grid and limits the connection of other new sources of energy. This phenomenon is unfavorable from the point of view of developing power generation, including the development of renewable sources of energy.

In regards to the above, the institution of connection terms and its legal character were made more specific. In accordance with Art. 7(3a) of the Energy Law the subject applying for connection to the grid is obliged to submit a request for definition of the terms for connection to the grid. This request for definition of the terms for connection is to include in particular denotation of the subject applying for connection, definition of properties, the object or
locale, to which gas fuels or energy are to be supplied, along with information essential for assuring that all technical and exploitative demands are met.

The terms for connection are valid for two years from the day of their issue [Art. 7(8h) of the Energy Law]. The issue of terms for connection takes place in the form of a statement of intent on the part of the energy undertaking handling the transmission or distribution of electricity (TSO or DSO). The provision of Art. 7(8i) of the Energy Law defines the legal character of the terms for connection: in the period of their validity they pose the civil law obligation of the energy undertaking to conclude a contract on connecting a given subject to the electricity grid.

As already mentioned at the beginning of this paper, the amendment to the Energy Law has introduced the institution of a ‘payment in the form of a fee’ for connection to the electricity grid, which is intended to prevent the phenomenon of blocking connections capacities by subjects not in possession of financial means permitting the construction of a power generation source. Therefore, obliged to suspend this payment are only those subjects that are applying for connection to the electricity grid of a source generating more than 1kV [Art. 7(8a) of the Energy Law].

The manner for reckoning the payment in the form of a fee for connection to the electricity grid has been defined in law, and so has its maximum level. In accordance with Art. 7(8a) of the Energy Law the amount of the payment in the form of a fee comes to 30zł for each kilowatt of power transmitted, as defined in the request for definition of connection terms. The amount of the down payment may not however be greater than the amount of the anticipated fee for connection to the grid, and cannot exceed 3,000,000zł. The down payment is submitted within seven days from the day the request is submitted for definition of connection terms, on pain of the request not being considered [Art. 7(8c) of the Energy Law].

With regard to the significant amount of the down payment, especially as pertains to large projects, provision Art. 7(8j) of the Energy Law defines the terms for the down payment’s return – namely, in the case when the energy undertaking:

- refuses to issue connection conditions or to conclude a contract on connection to the electricity grid with a subject applying for connection for the reason of a lack of technical or economic terms for connection, it is obliged to immediately return the down payment taken;
- issues connection terms after the time period, it is obliged to pay interest on the down payment reckoned for each day of delay in issuing said terms;
- issues connection terms that will be a matter of contention between the energy undertaking and the subject applying for their issue and the dispute will be resolved in favor of the subject, it is obliged to return
the payment taken together with interest reckoned from the day said payment was made until the day of its return, insofar as connection does not occur.

As concerns the subjects obliged to make such payment – that is, subjects applying for connection of an energy source to the electricity grid of a voltage higher than 1 kV – another scope of documentation essential for obtaining connection terms has also been defined. In accordance with the provision of Art. 7(8d) of the Energy Law the relevant subjects are obliged to attach to their request for definition of connection terms in particular:

– an extract and sketch of the local spatial plan;
– in the case such a plan is absent, a decision concerning the terms for construction and utilization of the area for the immovable property defined in the request, if such is required on the basis of regulations for planning and zoning.

The extract and sketch of the local spatial plan or decision concerning the terms for construction and utilization of an area are to confirm the permissibility of the locality of the given energy source on the area embraced by the planned investment, which is in turn embraced by the request for the definition of connection terms.

Connected with the detailing of the procedure for issuing connection terms are new obligations on the operators of electricity systems in this scope. The energy undertaking is obliged to issue connection terms within a time period of [Art. 7(9g) of the Energy Law]:

– 30 days from the day the request for definition of connection terms is submitted by the request-submitter being connected to a grid with a voltage not exceeding 1 kV, and in the case of connecting a source – from the day of tendering the down payment;
– 150 days from the day the request for definition of connection terms is submitted by the request-submitter being connected to a grid with a voltage exceeding 1 kV, and in the case of connecting a source – from the day of tendering the down payment.

In both of these instances the time periods indicated bind the energy undertaking, if the request for connection is complete. For exceeding the time period for issuing connection terms the energy undertaking is subject to a penalty of not less than 3,000 zł for each day of delay in issuing connection terms (Art. 56 of the Energy Law).

Moreover, the energy undertaking dealing in the transmission or distribution of electricity (TSO and DSO) assures and finances the drafting of expert studies into the impact on the electricity system of the equipment, installations, or grids connected directly to the electricity grid of a voltage greater than 1 kV with the exception of:
– generating units to be connected of a joint installed power not greater than 2 MW, or;
– equipment of the final recipient of a joint transmission power not greater than 5MW.

Obligations regarding making information available have also been placed upon energy system operators. In particular, the TSO and DSO is obliged to draw up information concerning:
– subjects applying for connection to the electricity grid of a voltage greater than 1 kV, the localization of connections, transmission power, the dates of issuing connection terms, concluding contracts on connection to the grid, and commencing the supply of electricity;
– the amount of available transmission power for electricity stations or their groups that enter into the compass of the grid with a voltage greater than 110kV, and also planned changes of their amounts forecast over the upcoming 5 years, from the day such data are published.

Operators are to draw up this body of information in accordance with the regulations concerning the protection of secret information or other information that is protected by law. The undertaking is to update such information once per month and to place such on its website, and also to make it available for public view at its headquarters.

4. Changes in the procedure for designating an operator of a transmission system distribution system, storage system, system for liquefying natural gas, or the operator of a combined system

The Act on January 8, 2010 on amending the Energy Law and on amending certain other acts has introduced a range of changes in the procedure for designating an operator of a transmission system distribution system, storage system, system for liquefying natural gas, or the operator of a combined system. The basic objectives of this amendment in the scope of the new principles for designating the above-mentioned operators are:
– adapting the Energy Law to the requirements of the Third Energy Package;
– assuring that the tasks of systems operators are carried out according to the Energy Law;
– assuring that the system operators enjoy independence;
– improving the safety conditions of electricity supplies;
– eliminating ‘gaps’ – that is, areas for which no operator has been designated;
– assuring the exclusivity of a single transmission operator on the territory of Poland.
Above all, the amendment has introduced the possibility for the owner of a given network or installation to entrust another energy undertaking to perform the obligations of operator in making avail of such network or installation. Owing to this the catalogue of subjects allowed to perform the function of operator (of whatever kind) has been expanded. Among those who may become such an operator are foremost: the owner of a transmission grid, the owner of a distribution grid, the owner of a storage facility or installation for liquefying natural gas who possesses a concession for conducting business activity in making avail of such grid or installation. Beyond that list, others who may become such an operator include: an energy undertaking possessing a concession for conducting business activity in the scope of transmitting or distributing gas fuels or electricity, storage of gas fuels, liquefying natural gas, and re-gasification of natural gas, with which the owner of a transmission system, distribution system, storage system, or system for liquefying natural gas, has concluded a contract entrusting said energy undertaking to perform the obligations of operator in making avail of the grid or installation it owns.

However, the possibility of entrusting the performance of the obligations of operator is not unlimited. Entrusting the performance of the obligations of operator may pertain to carrying our business activity in the scope of distributing electricity if the number of recipients connected to the electricity grid of the energy undertaking is not greater than 100,000, or in the scope of distributing natural gas if the number of recipients connected to the gas network is not greater than 100,000 and the sale of gas fuels does not exceed 100 mln m³ annually.

The contract on entrusting the performance of the obligations of operator is to define, in particular, the area in which the given operator will be carrying out business activity, along with the principles for carrying out the principles of equal treatment of recipients, with itemization of the obligations entrusted to be carried out directly by the operator of a transmission system or distribution system [Art. 9h(5) of the Energy Law].

The manner for designating operators was defined in Art. 9h(1) of the Energy Law. A suitable operator is designated by the President of the Urzędu Regulacji Energetyki (Energy Regulatory Office; hereafter, the URE President) on the motion of the owner of the transmission grid, distribution grid, storage facility for gas fuels, or natural gas liquefaction facility. Such designation takes place by way of an administrative decision for a defined time period, one not to exceed the period for which the concession is valid. Moreover, within this decision the area is defined in which the business activity will be carried out.

The Act stipulates that within the territory of the Republic of Poland designation is made of only one operator of the gas transmission system or
one operator of the combined gas system, and one operator of the electricity
transmission system or one operator of the combined electricity system.

Generally, the designation of the operator of a given network or installation
takes place on the basis of the decision of the URE President issued on the
motion of the owner of said installation or network. In accordance with
Art. 9h(6) of the Energy Law the owner of a network is obliged to table
a motion to the URE President concerning the designation of an operator
within a period of 30 days from the day the decision of the URE President
is handed down on awarding that owner a concession to carry out business
activity in making avail of those networks or installations, or from the day in
which the owner concluded a contract on entrusting the performance of the
obligations of the operator.

Together with designating a given energy undertaking as an operator, the
URE President, in accordance with the guidelines contained in the Energy
Law, takes into purview the economic effectiveness of that undertaking, its
efficaciousness in managing gas systems or energy systems, along with the
security of the supply of gas fuels or electricity, the operator’s fulfillment of
the terms and criteria of independence, and the range of the obligations of its
concession. However, the President of the URE refuses to designate a given
undertaking as an operator if the undertaking does not possess the appropriate
economic or technical means, does not guarantee effective management of the
system, or does not meet the terms and criteria of independence.

Moreover, the designation of an operator may take place by way of a
decision issued by the URE President ex officio (Art. 9h(1)–(5) and (7)–(9)
of the Energy Law). The URE President designates ex officio, by way of
administrative decision, an energy undertaking possessing a concession for
transmitting or distributing gas fuels or electricity as operator of the relevant
transmission system or distribution system in two instances. Firstly, in the case
when the owner did not submit a motion to designate an operator of a gas
system or the operator of an electricity system who would carry out business
activity in making avail of its network and installation. Secondly, in the case
when the URE President has refused to designate an operator that would
carry out business activity in making avail of the network or installation in
the motion. In issuing such a decision the URE President defines the area,
installations, or networks in which the operator will be carrying out business
activity, along with the terms for meeting the criteria of independence essential
for performing the tasks of the operators of systems relevant to the scope
of demands for the equal treatment of recipients and to scope of demands
regarding environmental protection.

Through introducing changes in the procedure for designating the operator
of a transmission system, the operator of a distribution system, the operator
of a storage system, the system for liquefaction of natural gas, or the operator of a combined system the above described amendment was targeted above all at enabling a change of seller within the area of each network (by enabling a definition of the locally appropriate subject for performing the function of operator). In the longer term it was designed to enable the further development of elements of competition on the energy market. Moreover, the amendment here described introduced the legal determination that in Poland there is one operator of the gas transmission system and one operator of the electricity transmission system.

5. The introduction of a system of support for generating electricity in high-efficiency cogeneration by units burning methane from mines or gas obtained from processing biomass

The amendment being discussed also introduced significant changes in the system for supporting the generation of electricity in high-efficiency cogeneration. Most importantly, the scope of the support system was expanded by embracing within it the energy generating units in high-efficiency cogeneration thanks to methane released and captured during underground mining work in either active coal mines or those undergoing liquidation (and in some that have been liquidated). It also embraces energy generating units in high-efficiency cogeneration thanks to gas obtained from the processing of biomass [Art. 91(1)(1a) of the Energy Law]. The generators producing electricity in these units may obtain in this way certificates of origin in the form of so-called ‘violet certificates’.

As indicated in the grounds for the act, distinguishing the support for methane from mines stems, on the one hand, from the need to avoid unfavorable consequences for the environment by the release of these gas fuels into the atmosphere or their use in less effective ways (in furnaces and the like). On the other hand, this stems from the divergent technologies and the costs of fuels in comparison with units burning natural gas or coal. Introducing a support system in the form of violet certificates is targeted at increasing the safety of mining work, the potential avoidance of emitting approx. 340 million m³ of methane annually into the atmosphere, as well as stimulating the development of taking advantage of these gases directly on location and obtaining them to generate energy in high-efficiency cogeneration. In Polish coal-mining some 810 mln m³ of methane are brought to the surface annually, including approx. 560 mln m³ by way of ventilation and approx. 250 mln m³ via installations removing methane from mines. Methane removed from mining works by way of ventilation is entirely released into the atmosphere. Therefore,
the potential in making avail of this fuel, on condition that a support system is functioning, is great.

The amendment also introduced regulations enabling a certain amount of electricity to be reckoned as belonging to high-efficiency cogeneration, as in this way it is embraced within the support system. The electricity here concerned arises from the generation of energy in a unit burning methane from mining or gas from processing biomass together with other fuels that do not qualify as belonging to the support system. Moreover, the provision of Art. 91(1b) states that for electricity produced in high-efficiency cogeneration in a unit burning gas fuels of a power less than 1 MW, as well as in a unit burning methane from mining or gas obtained from processing biomass, there seems to be but one certificate of origin from cogeneration. This provision is targeted at preventing the phenomenon of accumulating yellow and violet certificates in the case when a burning unit generating energy uses at least two different types of fuel that are embraced by the support system by virtue of Art. 91(1) of the Energy Law.

The functioning of this expanded support system was correlated with the entire functioning of the whole support system for generating electricity in high-efficiency cogeneration.

6. The introduction of the support system for generating agricultural biogas

By virtue of the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts not only were changes introduced in the existing support system for generating electricity, but also a new support system was created in the form of certificates of origin of agricultural biogas (so-called ‘brown certificates’). These certificates, in contrast to the other colored certificates, are not given for the reason of generating electricity, but the reason of generating agricultural biogas and its direction to the gas distribution network.

In regard to embracing agricultural biogas within the support system it became necessary to introduce to the dictionary a definition of agricultural biogas by specifying that it is a gaseous fuel obtained from raw materials and side products from agriculture, liquid or solid animal manure, side products or the remains of the agricultural and food processing industry, or biomass from forests in the process of methane fermentation.

The way the support system for generating agricultural biogas functions is in its basic aspects analogous to the support systems for generating electricity in renewable sources and in high-efficiency cogeneration (i.e., the manner for submitting requests for issuing certificates of origin, the manner for issuing
certificates of origin, etc.). This system was correlated with the other such systems in the scope of subjects obliged to obtain and present for dismissal certificates of origin.

The basic difference between the support system for generating electricity in renewable sources and in high-efficiency cogeneration and the support system for generating agricultural biogas is the fact that the activity depending on generating agricultural biogas is, in light of the provision in Art. 9p of the Energy Law, a regulated activity (and not one that is on concession, as in the case of the generation of electricity). Conducting activity depending on the generation of agricultural biogas requires being entered into the registry of energy undertakings dealing in the generation of agricultural biogas, which is maintained by the President of the Agencja Rynku Rolnego (the Agricultural Market Agency; hereafter, ARR). The ARR President, as a registered organ, is obliged to convey to the URE President information on changes to the registry, to draft annual reports conveyed to the appropriate ministers and the URE President, and is authorized to inspect undertakings generating agricultural biogas.


7.1. Introduction

The introduction to the Energy Law of the provision in Art. 11c, 11d, 11e, 11f, and Art. 3(16a)(16b)(16c), and (16d) by virtue of the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts represents a transposition of the provisions of Directive 2005/89/EC of the European Parliament and of the Council of January 18, 2006 concerning measures to safeguard security of electricity supply and infrastructural investment. This Directive places on member-states the obligation to bring into effect statutory, executive, and administrative regulations essential for its application by February 24, 2008. Therefore, Poland, which introduced the necessary regulations not until January 8, 2010, significantly exceeded the timeframe stipulated in the Directive for implementation.

In regard to the implementation of Directive 2005/89/EC of the European Parliament and of the Council of January 18, 2006 concerning measures to safeguard security of electricity supply and infrastructural investment, to the Energy Law were introduced changes in the provision of Art. 11, provisions Art. 11d, 11e, 11f, and Art. 3(16a), (16b), (16c), and (16d) of the Energy
Law. These provisions implement the definitions contained in Art. 2 of the Directive and also implement the determinations of Art. 3(1) of the directive that demand the assurance of a high level of security in the supplies of electricity by defining the obligations of users of the market and of the organs responsible for the security of electricity supplies, including the operational safety of the electricity grid in normal conditions, as well as in a situation imperiling the security of electricity supplies.

The provision of Art. 24 of Directive 2003/54/EC permits the application of security means in an essential range and places obligations to immediately inform the European Commission and EU member-countries. As raised in the grounds for the Act on amending the Energy Law and on amending certain other acts, the provisions binding in this range, Art. 9c, Art. 9g, Art 9j, and Art. 11 of the Energy Law, in the appraisal of electricity system operators and regulatory experiences of the URE President were insufficient and required extension.

The provisions of Art. 11c-11f of the Energy Law, added by virtue of the amendment of January 8, 2010, ‘contain additional provisions concerning proceedings in situations of threat to the functioning of the electricity system and to the security of electricity supplies that may arise suddenly and require the immediate efforts of operators of electricity systems in order to prevent the outcomes of such threats. They also contain tasks in the scope of the operational security of the electricity grid’10.

7.2. New definitions

As mentioned above, in the aim of implementing the provisions of Directive 2005/89/EC to Art. 3 of the Energy Law, by virtue of the amendment here discussed legal definitions were introduced concerning the concepts of the security of electricity supplies, the security of the work of the electricity grid, and balancing the supplies of electricity with the needs for this energy [Art. 3(16a), (16b), (16d) of the Energy Law].

The definition of threat to the security of electricity supplies denotes the capacity of the electricity system to assure the safe functioning of the electricity grid and to balance the supplies of electricity with the needs for this energy. As results from the subject of the definition here in question, it is directly connected with two remaining issues: the safe functioning of the electricity system, and balancing the supplies of electricity with the need for this energy. Safe functioning (operational safety) signifies the uninterrupted work of the electricity grid, as well as the fulfillment of requirements in the scope of the

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10 From the grounds to the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts, Sejm print no. 2176, p. 31ff.
quality parameters of electricity and the quality standards in serving recipients, including permissible breaks in supplying electricity to end users, in the foreseeable conditions of the grid’s operation. However, balancing the supplies of electricity with the need for this energy means satisfying the foreseeable current and long-term needs of recipients for electricity and power, without the need of undertaking efforts targeted at introducing limitations in supply and collection.

7.3. Security threats to the supplies of electricity

In accordance with Art. 11(1) of the Energy Law in the event of a threat to Poland’s energy security, the security of its electricity supplies, the safety of persons, or the appearance of significant material losses on the Territory of Poland or its part, limitations in the sale of solid fuels may be introduced for a defined time, and also in the supply and collection of electricity or heat.

The provision of Art. 11c of the Energy Law regulates the situation of threat to the security of electricity supplies caused by events mentioned in para. 1 of that article, when the removal of said threat and the return of the correct functioning of the electricity system requires immediate efforts on the part of the system operator and the introduction of extraordinary means, and the necessary time for their introduction makes impossible application of the limitations in supplying and collecting electricity in a manner and scope defined in Art. 11(7) of the Energy Law.

The provision of Art. 11c(1) of the Energy Law therefore defines in what situations may occur a threat to the security of electricity supplies, in particular:

- efforts stemming from the introduction of a state of emergency,
- a natural catastrophe or a direct threat of the occurrence of a technical failure in the meaning of Art. 3 of the Act of April 18, 2002 concerning natural disasters,
- the introduction of an embargo, a blockade, limitation of lack of fuel supplies or electricity from another country on the territory of the Republic of Poland, or disturbances in the functioning of the electricity systems connected with the national electricity system;
- strikes or social unrest,
- the lowering of available reserves of generative capacity below the essential amount, as addressed in Art. 9g(4)(9) of the Energy Law, or the lack of the possibility to make avail of them.

11 From the grounds to the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts, Sejm print no. 2176, p. 31ff.
12 Journal of Laws 2002 No. 62, item 558, with further amendments.
In reference to the provision discussed here, we need note two fundamental questions. First, the catalogue contained in para. 1 has an open character (‘especially in result of’), and secondly, the situations listed in it do not directly determine the existence of a threat to the security of electricity supplies, but rather only create the possibility of its existence (‘may arise’).

In the case of an occurrence as described above, of a threat to the security of electricity supplies, the provisions contained in Art. 11c(2-6) of the Energy Law find application. In accordance with these provisions in the case of the occurrence of a threat to the security of electricity supplies the transmission system operator (TSO) or the operator of the combined system has at their disposal two types of measures. The operator undertakes the first type of measure in cooperation with users of the electricity system. Such measures are ‘all possible efforts in utilizing available means in the aim of removing the threat and preventing its negative outcomes’. From the wording of the provision of Art. 11c(2)(1) it results that undertaking such type of measures is the duty of the operator in the event when there appears a situation of threat to the security of energy supplies. Undertaking the second type of measures is at the operator’s discretion – the decision to undertake them was left by the legislator to the operator of the transmission system or combined system. In accordance with Art. 11c(2)(2) the operator may introduce on the territory of Poland or its part limitations in the supply and collection of electricity. These limitations can be binding until the time executive provisions come into effect, ones issued on the basis of Art. 11(7) of the Energy Law13, but for no longer than 72 hours.

The remaining provisions contained in the described article place upon the operator of the electricity transmission system or the combined electricity system a series of obligations of an information character. Above all, in the case of a threat to the security of electricity supplies the operator is obliged to immediately inform the minister responsible for economic affairs and the URE President of the occurrence of such threat and of the means and measures undertaken in the aim of removing the threat and preventing its negative consequences. Moreover, the operator may declare the necessity of introducing limitations on the basis of the ordinance of the Council of Ministers issued in reliance on the statutory disposition contained in Art.

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13 In accordance with Art. 11(7) of the Energy Law: ‘The Council of Ministers, on the motion of the minister responsible for economic affairs, by way of a order, may introduce for a defined period on the territory of the republic of Poland, or its part, limitations in the sale of solid fuels and in the supply and collection of electricity and heat’ in the event of a threat to the energy security of the republic of Poland that rests upon a long-term lack of balance on the fuel and energy market, of security in electricity supplies, safety of persons, or the occurrence of significant material losses.
11(7) of the Energy Law. Declaration by the operator of this type of necessity is essential above all in regards to the information conveyed to the minister responsible for economic affairs, for it is on his motion that the council of Ministers issues an ordinance in the matter of introducing a limitation in the sale of solid fuels and in the supply and collection of electricity and heat.

In the case when the Council of Ministers introduces limitations in the supply and collection of energy the operator of the transmission system or the combined system within a period of 60 days from the day of their suspension submits to the minister responsible for economic affairs and the URE President a report whose elements were exhaustively mentioned in the provision of Art. 11c(4) in fine and Art. 11c(5). These reports are taken into consideration in the reports of the minister for economic affairs from the monitoring f the security of electricity supplies. The legislator placed demands concerning the subject of the report in two separate provisions, which however (from the perspective of legislative technique) is unnecessary.

8. Removing the state of threat to the security of electricity supplies

The provision of Art. 11d. of the Energy Law defines the means and measures which may I are to be applied by the operator of the electricity transmission system or the combined electricity system for the removal of a threat to the security of electricity supplies. These measures were defined by the legislator in a non-random order, but rather in a hierarchical manner. The grounds for the act on amending the Energy Law and on amending certain other acts emphasizes the gradation of means the operator may apply: ‘In the first instance means are indicated that serve to balance the supplies with the collection of electricity in the electricity system. After exhausting all possible measures to cover the needs of recipients for electricity the TSO may issue recommendations to final recipients concerning limitations in the collection of electricity or interrupt its supply, in accordance with the plans for limitation, discussed in Art. 11(6a)’

In accordance with this provision, in a situation when a threat to the security of energy supplies occurs, the operator of the transmission system of the combined system undertakes the following particular measures:

- issues to the generator orders to instigate, set aside, alter the load, or cut off from the grid the generative unit centrally controlled;
- carries out intervention purchases of power of electricity; he issues to the proper operator of the electricity distribution system orders to instigate, I

14 From the grounds to the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts, Sejm print no. 2176, p. 33.
set aside, alter the load, or cut off from the grid the generative unit connected to the distribution grid in the area of his operation, when said unit is not a generative unit centrally controlled;

– issues to the appropriate operator of the electricity distribution system orders to reduce the amount of collected electricity by end users connected to the distribution grid in the area of his operation, or to interrupt the flow of electricity to an essential number of end users connected to the distribution grid in that area;

– after having exhausted all possible measures intended to cover the electricity needs, issues to end users connected directly to the transmission grid orders to reduce the amount of collected electricity or to cut off from the grid equipment and installations belonging to those recipients, in accordance with the plan for introducing limitations;

– carries out a reduction of the size of transmission capacity of the intersystem exchange.

Closer analysis in required to indicate the hierarchy of applying concrete measures that may be applied by the operator of the transmission system or the combined one in a situation when there occurs a threat to the supplies of electricity. Above all we need observe that the catalogue of measures mentioned in Art. 11d(1) of the Energy Law gas an open character. We may therefore divide the measures at the disposal of the operator of a transmission system of combined one into measures defined in the act and measures outside it, about which priority in application is to be ascribed to the measures defined by statute. Among that group of measures special attention need be paid to the measure defined in Art. 11d(1)(5) of the Energy Law – namely, issuing orders to final recipients connected directly to the transmission grid to reduce the amount of electricity been drawn or to cut off from the grid equipment and installations belonging to those recipients, in accordance with the plan for introducing limitations. In accordance with the wording of the entire provision of Art. 11d(1) of the Energy Law we need recognize that this measure finds application after having exhausted both the measures indicated in Art. 11d(1)(1-4) and (6) and the measures outside the act.

In accordance with the provision of Art. 11d(4) the operators of electricity systems cover the costs borne by the energy undertakings dealing in the generation of electricity in connection with application of the measures defined in Art. 11d(1) of the Energy Law. In regard to the lack of a definition of the concept ‘costs borne by the energy undertakings dealing in the generation of electricity’ this provision remains in a relationship with the provision of Art. 11e(1) of the Energy Law, in accordance with which the operator of the transmission system or the combined system, which as a result of circumstances for which he is responsible, introduced limitations or permitted sloppiness in
carrying out an appraisal of the fittingness of introducing said limitations, and answers for the damages arisen among users of the national electricity system, including recipients of electricity connected to the grid on the territory of the Republic of Poland affected by limitations, as a result of application of means and measures described in Art. 11c and 11d of the Energy Law. As the basic criterion for distinguishing the costs borne by the energy undertakings dealing in the generation of electricity in connection with the application of measures defined in Art. 11d(1) of the Energy Law, as well as the damage suffered by them as a result of the application of means and measures described in Art. 11c and Art. 11d of the Energy Law, the criterion must be recognized of the operator’s error in applying the indicated means and measures. In the case of the lack of fault on the part of the operator, he is obliged to cover only the costs borne by the generator, however, in the case of the operator’s error he shall answer to the generator on the bases defined in Art. 11e of the Energy Law.\footnote{Cf. F. Elżanowski [in:] M. Swora, Z. Muras (eds), \textit{Prawo energetyczne. Komentarz [Energy law. Commentary]}, Warszawa 2010.}

In light of the provision of Art. 11d(5) the costs borne by the operators of the electricity system connected with the undertaking of measures indicated in para. 1 of the here described provision are for that operator justified costs of the measures described in Art. 45(1)(2) of the Energy Law. In accordance with the provision here discussed the operators may reckon the amount of the costs paid for the above described reasons toward ‘covering the justified costs borne by the operators of the transmission and distribution systems in connection with the realization of their tasks’ in calculating the tariff for electricity.

9. The new powers and obligations of the URE President

In regard to the here described amendment to the Energy Law, the catalogue of powers and obligations of the URE President (Art. 23 of the Energy Law) underwent change. Below are listed the most important changes introduced, ones that represent a consequence of the changes to the Energy Law described in this paper. Thus, they do not require special discussion, but merely a full listing.

To the catalogue contained in the provision of Art. 23 of the Energy Law were added the following powers and obligations of the URE President:

\begin{itemize}
\item approval of the operators’ Compatibility Program;
\item approval of the full Instructions for the Movement and Exploitation of the Transmission Grid and the Instructions for the Movement and Exploitation of the Distribution Grid;
\end{itemize}
designation of the operators of electricity and gas systems;
- designation of the operators for the grids belonging to other energy undertakings;
- conducting auctions for new generative powers or enterprises reducing the need of electricity;
- the obligations connected with the security of the National Energy System (KSE), involving i.a., monitoring the activities of operators in the case of threats to the security of electricity supplies;
- issuing certificates of origin for energy from biogas and supervision of the obligation to carry out the obligation of purchasing those certificates by energy undertakings;
- monitoring and supervision of the generators of electricity and heat, specifically their reserves of fuel in an amount assuring the maintenance of continuity of electricity and heat supplies for recipients;
- monitoring the observance of the obligation to sell electricity by way of open auction or by a goods market and internet trade platform by the generators of electricity (the obligation to sell 15% of the electricity generated in a given year) and by generators of electricity having the right to receive compensation on account of stranded costs (the obligation to sell the entirety of electricity);
- the power to invalidate an auction for the sale of electricity;
- to free generators of electricity from the obligation to sell their produced electricity by public trade;
- declaring median prices for sale of: electricity generated in high-efficiency cogeneration; electricity on the competitive market, and the way it is reckoned; heat generated in generating units belonging to undertakings possessing a concession, but are not cogeneration units.

Here we need note that the amendment here described affected a partial implementation of the determinations of the Third Energy Package (time period for completion – March 3, 2011) and strengthened the legal position of the URE President.

As a consequence of the indicated powers and obligations of the URE President, which correspond accordingly to the obligation of energy undertakings, the catalogue of offenses and sanctions contained in Art. 56 of the Energy Law was expanded.
10. Introducing the requisite public trade of electricity by generators in the aim of preventing the phenomenon of unjustified increase of stranded costs

10.1. Ratio legis for introducing the obligation of public trade of electricity and the subject and object scope of the obligation

By virtue of Art. 49a the legislator introduced to the Energy Law the obligation to carry out the trade of electricity in a statutorily defined way aimed at assuring open and public trade of energy and in consequence an improvement of the conditions for competition reigning on the electricity market in Poland. In accordance with the grounds for the governmental draft of the act on amending the Energy Law and on amending certain other acts, the introduction of the obligation to carry out trade in electricity in a public way and on open bases is intended to eliminate the phenomenon of jacking up the amounts of compensation being received on account of stranded costs. This phenomenon involves the generator selling electricity to a trade company operating within the framework of the same capital group for a price significantly lower than the price established for those outside the group (i.e., the market price), and this leads to lowering the income of the generator, which is then factored into the calculations to correct the amount of compensation paid out to cover the stranded costs. The introduction of the regulation contained in Art. 49a is therefore designed to exclude the possibility of abusing the public assistance extended to energy undertakings by virtue of the act of June 29, 2007 on the bases for covering the costs arisen among generators in connection with the premature dissolution of long-term contracts (hereafter, LTC) for the sale of power and electricity (the so-called act on dissolving LTCs)\textsuperscript{16}.

The compensation paid to energy undertakings on account of stranded costs after the dissolution of long-term contracts was qualified as public assistance. The long-term contracts themselves became a significant problem at the moment Poland joined the European Union, as they disrupted competition on the energy market and were at variance in this regard with community law. They had a selective character and assured profits only to those power plants and energy producers which signed them, and above all they strengthened the monopolist position of the PSE company – Polskie Sieci Elektroenergetyczne. Moreover, PSE – Operator S.A. is a company belonging to the state treasury, which the European Commission treats as a state institution. For these reasons the LTC were recognized in the opinion of the European Commission as

\textsuperscript{16} Journal of Laws 2007 No. 130, item 905, as amended.
impermissible public assistance at variance with the European Treaty. In July 2001 in regard to the fears concerning possible improprieties the European Commission issued a ‘Communique concerning the methodology of analyzing public assistance connected with the phenomenon of stranded costs’. All the above indicated factors negatively influenced the functioning of the competitive electricity market in Poland.

In accordance with para. 1 of the provision here described the energy undertaking dealing in the generation of electricity is obliged to sell no less than 15% of the electricity generated in a given year on the goods markets in the understanding of the act on goods markets or on the market regulated in the understanding of the act of July 29, 2005 on trade in financial instruments. However, in accordance with para. 2 an energy undertaking dealing in the generation of electricity and having the right to receive funds for covering stranded costs on the basis of the act on dissolving LTCs is obliged to sell generated electricity not embraced with the obligation described in para. 1 in a way assuring public, equal access to such energy, by way of an open auction, on an internet platform on a regulated market in the understanding of the act of July 29, 2005 on trade in financial instruments or on goods markets in the understanding of the act on goods markets.

In the aim of carrying the proper qualification of subjects which are embraced with the obligation resulting from Art. 49a(1) and (2) of the Energy Law the subject amendment also introduced a change in the definition of the end user [Art. 3(13a) of the Energy Law]. In the previous wording of the provision in question the end user was defined as the recipient carrying the purchase of fuel or energy for their own use. The Act of January 8, 2010 on amending the Energy Law and on amending certain other acts specified that one’s own use does not include electricity purchased in the aim of using it for generation, transmission, or distribution.

10.2. Allowable forms for trade in electricity by virtue of Art. 49a para. 1 and 2 of the Energy Law

The goods market and the regulated market

In its definition of the goods market and the regulated market the provision of Art. 49a of the Energy Law refers us to the proper acts in this scope. The definition of the goods market is contained in Art. 2 item 1 of the act on goods markets. In accordance with the provision here discussed the goods market

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is ‘a set of people, equipment, and technical means assuring all participants of trade identical conditions for concluding market transactions and identical access in the same time to market information, and in particular to information on rates and the prices of market goods and turnover of market goods’. In the understanding of Art. 2 item 2 lit. b) of the act on goods markets energy is a market good.

The definition of the regulated market is contained in Art. 14(1) of the Act of July 29, 2005 on trade in financial instruments. In light of this definition the regulated market is a permanently operating system of trade in financial instruments permitted to such trade that assures investors universal and equal access to market information in the same time by associating offers for buying and selling financial instruments, and identical conditions for purchasing and selling such instruments: it is organized and subject to oversight by the proper organ on bases defined in the provisions of the act, and it is recognized by the member country as fulfilling those conditions, and indicated to the European Commission as a regulated market.

**Auction**

The auction, as one of the forms of trade permitted for carrying out the statutory obligation to trade energy, is an institution of civil law. The specific procedure for organizing and conducting auctions will be defined by the ordinance issued by the minister responsible for the economy on the basis of statutory delegation contained in Art. 49a(12) of the Energy Law. The general conditions for organizing and conducting auctions are contained however in the act of April 23, 1964 of the Civil Code (Art. 701–721) and in Art. 49a(10–12). Therefore, in matters unregulated in the ordinance, provisions of the Civil Code will find application.

The provision of Art. 49a(10) contains a catalogue of subjects that may organize auctions whether for purchases or for the sale of electricity: energy undertakings dealing in the generation of electricity and having the right to receive funds for covering stranded costs on the basis of the act on dissolving LTCs, final recipients and the subject operating on its behalf. As it results from the wording of Art. 49a(10) and (11) the organizing and conducting of an auction may be commissioned to third-party subjects by both generators and recipients of energy.

In accordance with Art. 49a(11) of the Energy Law an auction for the sale of electricity organized and conducted by an energy undertaking or a subject operating at its behest is subject to the oversight of the URE President in terms of agreement with the way and manner of organizing and conducting an auction as defined in the ordinance issued by the minister responsible for
economic affairs. When it is stated that an auction was conducted not in accord with these provisions, the URE President may declare an auction invalid. The provision contained in Art. 49a(11) speaks about ‘the way and means of organizing and conducting an auction’, and thus the scope of activities subject to oversight on the part of the regulatory organ is very broad.

We need stress the fact that this provision does not concern auctions for the purchase of electricity, i.e., auctions organized by recipients of energy. In comparing the wording of Art. 49a(2) and Art. 49a(11) one may observe that the generator that has the right to receive funds for covering stranded costs on the basis of the act of June 29, 2007 on the bases for covering the costs arisen among producers in regard to premature dissolution of long-term contracts for selling power and electricity may carry out the statutory obligation by way of sale of energy both at auction for purchase and at auction for sale of energy organized by the generator, which fact does not concern the auction for purchasing energy. However, both forms of trade pose a balanced opportunity for carrying out the obligation resulting from Art. 49a para. 2 of the Energy Law.

The internet trade platform

The definition contained in Art. 49a(3) of the Energy Law of an internet trade platform has a general character and defines only its basic features. One supplement of this definition is found in para. 4, which indicates which conditions for carrying our transactions should be assured to subjects making avail of internet trade platforms. Moreover, the conditions which are to be met by an internet trade platform will be further clarified in an ordinance of the minister responsible for economic affairs, a delegation to the issuance of which was contained in Art. 49a(12) of the Energy Law (as discussed above).

As already mentioned above, this ordinance is targeted at clarifying the definition of an internet trade platform. Thus, the definition of the features of an internet trade platform and of the conditions for trade via this medium is comprised of three elements: a classic definition contained in Art. 49a(3), a non-classic definition contained in para. 4 and provisions contained in the ordinance of the minister responsible for economic affairs concerning the way and manner of organizing and conducting an auction and the sale of electricity on an internet trade platform.

In accordance with the premise of the legislator, the subjects conducting internet trade platforms are obliged to assure participants of turnover: openness

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of operating principles; openness of fees collected; identical conditions for concluding transactions for all participants in trading and access to market information in the same time. The concept of openness of operating principles and the concept of openness of fees are to be understood as openness toward all those interested, not only the participants in trading on internet trade platforms. In consequence it need be recognized that information such as the rules for the operation of an internet trade platform and the table of fees and the way fees are applied are to be open to public view.

The matter of a mistake in the editing of this provision also requires discussion, for in Art. 49a(2) we read ‘(…) on an internet trade platform on a regulated market (…)”. The intention of the legislator is not in doubt, as it was to establish internet trade platforms and regulated markets as distinct forms for trading in electricity. In the provision here discussed there was no comma as would have separated the two expressions from one another. In result of this the literal reading of the provisions leads to the conclusion that carrying out the obligation of Art. 49a(2) may occur by selling electricity through the medium of an internet trade platform functioning within the framework of a regulated market. Thus, in light of Art. 49a(2) the internet trade platforms that do not operate within the framework of a regulated market do not meet the statutory requirements. However, it must be stressed that legislative work is being completed in the aim of correcting this mistake in the editing of the provision.

11. The manner for carrying out the obligation resulting from Art. 49a para. 1 and 2 of the Energy Law

It must be underlined that the object scope of the provision of Art. 49a(2) in comparison with Art. 49a(1) is significantly narrower. However, the subject scope and the scope of opportunity for carrying out the obligation of public trade in electricity is broader. Art. 49a(2) concerns the whole of the electricity generated in a given year by generators having the right to receive funds for covering stranded costs and in regards to 85% of the energy they generate this gives the possibility to sell it in another way than on the goods market or the regulated market. The provision examined here does not contain in this regard any percent thresholds, nor any quantitative thresholds determining the amount of obligation in regards to particular forms of trade. This means that a given generator that has the right to receive funds for covering stranded costs may both sell 100% of the energy it generates in a given year through the medium of a goods market (15% in the framework of carrying the obligation of Art. 49a(1) and 85% in the framework of carrying out the obligation of Art.
49a(2) and sell 15% of the generated energy on the market, and the remaining 85% sale e.g., exclusively at auction.

We need note that the shape of the obligation laid upon the generators of energy posits a certain element of forecasting, as the energy undertaking, in selling energy through the medium of the goods market or on the regulated market, must accept the premise of what amount of energy it will generate in order to sell it in an amount not less than 15%. In this regard it is probably necessary to expect increased volumes of energy offered for sale at the close of the calendar year.

Failure to meet the obligations of Art. 49a(1) and (2) of the Energy Law may occur not only as a result of selling too small an amount of electricity in forms foreseen in the act, but also as a result of selling on the goods market or internet trade platform, which do not meet the requirements contained in the acts (whether legislative or executive). The outcome of such a state of affairs will be tantamount to flouting the obligation resultant from Art. 49a(1) and (2), for which Art. 56(3) in connection with Art. 56(1)(32) of the Energy Law foresees sanctions in the form of monetary penalties meted out by the URE President. The amount of such a penalty may not exceed 15% of the revenues of the penalized business as achieved in the previous tax year. The monetary fine is meted out by the URE President in the form of an administrative decision.

12. Exemption from the scope of the obligation defined in Art. 49a para. 1 and 2 of the Energy Law

From the scope of the obligation defined in Art. 49a(1) and (2) of the Energy Law were exempted six categories of electricity. The reasons which led the legislator to make such exemption are indicated by the following issues:

- non-introduction of energy to the electricity system, i.e., supplying it to the recipient by means of a direct line [Art. 49a(5)(1)] or using energy for one’s own needs [Art. 49a(5)(4)];
- generating energy embraced with support in the form of certificates of origin [Art. 49a(5)(2) and (3)];
- using of energy by the grid undertakings to carry out statutory tasks [Art. 49a(5)(5)];
- energy generated in a unit of small installation power, exempted from the obligation to obtain a concession for generating electricity [Art. 49a(5) and (6)].

It need be stressed that the indicated exemption is an exemption by virtue of law (ex lege), which means that it is effective on the basis of the very provision of the act and does not require for its effectiveness a solution issued by the
URE President nor a motion on the part of an energy undertaking. When an energy undertaking exceeds the scope of exemption discussed here, this will result in the energy undertaking’s failure to observe the obligation described in Art. 56(1)(32). In regard to Art. 56(3) the URE President then metes out on the undertaking a monetary penalty of an amount up to 15% of the revenue achieved in the previous tax year.

Moreover, in the provision to Art. 49a(6) of the Energy Law premises were concluded for obtaining an exemption from the obligation of mandatory trading in electricity in legally defined forms. Said exemption is awarded by the URE President on the motion of the energy undertaking. The exemption foreseen in Art. 49a(6) has an optional character for the URE President and concerns only a portion of the electricity generated by the undertaking. The exemption of the energy undertaking from the obligation to sell generated electricity in a statutorily defined way is also carried out in the form of an administrative decision. This is a decision issued in proceedings begun on a motion submitted by an energy undertaking that meets the conditions defined in Art. 49a(6)(1) or (2).

The exemption here discussed may concern both all generators having the obligation to sell 15% of their energy through the medium of a goods market or on a regulated market as placed on all generators, and those generators having the right to receive funds for covering stranded costs, upon which rests the obligation to sell the entirety of the generated energy on the bases of public trade. The exemption of electricity from the obligation resulting from Art. 49a(1) and (2) may concern energy sold for the needs of carrying out long-term obligations resulting from contracts concluded with financial institutions in the aim of carrying out investments connected with the generation of electricity and energy generated for the needs of the operator of a transmission system, made avail of for the needs of the proper functioning of the national electricity system. The premises conditioning the possibility of exemption of the energy undertaking from the obligation to sell in forms defined in Art. 49a(1) and (2) were however limited in an absolute way by one condition: ‘if it does not cause real disruption to the conditions of competition on the electricity market or disruption on the balancing market’.

In the case when the energy undertaking does not obtain the required exemption by virtue of a decision of the URE President and despite this does not sell the generated energy in a way foreseen in Art. 49a(1) and (2), the URE President will mete out to that undertaking a monetary penalty in the amount of 155 of the revenue achieved in the previous tax year [Art. 56(1) (32) in regards to Art. 56(3) of the Energy Law].
13. The information and report obligations

The provision of Art. 49a(7) of the Energy Law places on the energy undertaking dealing in the generation of electricity obliged to sell 15% of its generated electricity in a given year the obligation to inform about selling contracts having been concluded. This obligation concerns contracts to sell electricity concluded in a manner that differs from the manners mentioned in para. 1 and 2 of the provision herein discussed, i.e., on a goods market for energy, a regulated market, internet platform, or by way of auction.

In the case of energy undertakings dealing in the generation of electricity and having the right to receive funds for covering stranded costs such information will concern exclusively energy that was exempted from the obligation resultant from Art. 49a(1) and (2) by virtue of Art. 49a(5) and (6) (i.e., exemption by virtue of law or exemption awarded by the URE President). However, in the case of all the remaining undertakings dealing in the generation of electricity the obligation to convey information to the URE President concerns both contracts to sell energy above the 15% mandatory turnover on a goods market or regulated market, and the scope of energy exempted from the obligation resultant from Art. 49a(1) (also in this case exemption by virtue of law or exemption awarded by the URE President).

The provision of Art. 49a(8) of the Energy Law represents the consequence of Art. 49a(7) and concerns providing for public news the average price of electricity not subject to the obligation resultant from Art. 49a(1) and (2). This is an element of the information obligations resting by virtue of the Energy Law on the URE President. The aim of the provision here discussed is that of transparency and openness in the price of electricity not subject to the obligation to sell defined in Art. 49a(1) and (2).

The report writing obligation of energy undertakings, discussed in Art. 49a(9), represents the realization of a new duty for the URE President. It was introduced by the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts to Art. 23 of the Energy Law, in which is contained the catalogue of competencies of the regulatory organ. Art. 23(4a) places upon the URE President the duty to oversee the carrying out by energy undertakings of the obligations resultant from Art. 49a(1) and 2. The basic instrument serving the regulatory organ to carry out this duty is that of the indicated report writing obligation placed upon the energy undertakings dealing in the generation of electricity.

The provision here discussed does not contain any indications regarding the subject of the reports concerning the realization of the obligations resultant from Art. 49a(1) and (2). However, we may assume that such a report is to contain elements analogous to the information discussed in Art. 49a(7), i.e.,
the parties to the contract, the amount and price of electricity, and the period for which the contract was concluded. Such a report should, however, remain in connection with the model for carrying out transactions, that is, it should be adequate to the characteristics of the given form of trade, e.g., the subject selling energy through the medium of a goods market is not able to indicate the second party to the contract.

The requisite information is embraced with internal openness, thus the obligation foreseen in the discussed provisions does not violate the secret of the undertaking. What is more, this obligation results from provisions of a detailed character, which also excludes collision in this scope.

III. The Act of April 9, 2010 on making available economic information and exchanging economic data

In accordance with the provision of Art. 1 of the act on making available economic information and exchanging economic data, the following principles are stressed: making available economic information concerning payment credibility; exchange of data concerning payment credibility with institutions having at their disposal such information and having their headquarters in member-state countries of the European Union and in states that are party to the European Economic Area; the creation and operation of an economic information office; the publication, preservation, updating, and removal of economic information and carrying out oversight regarding the economic information office.

The act here discussed, in chapter 7, entitled, ‘Changes in binding provisions, transitional and final provisions’ in Art. 52 contains a provision amending the Energy Law. By virtue of this provision to the Energy Law Art. 62a was amended in accordance with which the energy undertaking may make available data about the recipient on the bases and in a manner defined in the act on making available economic information and exchanging economic data. The provision at issue was placed in the final part of the Energy Law, in chapter 7, entitled ‘Changes in binding provisions, transitional and final provisions’. We need note that in the intention of the legislator the amended provision represents the basis for conveying by the energy undertaking economic data to economic information offices. The provision here discussed has therefore the character of a material-legal provision, and thus its placement in the transitional and final provisions does not find justification and must be deemed a mistake on the part of the legislator.
IV. Summary

As the present paper demonstrates, the Act of January 8, 2010 on amending the Energy Law and on amending certain other acts has introduced significant changes to the functioning of the electricity market in Poland. The solutions introduced by its virtue should be appraised altogether positively. During the elaboration of the text of the amendment the legislator was guided by clearly marked objectives and applied adequate means for their realization. In this regard, and thanks to e.g., the introduction of the obligatory public trading in electricity, the phenomenon was eliminated of increasing the amount of compensation being received on account of stranded costs, and the introduction of the ‘payment in the form of a fee’ for connecting sources to the electricity grid allowed a curbing of the ploy of reserving a defined amount of power in a given location, and also of trade in the conditions for connection to the electricity grid.

The solutions which have proved themselves in practice will no doubt be carried over by the legislator to the planned new Energy Law. The solutions that will fulfill their role and whose subsequent functioning the legislator will recognize as unessential will most probably not be continued.
Legislative Developments in Rail Transport in 2010

by

Katarzyna Bożekowska-Zawisz*  

I. Introduction

Polish rail transport law did not overcome such important amendments in 2010 as in 2009. There was a lengthy amendment act transposing several directives supposed to be enacted in 2010, which is unfortunately still proceeded by the Polish Parliament. The act transposes 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 Community1, Commission Directive 2009/131/EC of 16 October 2009 amending Annex VII to Directive 2008/57/EC of the European Parliament and of the Council on the interoperability of the rail system within the Community2 and Directive 2008/110/EC of the European Parliament and of the Council of 16 December 2008 amending Directive 2004/49/EC on safety on the Community’s railways3. This draft mainly concerns the interoperability of the Polish trans-European rail system with the Community trans-European rail system which has to be ensured while constructing and operating the parts of this system. It also particularizes the competences of the President of the Rail Transport Office (in Polish: Urząd Transportu Kolejowego; hereafter, UTK) in this area. This act is supposed to be enacted by September 2010 and to enter into force at the end of the year.

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1 OJ [2007] L 315/44.
In the course of the year 2010 one of the most popular subjects in the area of Polish rail transport law was the case C-512/10 referred by the European Commission, which is pending before the Court of Justice in Luxembourg. In this case the Commission alleges that Poland has failed to meet the obligations imposed on it pursuant to the provisions of the first railway package, namely of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways\(^4\) and of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification\(^5\). The case is one of many court proceedings initiated by the European Commission against EU Member States concerning wrong implementation of the first railway package\(^6\). Firstly, the Commission alleges that Poland introduced no mechanisms to ensure the decision-making and organisational independence of the infrastructure manager, namely PKP PLK S.A., from the holding concern – from the dominant company PKP S.A. and from other subsidiaries that operate as rail carriers. Secondly, according to the Commission, Poland did not take necessary measures aiming at financial equilibrium of the infrastructure manager within an appropriate period of time. Thirdly, in the Commission’s view, Poland did not provide for the incentives which would encourage the infrastructure manager to reduce the costs of provision of infrastructure and the level of access charges (such mechanisms are required under Article 6(2) and 6(3) of Directive 2001/14/EC). The fourth allegation is that Poland did not adopt the measures necessary to ensure that charges for minimal access to railway infrastructure are set at the cost that is directly incurred as a result of operating the train service (what is required by Article 7(3) of Directive 2001/14/EC). Moreover, the Commission alleges that Poland did not introduce any control mechanism that would enable an examination whether various market segments are in a position to bear the increased expenditure for access to and use of the railway infrastructure and thus did not fulfil Article 8(1) of Directive 2001/14/EC.

\(^5\) OJ 2001 L 75/29.
\(^6\) Similar cases were referred by the Commission against: France (C-625/10), Slovenia (C-627/10), Czech Republic (C-545/10), Germany (C-556/10), Portugal (557/10), Greece (C-528/10), Austria (C-555/10), Hungary (C-473/10), Spain (C-483/10).
II. The Act on Public Collective Transport

No major amendment of the Act on Rail Transport (in Polish: *Prawo Kolejowe*, PK) was enacted in Poland in 2010. However, the Act of 16 December 2010 on Public Collective Transport\(^7\) made some significant changes into the Act on Rail Transport.


One of the most controversial questions that came up during the works on the draft of the Act on Public Collective Transport was the possibility to grant exclusive rights in return for the discharge of public service obligations which could serve as an instrument to compensate the operators providing public service on ‘economically unattractive’ routes. The use of such a possibility – that is expressly allowed by the Regulation 1370/2007 [e.g. its Art. 1(1)] – was strongly opposed by the Polish Office of Competition and Consumer Protection. Finally, Art. 20 of the Act on Public Collective Transport excludes this possibility.

The changes of the Act on Rail Transport introduced by the Act on Public Collective Transport concern the organisation of public rail transport and access to the infrastructure. The act introduced the notion of the public rail transport organiser. The organiser is either a unit of local government or the Minister of Transport. The organiser is responsible for planning the development of transport, organising and managing public collective transport. These duties of the rail transport organiser are characterised in the Act on


\(^{8}\) OJ [2007] L 315/1.

Public Collective Transport because they also concern the organisers of public transport of different modes. One of the organiser’s tasks, if it is required according to Art. 9(1) of the Act on Public Collective Transport, is to prepare the plan of well-balanced public transport development. With a view to prepare this plan the organiser may ask the infrastructure manager to pass all the necessary information, including the plans of renovations and investments in the infrastructure. The transport plan determines also the range, in which the organiser may conclude with an operator the agreement on providing public services.

The Act on Public Collective Transport defined what is an occasional passenger rail transport. Occasional rail transport is exercised on a railway line within the limits of its free capacity. An interested entity has to file the motion for exercise of such transport is at least 7 days before the planned date of carriage. If the line disposes of free capacity, the infrastructure manager allows the motion and the conditions of exercising the carriage are specified in the agreement on access to the rail infrastructure.

The Act on Public Collective Transport introduced also a new form of decision on access to railway infrastructure, namely the decision on open access. According to the provisions on open access the rail passenger transport which does not have a character of public utility transport may be exercised by a railway operator on the basis of open access decisions. The decision is issued for a concrete route on the motion of the operator. Its issuance is preceded by the analysis of the effects that would be exerted by the activity specified in the motion on the economic conditions of the services which are provided on the same line on the basis of an agreement on providing public services. The decision is issued for a maximum period of 5 years and is reversed by the UTK President when the conditions specified in the decision were manifestly infringed and when the operator - for the reasons caused by himself - discontinued the exercise of transport for at least 6 months. The questions of occasional rail transport and the issuance of the decisions on open access were placed under the competence of the UTK President.

According to the amended Act on Rail Transport the agreement on access to the rail infrastructure with the aim to exercise passenger transport may be concluded on three basis: earlier conclusion of the agreement on providing public services, issuance of the decision on open access or allowance of the motion for occasional passenger transport. Moreover, in the area of passenger rail carriages the infrastructure manager is obliged to maintain the parameters of the line and the time of trains passage, such as they were specified in the data handed over to the organisers of public rail transport, as long as the agreement on access to the rail infrastructure or the framework agreement is in force. The train routes in passenger rail transport are planned in the
timetable by the infrastructure manager in line with concluded agreements on providing public services and issued decisions on open access.

Articles 39-40a PK which concerned among others the state subsidies compensating the operator’s losses resulting from the fare reductions specified in national law were repealed by the Act on Public Collective Transport. This is caused by the fact that such subsidies are now commonly regulated in the Act on Public Collective Transport in order to unify the rules for various transport modes and make them compatible with the Regulation (EC) No. 1370/2007.

The changes of the Act on Rail Transport introduced by the Act on Public Collective Transport enter into force on 1 March 2011. On 8th June 2011 Minister of Infrastructure issued Regulation on the documents and information which has to be enclosed to the motion for the decision on open access and on the level of charge for its issuance.

III. The Act on Commercialization, Restructuring and Privatization of a State Company ‘Polish State Railways’

Other important drafts concerning railway market enacted in 2010 result from two amendment acts: the Act of 20 May 2010 amending the Act on Rail Fund and the Act on Commercialization, Restructuring and Privatization of a State Company ‘Polish State Railways’\(^{10}\) and the Act of 29 October 2010 amending the Act on Commercialization, Restructuring and Privatization of a State Company ‘Polish State Railways’ and some other acts\(^{11}\).

The last of those acts created a possibility for the PKP S.A. to transfer the property or the perpetual usufruct of an estate together with the buildings of railway stations situated on those estate. Such transaction takes effect on a motion of the unit of local self-government and has to be pre-approved by the Minister of Transport. The unit of local government has to declare in its motion that in a given period it will rebuild or renovate the railway station and that it will conclude agreements to enable the companies, which are active in the domain of passenger carriages, to serve the passengers, e.g. to use ticket-offices, car parks, waiting rooms and the rooms for the equipment used to conduct rail traffic. The agreement between PKP S.A. and local government unit specifies the deadline and conditions of renovation (or rebuilding) of the station together with the terms of liability for failure to carry out such a renovation. Such transactions result in the extinction of the obligation that

\(^{10}\) Journal of Laws 2010 No. 108, item 686.
\(^{11}\) Journal of Laws 2010 No. 247, item 1651.
PKP S.A. has towards local government units due to real estate tax in the sum not higher than the market value of the property or the perpetual usufruct (if they would extinct above this sum it could have been questionable from the point of view of EU state aid rules).

The amendment act introduced also some possibilities to pay off the debts of PKP S.A. versus the state resulting from the corporate income tax or value added tax. It will be possible by the way of transferring the property of shares of PLK S.A. According to new Article 24d of the Act on Commercialization, Restructuring and Privatization of a State Company ‘Polish State Railways’ the shares of the face value corresponding to the obligations of PKP S.A. are acquired by the State Treasure (represented by the Minister of Infrastructure). Transfer of shares takes effect through conclusion of a written agreement.

According to added Art. 33ba of the Act on Commercialization, Restructuring and Privatization of a State Company ‘Polish State Railways’ also the claims of the State Treasure versus PKP S.A. due to the accomplishment of the agreements of guarantee will be exchanged into the shares of PLK S.A. It concerns the sums of payments made by the State Treasure as the accomplishment of guarantee agreements. The rights resulting from the shares acquired by the State Treasure will be exercised by the Minister of Infrastructure.

The Act of 20 May 2010 amending the Act on Rail Fund and the Act on Commercialization, Restructuring and Privatization of a State Company ‘Polish State Railways’ added Art. 3(3a) to the Act on Rail Fund, which allows to use the resources allocated in the Rail Fund to finance the acquisition of the shares of PLK S.A. by the State Treasure. Article 3(3c) of the Act on Rail Fund clarifies that after such acquisition the rights and obligations resulting from such shares are exercised by the Minister of Infrastructure.

New Article 3a of the Act on Rail Fund dedicates 150 millions PLN from the Fund to co-finance the organization of regional rail passenger carriages by the voivodeships. New Article 39a of the Act on Commercialization, Restructuring and Privatization of a State Company ‘Polish State Railways’ obliged PKP S.A. to contribute to PKP PR – as a non-monetary contribution – real estates that are necessary to exercise activity in the domain of rail passenger carriages. The maximum netto value of these assets was fixed for 300 millions PLN. According to Art. 39a(2) of this act, in exchange for those assets, PKP S.A. acquires the shares in the initial capital of PKP PR and these shares are acquired by the State Treasure. The acquisition by the State Treasure (represented by the Ministry of Infrastructure) is financed from the Rail Fund. Afterwards, the State transfers those shares to the local government units.
IV. Executive acts

Also in the domain of regulations of the Ministry of Infrastructure concerning railway transport there was not as much new as in 2009. There were two new regulations issued. One of them was a brief Regulation of the Minister of Infrastructure of 22 December 2010 on the companies created by PKP S.A., whose shares will be used to secure the claims of the State Treasure resulting from guarantees12.

Second was the Regulation of 20 July 2010 on Common Safety Indicators which implements Commission Directive 2009/149/EC of 27 November 2009 amending Directive 2004/49/EC of the European Parliament and of the Council as regards Common Safety Indicators and common methods to calculate accident costs13. Common Safety Indicators specified in the regulation are collected from the railway operators and infrastructure managers and inserted in the annual safety report prepared by the UTK President. The safety indicators are statistical data concerning basic activities of rail transport, railway accidents and the precursors of accidents, suicides, dangerous goods, the economic impact of accidents, technical safety of infrastructure, management of safety. The regulation replaced Regulation of the Minister of Infrastructure of 18 August on Common Safety Indicators14.

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In 2011 Polish Ministry of Infrastructure is continuing its works, some of which were initiated in previous years, on various amendment drafts concerning among others interoperability of the rail system, absorption of EU financing for investments in railways, organization of rail transport and better protection of passenger rights, state aid for railways, restructuring of PKP holding, system of certification of train drivers. One of the shortest but very important amendment acts proceeded in the Parliament seeks to guarantee more independence of the personnel (including the managers) of the infrastructure manager from the personnel of PKP S.A. and railway operators. We will see how many of those drafts will be enacted before the elections that will take place in autumn 2011.

14 Journal of Laws 2009 No. 142, item 1159.
Legislative Developments in the Aviation Sector in 2010

by

Filip Czernicki*

The Polish Aviation Law (in Polish: Prawo Lotnicze; hereafter, PL) of 3 July 2002 was amended only once in 2009. The amendment was introduced by the Act on the amendment of the Act on the Provision of services on the territory of the Republic of Poland of 4 March 20101, which entered into force on 10 April 2010. Accordingly, two new provisions were introduced into Polish aviation law: sub-article 1a was inserted into the existing Article 160 PL and a new Article 160a was created. Both insertions specify that the Act on the Provision of services on the territory of the Republic of Poland does not apply to its Aviation Law.

Furthermore, four acts of secondary legislation concerning the aviation sector were issued in 2010 by the Polish Minister of Infrastructure.

First, the executive order dated 18 February 20102 confirmed the applicability to Poland of the international requirements set out by the European Organisation for the Safety of Air Navigation (EUROCONTROL) on initial training of air traffic controllers. The executive order established also that specific rules on professional qualifications concerning air traffic controllers will be published by the President of the Polish Civil Aviation Office (in Polish: Urząd Lotnictwa Cywilnego; hereafter, ULC) in the Polish Civil Aviation Office Law Journal. On the basis of Article 163 PL, a separate executive order will be issued setting out the competences and duties of certified training institutions in this field. These competences and duties will be enforced by the President of the Polish Civil Aviation Office.

Second, the executive order dated 28 April 20103 specifies the amount as well as the terms and conditions of money transfers to cover the expenses and

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1 Journal of Laws 2010 No. 47, item 278.
2 Journal of Laws 2010 No. 32, item 173.
3 Journal of Laws 2010 No. 75, item 477.
finance the tasks of the Polish Civil Aviation Office. The amount for the year 2010 was set at 9,828,079 Polish zloty\(^4\), paid in twelve equal installments. This amount was calculated based on the Order of the European Commission No. 1794/2006 of 6 December 2006 which has set out a common charging scheme for aviation services\(^5\).

Third, the executive order dated 2 June 2010\(^6\) changed an earlier executive order on special requirements for airstrips. According to the new act, any given airport management authority is required to prepare an airstrip rescue plan. The executive order precisely describes what should such plan consist of, namely:

- basic information about the airstrip, including all technical data;
- general information about aircrafts which are the most common users of the given airstrip;
- alarm instruction and a description of all cooperating units;
- scope of activities which have to be undertaken by the airstrip manager in emergency cases until the arrival of support units;
- description of the rescue and fire fighting protection equipment that is secured while landing, departing, taxing and fueling of aircrafts;
- description of the airstrip, directions of approach and departure zones for flights, emergency landings fields and location of the closest hospitals within 3km from the airstrip reference point (as described on the map at a scale of 1:25 000 or bigger).

The plan has to be prepared in cooperation with the local fire brigade which should keep its copy. A copy of the plan has also to be kept at the office of the relevant local authority. The executive order states that airstrips should have at least one access road which connects them with the public roads system. At the time of aircraft landing and departing as well as during fueling, an active means of communication shall be secured at the airstrip.

Forth, the executive order dated 11 June 2010\(^7\) introduces prohibitions and restrictions in air traffic movements in the Polish air space, over the whole country or its parts for a period exceeding three months. The Polish airspace is divided into spheres, a number of special areas among them including: areas D (Danger Area), areas P (Prohibited Area) and areas R (Restricted Area). Certain special air traffic movement conditions are set up for these areas which all air traffic flying during the night (between 22\(00\)–6\(00\)). The Appendixes present different types of restrictions in refer to: restricted areas, dangerous areas and airspace defense areas.

\(^4\) App. 2 400 000 Euro.
\(^6\) Journal of Laws 2010 No. 100, item 640.
\(^7\) Journal of Laws 2010 No. 106, item 678.
Legislative Developments and Decisional Practice in the Postal Sector in 2009 and 2010

by

Monika Krakala-Zielińska*

I. Legislation

In Poland, the rendering of postal services is regulated by the Act of 12 June 2003 – Postal Law (in Polish: Prawo Pocztowe; hereafter the PP Act). The Act determines the conditions governing postal activities and their control as well as the rendering of postal services and the universal postal service. In 2009, the National Regulatory Authority proposed to the Ministry of Infrastructure a number of amendments to the PP Act. The new provisions were to ensure in particular fair conditions for postal operators to compete and for consumers to obtain access to postal services of high quality and at affordable prices. In this context, separate definitions of the different types of postal services were of key importance. The absence of such definitions makes it possible for private operators to classify postal services as carriage services to the detriment of consumer rights. Specific amendments were also to be introduced in light of the recommendations made in 2009 by the European Commission. The changes suggested by the Commission followed the state aid notification concerning the Polish universal postal services provider Poczta Polska. Ultimately however,

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3 The consequence of introducing the postal service definition will be, among others, the changes in the granting of authorizations. For more see: www.mi.gov.pl.
the aforementioned amendments will not be enacted due to the preparation of a new PP Act the aim of which is to implement Directive 2008/6/EC (III Postal Directive)\(^5\) into the Polish legal system and to specify the legal conditions concerning the provision of postal services. The implementation of the III Postal Directive is to be completed in Poland by 31 of December 2012. On this account, the current legal changes affecting the Polish postal sector are a consequence of the amendments of other legislation and are mainly of an organisational character.

The amendment most relevant to the postal sector in 2009 was introduced by the Act on Customs Service\(^6\). By its virtue, postal items were placed under the control of the Polish Customs Service. In particular, the Service is authorized to control documents concerning the items and the number of inward cross-border and outward cross-border postal items [Article 48(1)]. The Customs Service is also authorized to search the parcels and take samples of the goods sent [Article 48(2)]. In specific situations, postal operators are obliged to disclose the personal data of postal services users (Article 74).

In 2010, the Polish postal sector was affected most by the legislative changes introduced by the Act on the provision of services in the Republic of Poland\(^7\) (in Polish: ustawa o świadczeniu usług na terytorium Rzeczpospolitej Polskiej; hereafter, the USU Act). The USU Act implemented Directive 2006/123/EU on services in the internal market\(^8\). The aim of the Services Directive was to remove both administrative and practical barriers for the free movement of services across borders in the EU. Due to the significance and the scope of its provisions, the Directive was widely discussed and subject to a number of disputes among the EU Member States. Hence, Poland had trouble keeping to the three yearly implementation deadline set for the end of 2009 and adopted its USU Act four months late (the Act came into force on 4 March 2010).

According to Article 3 of the USU Act, its provisions do not apply to the rendering of universal postal services. Thereby, it is to be applied to all remaining postal services. The amendments introduced by the USU Act pertain to four main issues. The first refers to the adjustment of the PP Act to the requirements of EU law as to the notion of the principal place of business. Being one of the primary notions associated with the freedom of


\(^7\) The Act of 4 March 2010 on providing the services in the Republic of Poland (Journal of Laws 2010 No. 47, item 278).

establishment, it points out whether a given enterprise is established in the EU. As a result, in an application for the authorization and for the entry into the postal operators’ register, an entrepreneur is now obliged to indicate its registered office and address or adobe and its principal place of business [Article 9(1) and Article 15(1)]. Moreover, the rendering of postal services on a temporal basis also requires an authorization or registration [Article 6(6)].

The second major change of the legal regime affecting the Polish postal sector as a result of the USU Act refers to one of the key provisions of Services Directive: submissions by electronic means of communication. In this respect, both applications as well as associated documents can now be submitted by electronic means [Article 9(3) and Article 15(3a)]. In the third amendment, the provisions of the PP Act concerning authorisations granted for a limited period were removed. According to the requirements of the Services Directive, authorisations for the provision of postal services are now granted for an indefinite period of time (Article 11). The fourth amendment restricts the list of cases related to the prohibition to reapply for an authorization to provide postal services within 3 years of the date of the final withdrawal decision (new wording of Article 14).

II. Decisional practice

The National Regulatory Authority responsible for the Polish postal sector is the President of the Office of Electronic Communication (in Polish: Prezes Urzędu Komunikacji Elektronicznej; hereafter, UKE). The competences of the UKE President with respect to postal services can be divided into four categories9. The first is related to the regulation of the postal market – mainly by means of granting authorizations and maintaining the register of postal operators but also through the withdrawal of authorizations and prohibitions to continue postal activities. Within this realm, the UKE President is also authorized to impose fines and to approve proposal for the rule book and tariff list of universal postal services. The second category of competences includes the control whether postal operators comply with the law and provide services, especially universal postal services, of an appropriate quality. The third category covers mediation among postal operators themselves and between operators and consumers. The fourth category of the competences of the UKE President refers to the participation in legislative works and consultations as to new acts of law.

In 2009 and 2010, the UKE President issued over 80 decisions concerning the postal sector. The one most interesting and significant for the situation in the Polish postal market is the decision regarding the break-up of the monopoly of the universal postal services provider Poczta Polska. By virtue of the III Postal Directive, Poland was granted a 5-year transitional period to complete the liberalization process of its postal sector (Article 3). Until 31 of December 2012, the exclusive right to deliver post of up to 50g are thus to be exercised by Poczta Polska S.A (Article 47(4) PP). Other postal operators have the right to provide postal services with respect to such items also but they are obliged to charge not less than two-and-a-half times the public tariff for each item of correspondence in the first weight division of the fastest standard category defined in the public provider’s universal postal services tariff list (Article 47(2) PP). The UKE President investigated in 2009 one of the private postal operators. In the course of the procedure, the Authority established that the operator in question provided postal services exclusively to a single energy company. Its activities included the collection, transport and delivery of correspondence which contained invoices for the sale of electricity. In a decision issued in 2010, the UKE President ordered the scrutinised operator to cease its postal activity because packets weighed less than 50g were charged significantly lower rates than those of Poczta Polska. The private operator appealed the regulatory decision. In its opinion, the services provided in this case could not be regarded as postal services and consequently, they could not be considered to be part of the reserved services of Poczta Polska. The operator argued that its activity represented an exchange of documents concerning electricity sales between the energy provider and its customers. The UKE President upheld the original decision and thus the dispute was brought before the District Administrative Court in Warsaw (in Polish: Wojewódzki Sąd Administracyjny; hereafter, WSA)\(^{10}\). In its judgment, WSA confirmed the position of the UKE President. The activity in question could not be regarded as an exchange of documents since the transport and delivery of the correspondence was performed by the postal operator rather than the employees of the power company. Also, none of the parties offered means including the supply of ad hoc premises which allowed the delivery of own packets by means of a mutual exchange of packets between these entities. The power company ordered the postal operator to deliver the correspondence to its clients while it did not receive any documents from them in return. In

\(^{10}\) The judgment of the Regional Administrative Court in Warsaw of 14 July 2010, VI SA/Wa 986/10. In this contest it is worth mentioning that the other polish courts pass the judgments concerning broadly construed postal sector. However, these are mainly related to the judgment of the appeals against the fiscal authorities decisions. See i.e: the judgment of Regional Administrative Court in Gdańsk of 5 March 2009, I SA/Gd 369/08.
effect, the scrutinised activity was a postal service and its provision had to be regarded as a breach of the legal monopoly of Poczta Polska.

The Polish postal sector is also directly affected by the decisional practice of the National Competition Authority, the President of the Office of Competition and Consumer Protection (in Polish: Prezes Urzędu Ochrony Konkurencji i Konsumentów; hereafter, UOKiK). In 2009-2010, the UOKiK President issued over 10 decisions expressly aimed at the postal sector the most significant of which concerned the endangerment of collective consumer interests. In the most crucial decision of 2009 concerning the activities of InPost, the UOKiK President stressed that a loophole might exist with respect to consumer protection in the postal market. The decision concluded an investigation of InPost – one of the biggest private postal operators in Poland – that is well known for being a company that circumvents the law but does not violate it. InPost attaches paper or metal cards onto postal items in order for them to exceed the 50-gram weight limit. As a result, InPost could deliver them even though the correspondence itself (the envelope) falls within the area reserved for the public postal operator – Poczta Polska S.A. The UOKiK President investigated the standard contract form used by InPost. The Authority questioned the low threshold of InPost’s liability for its correspondence and parcels as well as the considerable length of time after which complaints are considered (30 days after posting). These provisions were far less favourable to consumers than those used by the public postal operator.

The legal issue under consideration here arises from the fact that the public (Poczta Polska) and private postal operators are bound in Poland by two separate legal regimes with respect to consumer protection. Poczta Polska is obliged to apply the PP Act that determines the limits of the liability of the universal postal services provider. It is worth mentioning that these limits are fairly broad. Private postal operators bear on the other hand full contractual liability because they are bound by the obligation to comply with the Civil Code. But the Civil Code does not include any specific provisions in the area of consumer rights in the postal market. That is why, the law authorised private postal operators to determine themselves the scope of their liability and the applicable complaints procedure. Such a situation may result in the adoption of less favourable provisions by private postal operators than those applicable to Poczta Polska – to the detriment of their consumers. Evaluating the practices of InPost, the UOKiK President referred therefore to the PP Act noting that the postal legislation sets out a standard form of good customs and a standard of consumer protection in the postal market. By applying a lower

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11 Decision of the UOKiK President of 7 October 2009, RKR-18/2009.
level of consumer protection, InPost violated the PP Act in the view of the Competition Authority.

Consumer rights were also found to have been violated by the standard form contract used by TNT Express Worldwide (Poland)\(^{12}\). In 2010, the UOKiK President established that changes introduced to TNT’s complaints procedure were unlawful. They included: handling of complaints submitted by means of a registered letter only and imposing an obligation to submit data not required by the law (i.e. a bank account number). Furthermore, TNT was alleged to have used unfair commercial practices because it did not specify which type of services were to be provided – postal services or carriage service. The importance of this distinction was apparent in another UOKiK decision concerning UPS Polska\(^{13}\). The standard form contract used by UPS did not include any information about the rendering of postal services (even though UPS is a provider of such services) – mentioned instead were carriage services only. This unfair commercial practice misled the consumers – a key consideration for compensation claims seeing as the provision of postal services entails full contractual liability while carriage services entail partial liability only (do not include lost benefits).

The Kwoczała decision of 2010\(^{14}\) is the most important UOKiK case of competition-restricting practices. The UOKiK President found here a competition law infringement (tender-fixing agreement) in the domestic market for the supply of automatic stamps to institutional customers. The concerned practice related to the manufacturing and supplying of automatic stamps put out to tender by Poczta Polska S.A. Two undertakings were found to have colluded in this case (separate entities owned by two individuals who were in private a couple). The UOKiK President found proof of concertation in the terms and conditions of the submitted bids as well as in the behaviour of the supposed competitors during the procedure itself. Collusion was found to have taken place because the proposed prices differed only by a few percent points between the participants, and because of the last minute withdrawal of the undertaking that won the bid (due to its lower prices) in order for the more expensive entity to be selected.

To sum up, the decisional practice of the UKE and UOKiK Presidents have a significant influence on the Polish postal market – each within their respective competences. However, in light of the expected complete liberalization of postal services, UKE’s proposals for legal changes concerning the postal sector require a major reconsideration.

\(^{12}\) Decision of the UOKiK President of 17 November 2010, RWA-17/2010.
\(^{13}\) Decision of the UOKiK President of 30 October 2009, RWA-35/2009.
\(^{14}\) Decision of the UOKiK President of 4 October 2010, RWR-24/2010.
Is making the conclusion of contracts for the provision of broadband internet access service conditional upon the conclusion of a contract for telephone services prohibited?

Case comment to the preliminary ruling of the Court of Justice of 11 March 2010

**Telekomunikacja Polska SA v President of Office of Electronic Communications**

(Case C-522/08)

**Facts**

In its preliminary ruling delivered on 11 March 2010, the Court of Justice had yet another opportunity, after the *VTB-VAB* and *Galatea* cases, to express its views on the legality of national legislation prohibiting combined sales (that is bundling and tying). The preliminary question arose in a dispute between Telekomunikacja Polska SA (hereafter TP SA), the Polish incumbent telecoms operator, and the UKE President (in Polish: *Urzęd Komunikacji Elektronicznej*; herefater, UKE), the Polish national regulatory authority (NRA) responsible for the telecoms field. The original case concerned the conditions for the provision of broadband internet access services, ‘Neostrada TP’ by TP SA. According to Article 57(1)(1) of the Polish Telecommunications Law of 2004 (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT) ‘A service provider may not make the conclusion of a contract for the provision of publicly available telecommunications services, including connection to a public telecommunications network, conditional upon the conclusion by the end-user of a contract for the provision of other services (...).’ The telecoms regulator has taken the view that the incumbent’s commercial practice (making the conclusion of contracts for the provision of Neostrada TP conditional upon the conclusion of a contract for telephone services) had infringed Article 57(1)(1) PT. The UKE President issued in December 2006 a decision requiring the incumbent to put an end to such practices. Alleging an incorrect application of Article 57(1)(1) PT, despite its incompatibility with

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3 Following the incumbent’s application for re-examination, the decision was subsequently upheld by the NRA on 28 December 2006.
the Universal Service Directive, TP SA lodged an appeal to the Regional Administrative Court\(^4\) and after its dismissal, a cassation to the Supreme Administrative Court. The latter decided to stay the proceedings and ask the Court of Justice whether EU law precludes a national prohibition, applicable to all telecoms operators, to make the conclusion of a contract for the provision of a service contingent upon the conclusion, by the end-user, of a contract for the provision of another service, and in particular, whether such a measure goes beyond what is necessary to attain the objectives of the EU telecoms package\(^5\).

Key to the reference for this preliminary ruling was the analysis of the conformity of Article 57(1)(1) PT with the EU telecoms package, and in particular, with Articles 15 and 16 of the Framework Directive\(^6\), and Articles 10 and 17 of the Universal Service Directive\(^7\). The relevant provisions of the Framework Directive lay down the tasks assigned to NRAs whereby they are required: to define relevant markets in the electronic communications sector in close collaboration with the European Commission [Article 15(3)]; to carry out an analysis of the relevant markets; and to impose \textit{ex ante} obligations on undertakings with significant market power (SMP) in markets without effective competition (Article 16). The relevant provisions of the Universal Service Directive require Member States to ensure that designated undertakings do not establish such terms and conditions that oblige subscribers to pay for facilities or services which are not necessary or required for the requested service (Article 10), and provide that retail obligations that may be imposed on undertakings with SMP include, \textit{inter alia}, an obligation to not bundle the provision of their services unreasonably [Article 17(2)].

**Key legal problems of the case**

The main controversy related here to the essentially \textit{per se} prohibition of combined sales, that is, the tying of two products/services, established in Article 57(1)(1) PT. Such general prohibition may be surprising given that tying seems to be a common commercial practice that permeates the everyday life of consumers and that can be found in virtually all industry sectors\(^8\). Despite EU competition law’s overall

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\(^{4}\) The Regional Administrative Court dismissed on 22 October 2007 the action of TP SA (Ref. No. VI SA/Wa 890/07).


\(^{8}\) Robert H. Bork noted over thirty years ago ‘Every person who sells anything imposes a tying agreement. This is true because every product could be broken down into smaller
Is making the conclusion of contracts for the provision of broadband internet... 237

hostility\(^9\), tying is acknowledged to occur simply because it can produce efficiencies through production, transportation or information cost saving for instance\(^{10}\). Combined sales are problematic however, because they can be used in order to pursue a variety of commercial objectives, some of which harmful to competitors and detrimental to consumers. On the one hand however, a seller or service provider may want to increase the attractiveness of a newly launched product by tying its sale to another item with an already established reputation. Depending on the attractiveness of the offer, consumers may be more or less willing to acquire the new product. Still, combined sales may force consumers to acquire an additional service, which by no means is essential or necessary for the acquisition of the main service. Consumers may thus be effectively forced to purchase extra products that they do not actually want. Was this the case in relation to the combined sales of broadband with voice telephony? Driven by technological progress, which brought about many new applications and services for which broadband has become essential, consumer demand for high-speed Internet access has certainly significantly increased over the last decade. Decreasing revenue from fixed telephony, increasing mobile penetration rate, and the substitution of services provided over traditional switched networks by mobile and broadband services\(^{11}\) indicate, \textit{inter alia}, that consumers may be interested in contracting broadband on a stand-alone basis. Given these market developments as well as the technical features of telecoms networks, which make it possible to provide broadband without voice telephony, it is safe to argue that the combined sales of the two contested services could not in the present case be considered commercially attractive for consumers.

The Court of Justice stated that to answer the question whether a national prohibition of combined sales, such as Article 57(1)(1) PT, is in conformity with EU law, it is necessary to determine whether the prohibition affects the powers derived by the NRA from the Framework Directive and Universal Service Directive. The Court of Justice ruled that in its view, no such limitation took place in this case\(^{12}\). It stressed moreover that the Polish prohibition seeks to guarantee enhanced consumer protection in their relations with telecoms operators. As the EU telecoms package provides for a minimum level of harmonization of consumer protection, national legislation is not precluded from laying down stricter conditions in matters falling

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\(^{9}\) See e.g. Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 - Tetra Pak II).


\(^{12}\) Case C-522/08, para. 28.
within the scope of the Directives. As such, Article 57(1)(1) PT is not, in opinion of the Court of Justice, incompatible with the Framework Directive and Universal Service Directives.

The Court of Justice considered it essential to examine whether the national law affects the competences of the NRA. It could be argued however that its analysis was one-sided because it only examined whether a ‘limitation’ took place of the powers of the UKE President concerning market analysis and remedies. The competences of the regulator could have also been affected however if Article 57(1)(1) PT had unduly ‘expanded’ them. The incumbent claimed that the provisions of the Universal Service Directive preclude national legislation that, without an assessment of the degree of competition on the market and independently of the firms’ market power, requires all operators to refrain from combined sales.

The analysis of Article 17 the Universal Service Directive clearly indicates that the obligation not to unreasonably bundle services is a form of regulatory control over retail services. According its paragraph 1, such obligation can be imposed as a result of a market analysis and only on undertakings identified as having significant market power. Such view seems to be confirmed in paragraph 26 of the Court of Justice ruling13. If so, is it still possible to conclude that the powers of the Polish NRA were not affected by the prohibition laid down in national legislation? The answer may not be as unambiguous at the judgment seems to imply. It is generally agreed that in the fields covered by the Framework Directive and Universal Service Directive with their minimal level of harmonization only, Member States may lay down stricter rules to enhance end-user protection. However, obligations imposed on the basis of Article 17(1) of the Universal Service Directive must be based on the nature of the problem identified and be proportionate and justified in the light of the objectives of Article 8 of the Framework Directive14. This requirement seeks to ensure that NRAs impose the most effective but least intrusive remedies possible. While Article 57(1)(1) PT does not limit the powers of the Polish NRA to carry out a market analysis, it seems to allow the regulator to impose retail obligation (a prohibition of combined sales) without having to carry out a full market assessment first. In its absence, how can it be known that a prohibition of combined sales is proportionate and the least intrusive remedy available to address the problem at stake?

In addition to assessing the compatibility of the national prohibition of combined sales with the EU telecoms package, the Court of Justice took the liberty to examine, albeit very briefly, the conformity of the contested provision with the Unfair Commercial Practices Directive 2005/29/EC15. Unsurprisingly, the Court reached

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13 Interestingly, the Regional Administrative Court in its 2007 judgment stated that Art. 57(1)(1) PT does not imply an obligation to carry out a market analysis with a view to identify an operator with SMP because the aim of this provision is to protect consumer and not a competitor.

14 Article 17(2) Universal Service Directive

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here an opposite conclusion given that the normative objective of this act resides in the full harmonization of consumer protection, as explicitly stated in Recitals 14 and 15 of Directive 2005/29/EC. Referring to its previous judgments in VTB-VAB and Galate, the Court of Justice reminded that the Unfair Commercial Practices Directive ‘must be interpreted as precluding national legislation which, with certain exceptions, and without taking into account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer’16.

In accordance with Directive 2005/29/EC, only those commercial practices that are black listed in its Annex I are deemed to be unfair per se, that is, in all circumstances. As such, they do not need to be examined on a case-by-case basis. It shall be noted that neither Directive 2005/29/EC nor the Polish Act on combating unfair commercial practices17, which transposes it, contain an outright prohibition of combined sales. Since they are not black listed, the examination of their unfairness must be carried out in concreto, taking into account the specific circumstances of each case. Combined sales must therefore be assessed from the point of view whether they can be seen as a misleading (Articles 6 and 7) or aggressive commercial practice (Articles 8 and 9), and if not, they can still be assessed under the general test provided in Article 5(2). However, the prohibition laid down in Article 57(1)(1) PT did not require such an analysis. Since Article 4 of Directive 2005/29/EC expressly provides that Member States may not adopt stricter rules than those provided for in this EU act, even in order to achieve a higher level of consumer protection18, a general prohibition of combined sales such as that laid down in Article 57(1)(1) PT, is therefore incompatible with Unfair Commercial Practices Directive.

The significance of the judgment

The implications of this preliminary ruling extend beyond the question of the conformity of Article 57(1)(1) PT with EU law. Considering the legality of combined sales first, it can be concluded in general that firms may resort to such a practice in their commercial relationships with consumers. Still, combined sales may be prohibited if they are declared unfair, which in turn requires them to be contrary to good customs and significantly distort, or be capable of distorting, the economic behavior of an average consumer prior to, during or after the conclusion of a product contract19. Second, any general prohibition of combined sales, irrespective of the legislative act in which it is established, may be declared incompatible with Directive 2005/29/EC. This is implied from the fact that in the preliminary ruling at hand, the Court


16 Case C-522/08, para. 31.
18 Joined Cases C-261/07 and C-299/07, para. 52.
19 Article 4(1) of the Act on combating unfair commercial practices.
of Justice examined for the first time the conformity with the Unfair Commercial Practice Directive of national legislation that did not directly implement the provisions of this very Directive.

Following the judgment, the Polish Supreme Administrative Court dismissed the cassation stating that it was unfounded\textsuperscript{20}. When it comes to the interpretation of EU law, the Polish court held that an unambiguous and precise answer given to a preliminary question by the Court of Justice effectively determines the content of the national judgment in that case. Moreover, despite the lack of a clear regulation of that matter, the Court’s answer becomes universally binding\textsuperscript{21}. Furthermore, the assessment of a cassation request is limited to the scope of the complaint. The Supreme Administrative Court could thus not express its views on the compatibility of Article 57(1)(1) PT with the Unfair Commercial Service Directive because TP SA did not raise this issue in its appeal of the UKE decision before the Regional Administrative Court. Ultimately therefore, the Supreme Administrative Court held that Article 57(1)(1) PT is compatible with the EU telecoms package.

Last but not least, the transposition date for Directive 2005/29/EC expired on 12 December 2007 – the contested decision was thus adopted before that date. While found compatible during the proceedings, the national prohibition of combined sales has become incompatible with EU law since the transposition date of the Unfair Commercial Practices Directive expired\textsuperscript{22}. In the aftermath of the ruling, Article 57(1) (1) PT will have to be amended accordingly, which effectively means that point (1) will have to be deleted. Such solution is in fact already proposed in the amendment draft of Polish Telecommunications Act\textsuperscript{23}.

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\textsuperscript{20} Judgment of the Supreme Administrative Court of 27 May 2010, II GSK 355/10.
\textsuperscript{21} Judgment of the Supreme Administrative Court of 19 September 2008, I GSK 1038/07.
\textsuperscript{22} On the basis of Article 3(5) of the Directive 2005/29, Member States may continue to apply stricter provisions until 12/06/13 if they are necessary to ensure that consumers are adequately protected against unfair commercial practices and proportionate to the attainment of this aim.
\textsuperscript{23} Draft of the amended Telecommunications Act, which transposes the new revised regulatory framework as well as the preliminary ruling discussed in this Article is available at: http://bip.mi.gov.pl/pl/bip/projekty_aktow_prawnych/projekty_ustaw/ustawy_telekomunikacja_2010/proj_ustawy_o_zmianie_ustawy_prawo_telekom_oraz_niektor_innych_ustaw/px_projekt_pt_na_bip_18.07.2011.pdf
The regulation of number porting services in the EU: Are the principles set out by the ECJ in the recent *PTC* decision reconcilable with the practical consequences of the earlier *Mobistar* judgment?

Case comment to the preliminary ruling of the Court of Justice of 1 July 2010

_Polska Telefonia Cyfrowa v President of Office of Electronic Communications_ (Case C-99/09)

Introduction

Number portability is the name given to the facility that allows the subscribers of Publicly Available Telephone Services (PATS) to change their service provider while retaining their original number. By enabling subscribers to switch between telecoms network/service providers with little inconvenience, the number porting service therefore constitutes a key facilitator of consumer choice and effective competition on the electronic communications market. The importance of number portability in this respect is easily demonstrated if it is considered that, in 2010 alone, 930,000 Polish fixed line subscribers availed of this facility, along with a further 866,000 mobile network subscribers.

The obligation for operators to provide number porting services in the European Union (EU) is included in Article 30 of the Universal Service Directive (the Directive), and constitutes a valuable regulatory tool under both EU and national law. Prior to its amendment in 2009, the latter provision regulated the pricing of number portability.

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2 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and user’s rights relating to electronic communications networks and services (Universal Service Directive) (as amended by the Citizens’ Rights Directive), OJ [2002] L 108/51. The implementation of number portability at MS level is carefully enforced by the European Commission, which has taken infringement proceedings against Austria, Bulgaria, Czech Republic, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia for their failure to adequately implement the requirements.
in the EU by subjecting any charges levied at wholesale level for the provision of this facility to the principle of cost orientation. It also sought to ensure that customers could not be dissuaded from availing of this service by prohibiting the setting of disproportionate retail prices.

In response to a request submitted by the Polish Supreme Court, the European Court of Justice (ECJ) delivered a preliminary ruling in C-99/09 **PTC** on 1 July 2010 regarding the application of Article 30(2) of the Directive in Poland. In this judgment, the Court clarified that National Regulatory Authorities (NRAs) are required to consider the costs incurred by mobile operators when providing number porting services in order to determine the appropriateness of the direct subscriber charge under Article 30(2). Such retail charges must, however, be set at a level below the costs actually incurred if they are likely to constitute a ‘disincentive’ to subscribers in accordance with that provision.

This paper analyses the ECJ’s judgment in the **PTC** case in the light of its earlier preliminary ruling in C-438/04 **Mobistar**, which also concerned the costing of number porting services under Article 30(2) of the Directive. The reasoning adopted by the Court in both judgments is appraised separately, while the difficulty in reconciling the practical consequences of the **PTC** ruling with the principles as established in the earlier **Mobistar** decision is also explained. In particular, it is argued that, while the ECJ genuinely sought to accord a literal interpretation to the provisions of Article 30(2) in both decisions, the principles enunciated in the **PTC** ruling, coupled with the application of diverse practices at national level regarding the recovery of number porting costs, raises the undesirable possibility that operators in different Member State (hereafter, MS) may be subject to discordant regulatory principles with respect to the costing of the number porting service.

It is argued that such a scenario risks placing certain telecoms operators at an economic disadvantage vis-à-vis those that may, depending on the national regulatory framework in place, be subject to the application of more favourable price control principles when recovering their costs. The importance of ensuring the application of a consistent approach with respect to cost recovery at national level is accentuated by the rate of increase in the uptake of the number porting service on a year to year basis in the EU. In Poland alone, mobile number porting transactions increased by 110%.

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3 The original wording of Article 30(2) has been slightly changed following the amendment of the 2002 EU Regulatory Framework for Electronic Communications in 2009. The former reference to ‘pricing for interconnection’ has now been replaced by reference to ‘pricing between operators and/or service providers related to the provision of number portability’. This amendment brings greater clarity to the text of Article 30(2) in the light of the ECJ’s decision in **Mobistar**, and ensures that the regulatory principle of cost orientation applies to all charges associated with the provision of number porting facility that are levied at wholesale level, and not only those concerning strict traffic related costs.

4 C-99/09 **Polska Telefonia Cyfrowa sp. z.o.o. v Prezes Urzędu Komunikacji Elektronicznej (PTC)**.

5 C-438/04 **Mobistar SA v Institut belge des services postaux et de télécommunications (IBPT) (Mobistar)**, ECR [2006] I-6675.
from 2009 to 2010, while the percentage increase in fixed number porting transactions during the same period stood at 62.5\%\(^6\). As the provision of number portability may, in practice, account for a growing part of the expenses incurred by a telecoms operator on a national market, it is therefore important that the costing of this service is subject to the application of congruent regulatory principles in the EU\(^7\).

The ECJ’s decision in PTC

In 2007, the Polish telecoms regulator, the President of the Office for Electronic Communication (in Polish: \textit{Urząd Komunikacji Elektronicznej}; hereafter, UKE), imposed a fine of PLN 100,000 (approx. EUR 25,000) on the Polish mobile operator Polska Telefonia Cyfrowa (PTC). This fine was imposed on the grounds that the one-off fee of PLN 122 (approx. EUR 30) that PTC had been charging subscribers for the provision of the number porting service during the period from 28 March until 31 May 2006 dissuaded them from availing of this facility, and thus constituted an infringement of Article 71(3) of the Polish Telecommunications Law (the latter provision partially transposes the requirements of Article 30(2) of the Directive into national law)\(^8\). PTC appealed this decision, arguing that Article 30(2) obliges NRAs to take account of the costs incurred by an operator at wholesale level during the porting process when assessing whether or not its retail charge discourages subscribers from availing of this service.

This dispute was eventually litigated before the Polish Supreme Court which\(^9\), in December 2009, referred the following question to the ECJ for a preliminary

\(^6\) Raport..., p. 44, 67.

\(^7\) Wholesale prices for the provision of number porting services across the EU vary to a great extent: from zero charge for porting fixed numbers in Estonia, Germany and Lithuania to EUR 33.9 in the Czech Republic and up to EUR 50 in Slovakia; and from zero charge for mobile porting in seven MS to EUR 20.6 in the Czech Republic and EUR 33.2 in Slovakia. Source: Commission Staff Working Document accompanying the 15\(^{th}\) Implementation Report (March 2010), p. 63 (available at: http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/15threport/15report_part2.pdf)

\(^8\) In this respect, the Polish telecoms regulator (UKE) commissioned the undertaking of a consumer survey in 2006 in order to determine how much fixed and mobile customers were prepared to pay for the number porting service. Its results led UKE to the conclusion that the imposition of a one-off retail charge of more than PLN 50 risked dissuading customers from porting their numbers, and thus constituted a breach Article 71(3) of the Polish Telecommunications Law (the latter provision partially transposes the requirements of Article 30(2) into national law). The adequacy of this approach, whereby retail prices are set by the NRA on the basis of a consumer survey, is questionable. For a more insightful discussion on this issue, see: 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.

\(^9\) Prior to its hearing in the Polish Supreme Court, this case was firstly litigated before the District Court in Warsaw, the decision of which was appealed to the Court of Appeals of Warsaw.
ruling under Article 234 of the EU Treaty [currently Article 267 of the Treaty on the Functioning of the European Union (TFEU)]:

‘Is Article 30(2) of the (Universal Service Directive) to be interpreted as meaning that the competent (NRA), when ensuring that direct charges to subscribers do not act as a disincentive for the use of the facility of porting numbers, has an obligation to take account of the costs incurred by mobile telephone network operators in providing that facility?’

In essence, the ECJ understood the above question as a request for guidance from the Polish Supreme Court concerning the degree to which an NRA is required to consider the actual costs incurred by an operator when seeking to ensure that retail charges do not act as a ‘disincentive’ to subscribers contrary to Article 30(2) of the Directive.

As noted earlier, Article 30(2) allows for the possibility to regulate the provision of the number porting service at both wholesale and retail levels. While this provision requires that any charges levied at wholesale level are subject to the cost orientation requirement, it does not, however, subject customer number porting charges to a specific price control regime. It is submitted that Article 30(2) therefore facilitates the application of two different, and, in practice, potentially discordant, cost control methodologies. While all charges imposed at wholesale level are subject to the regulatory principle of cost orientation under Article 30(2), the latter provision does not stipulate what price control regime should apply to retail number porting charges. On the contrary, Article 30(2) only sets a relatively subjective benchmark when determining the appropriateness of retail number porting fees; i.e. the notion of a retail charge that acts as a ‘disincentive’ to consumers, or that dissuades them from availing of the number porting service. This framework thus grants NRAs a measure of discretion when regulating the prices paid by subscribers for number porting services, presumably in the light of the diverse economic, social and cultural circumstances that characterise each national telecoms market.

When seeking to address the question submitted by the Polish Supreme Court, the ECJ, in a judgment of only twenty nine paragraphs, acknowledged that the practical implementation of the number portability facility requires the same three elements as identified by the same Court in its earlier Mobistar ruling (discussed below), namely: ‘(...) the platforms between operators to be compatible, the subscriber’s number to be ported from one operator to another and technical operations to allow the forwarding of telephone calls to the ported number’.

The Court also expressly recognised that an NRA has the task of determining both the costs incurred by the operators when providing number portability, as well as ensuring that the level of the direct charge does not deter subscribers from using

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10 PTC, para. 12.
11 Ibid, para. 13.
12 Ibid, para. 16. In fact, the ECJ in PTC quoted verbatim the text of its earlier decision in Mobistar in this regard, citing para. 24 of the latter judgment.
The regulation of number porting services in the EU…

this service\textsuperscript{13}. The ECJ went on to state that an NRA must oppose the application of a direct charge which, although in line with these costs, would be likely to constitute a ‘disincentive’ contrary to Article 30(2) of the Directive\textsuperscript{14}. In light of this requirement, the ECJ concluded in \textit{PTC} that an NRA therefore retains the power to fix the maximum amount of any such charge at a level below the costs actually incurred when providing this facility if it considers that a higher charge is likely to dissuade subscribers from availing of the number porting service\textsuperscript{15}.

\textbf{The ECJ’s decision in \textit{Mobistar}}

While also a preliminary reference ruling, the earlier \textit{Mobistar} case differed from \textit{PTC} in that it concerned the setting of number porting charges at wholesale level, while the \textit{Mobistar} decision concerned the setting of consumer charges at retail level. The issue of retail pricing was therefore only indirectly addressed by the ECJ in \textit{Mobistar}, which affirmed that prices should be fixed in such a manner that subscribers are not dissuaded from making use of the number porting facility\textsuperscript{16}.

In \textit{Mobistar}, the claimant operator had taken an action at national level alleging that the Belgian NRA (\textit{Institut belge des services postaux et des télécommunications}; hereafter, IBPT, had fixed the so-called ‘set-up costs’ that the donor operator (the number is ported from its network) could recover from the recipient operator (the number is ported onto its network) during the number porting process at an excessively high level\textsuperscript{17}. Importantly, these ‘set-up costs’ were defined under Belgian national law as ‘(…) the non-recurrent additional cost[s] generated as a consequence of the porting of one or more mobile numbers, in addition to the costs connected with the transfer of clients without number portability to another mobile operator or service provider or in order to terminate the provision of the service’\textsuperscript{18}.

\begin{footnotesize}
\begin{enumerate}
\item Ibid, para. 25.
\item Ibid, para. 26
\item Ibid, para. 28.
\item \textit{Mobistar}, para. 26.
\item At the time that the request for a preliminary ruling in the \textit{Mobistar} case was submitted to the ECJ, Belgian law stated that the donor operator was entitled to recover certain “set-up” costs associated with the number porting process from the recipient operator at wholesale level through the imposition of an inter-operator fee. While the donor operator was prohibited from levying a retail customer for the provision of the number porting service, the recipient operator was entitled to demand the payment of a regulated retail charge (of no more than EUR 15). This legal framework facilitated the recovery of the donor operator’s costs at wholesale level, while the recipient operator could seek to recover some (or all) of its costs through the imposition of a regulated customer fee at retail level. See: Decision taken by IBPT according to the Law of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors (\textit{Moniteur belge}, 24 January 2003) and of the Royal Decree of 23 September 2002 on portability for end-users of publicly available mobile telecommunications services (\textit{Moniteur belge}, 01 October 2002).
\item Article 18 of the Royal Decree of 23 September 2002.
\end{enumerate}
\end{footnotesize}
According to the IBPT decision that fixed the ‘set-up costs’ per mobile number successfully ported (the contested IBPT decision), the notion of ‘set-up costs’ under Belgian law referred only to costs that are incurred by the donor operator\textsuperscript{19}.

This dispute was litigated before the Belgian Court of Appeals, which sent the case as a preliminary reference to the ECJ, asking, among other questions, whether: ‘(…) Art. 30 (2) of the [Directive] […] refer[s] only to those costs related to traffic to the ported number [i.e. strictly interconnect related costs], or does it also refer to tariffs of costs incurred by operators in executing requests for number porting\textsuperscript{20}’. When seeking to address this question, the ECJ expressly recognised that the actual implementation of the number porting facility by telecoms operators includes the following three elements: 1) the synchronising of platforms between the donor and recipient operators; 2) the actual porting of the subscriber’s number from the donor to the recipient network, and; 3) the technical operations necessary to allow the routing of traffic to the ported number\textsuperscript{21}. Importantly, the exact same elements were later identified by the ECJ in its \textit{PTC} judgment.

The ECJ also acknowledged in \textit{Mobistar} that the contested ‘set-up costs’ did not fall within the scope of the checks as expressly set out in Article 30(2)\textsuperscript{22}. It simultaneously concluded, however, that any interpretation of this measure according to which these ‘set-up costs’ would not be subject to the requirements set out in Article 30(2) would be contrary to the aim and purpose of the Directive, and would thus risk limiting its effectiveness\textsuperscript{23}.

Following from this, the Court recognised in \textit{Mobistar} that the fixing of ‘set-up costs’ at excessive levels by donor operators, and particularly those already established on the market benefitting from a large client base, may dissuade subscribers from making use of the number porting facility\textsuperscript{24}. The ECJ concluded, therefore, that wholesale interconnection services related to the provision of number portability as referred to under Article 30(2) included both the traffic costs of numbers ported (strictly interconnect related costs) as well as the so-called ‘set-up costs’ incurred by an operator when implementing the porting service\textsuperscript{25}.

Notwithstanding the fact that the Court repeatedly stressed the importance of subjecting ‘set-up costs’ to specific price regulation in the \textit{Mobistar} decision, it chose not to define the scope of such costs. In this respect, it only acknowledged in broad terms that such ‘set-up costs’: ‘[...] represent a large part of the costs that may be passed on directly or indirectly by the recipient operator to the subscriber who wishes to make use of the portability facility for his/her mobile number\textsuperscript{26}.

\textsuperscript{19} \textit{Mobistar}, para. 14.
\textsuperscript{20} \textit{Mobistar}, para. 19.
\textsuperscript{21} \textit{Mobistar}, para. 24.
\textsuperscript{22} \textit{Mobistar}, para. 29.
\textsuperscript{23} \textit{Mobistar}, para. 27.
\textsuperscript{24} \textit{Mobistar}, para. 29.
\textsuperscript{25} \textit{Mobistar}, para. 30.
\textsuperscript{26} \textit{Mobistar}, para. 28.
Are the principles set out in *PTC* reconcilable with the practical consequences of the earlier *Mobistar* ruling?

(i) *The operator costs taken into consideration by the ECJ in *PTC* and *Mobistar*:*

The ECJ clearly accords a maximalist interpretation in its *Mobistar* ruling to the requirements of Article 30(2) in order to ensure that all costs levied at wholesale level for the provision of the number porting service are subject to the regulatory principle of cost orientation. It would appear that, by adopting such an approach, the Court is attempting to appropriately address the risk that the setting of excessive wholesale charges could be passed on to subscribers, thus prohibiting or dissuading them from using this important facility. This point is demonstrated by the fact that the ECJ expressly acknowledges in *Mobistar* that the exclusion of the so-called ‘set-up costs’, as referred to in the judgment, from the scope of Article 30(2), would be: ‘(...) contrary to the aim and purpose of the Universal Service Directive and might limit its effectiveness from the point of view of the provision of [number] portability’.

While the ECJ chose not to define the exact scope of such ‘set-up costs’ in the *Mobistar* judgment, it is nonetheless clear that the Court also sought to attach an expansive interpretation to this notion. This point is illustrated if we consider the wide interpretation accorded by the ECJ to the preliminary reference question submitted by the Belgian Court of Appeal. While the latter Court specifically asked whether or not Article 30(2) refers only to costs related to traffic to the ported number, or whether it also refers to the ‘(...) tariffs of costs incurred by operators in executing requests for number porting (…)' the ECJ chose to interpret this question as asking simply if: ‘(...) pricing for interconnection related to the provision of number portability, as referred to in Article 30(2) of the Universal Service Directive, concerns the set-up costs in addition to the traffic costs’.

It is therefore submitted that, owing to the manner in which it chose to interpret the Belgian Court’s reference question in *Mobistar*, the ECJ seems to have understood the notion of ‘set-up costs’ to be synonymous with the tariffs of all costs incurred by operators at wholesale level when executing a number porting request, other than the traffic costs of numbers ported (or strictly interconnection related traffic costs). It thus becomes clear that the costs associated with two of the three elements identified in *Mobistar* as prerequisite to the practical implementation of the number porting facility therefore automatically fall within the scope of the definition of ‘set-up costs’ as also identified in that ruling. In accordance with the Court’s rationale in this respect, the costs associated with: 1) the synchronisation of the platforms between the donor and

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27 The maximalist approach adopted in *Mobistar* is inadvertently acknowledged by the ECJ when it expressly recognises that ‘set-up costs’ do not fall within the scope of the checks laid down in Article 30(2). See para. 29 of the judgment.
28 *Mobistar*, para. 27.
29 *Mobistar*, para. 19.
30 *Mobistar*, para. 20.
recipient operators, and 2) the actual porting of the subscriber’s number from the
donor to the recipient network clearly constitute all of the costs that are borne by an
operator at wholesale level when executing a number porting request, in addition to
the traffic related or *per se* interconnection costs\(^{31}\).

Notwithstanding the above, it is also submitted that the costs associated with the
aforementioned two elements may actually qualify as ‘set-up costs’ under the loose
definition attributed by the Court in *Mobistar* to this notion. The costs associated
with; 1) the synchronisation of the donor and recipient operators’ platforms, and 2)
the actual porting of the subscriber number from one network to another, constitute
a large part of the expenses that will either be incurred by, or passed on to, the
recipient operator, and that will, either directly or indirectly, be passed on by the latter
operator to the subscriber at retail level\(^{32}\).

In this regard, the recipient operator will be required to incur certain technical
costs when synchronising its platform with that of the donor operator in order to
facilitate the number porting process (No. 1) above) and, depending on the practice
in place in a particular MS, may also be required to cover the costs incurred by the
donor operator under (No. 2) above through the payment of an inter-operator fee
at wholesale level (as appears to have been the case under Belgian law prior to the
*Mobistar* dispute). In either case, and depending on the legal framework in place at
national level, the recipient operator may be able to recover both sets of costs (the
costs borne directly by this operator as well as the costs billed by the donor operator
at wholesale level) through the imposition of a subscriber fee for the number porting
service (direct recovery). Alternatively, the recipient operator may chose to recover
these costs by, for example, implementing a slight but proportionate increase to the
prices charged to subscribers for the provision of other electronic communications
services (indirect recovery)\(^{33}\).

Likewise, and in accordance with the explanation of ‘set-up costs’ found in the
contested IBPT decision, the costs incurred with respect to both of these activities may
also be incurred, in part or in whole, by the donor operator as a result of the porting
of a subscriber number. In particular, the donor operator will incur the same network
synchronisation costs as the recipient operator under No. 1) above. Moreover, it will
also incur costs associated with the actual porting of the number from its network to

\(^{31}\) It is possible that the ECJ intended that the costs incurred when providing the third
prerequisite element in the number porting process (3) the technical operations necessary to
allow the routing of traffic to the ported number latter costs) be understood as synonymous to
such traffic related or *per se* interconnection costs.

\(^{32}\) The Court underlines at par. 28 of *Mobistar* that such ‘set-up costs’ refer exclusively
to: ‘(…) a large part of the costs that may be passed on directly or indirectly by the recipient
operator to the subscriber who wishes to make use of the portability facility for his/her mobile
number’.

\(^{33}\) The indirect recovery of costs in this manner is, however, difficult to implement on
a competitive market, and undertakings may risk losing market share by unilaterally raising
prices for other services in order to recover costs borne in the number porting process.
the network of the recipient operator such as, for instance, technical costs, consumer service costs etc. (No. 2) above).

It is also possible that the third practical element identified by the ECJ in *Mobistar* regarding the implementation of the number porting process (No. 3) above; the technical operations necessary to allow the routing of traffic to the ported number) may fall within either the scope of the definition of the ‘set-up costs’ as established by the Court in that judgment, or within the definition as established by the Belgian NRA in the contested *IBPT* decision. This issue will ultimately depend on the technical solution adopted at national level to facilitate the routing of calls to a ported number.

In the case that the atypical ‘onward routing’ solution is applied in this respect, the donor operator may incur extra traffic related costs as a result of the porting of a subscriber number which it will charge to the recipient operator in the form of a so-called ‘donor conveyance charge’\textsuperscript{34}. Such a ‘donor conveyance charge’ constitutes a typical and recurrent traffic or *per se* interconnection cost that is paid by the recipient operator each time a call is terminated at a ported number. It therefore differs from the Court’s definition of a ‘set-up cost’ in *Mobistar* by virtue of the fact that it will not usually be passed on by the latter operator to the subscriber that has ported his/her number\textsuperscript{35}. Notwithstanding this, the ‘donor conveyance charge’ constitutes a cost that is incurred, in whole, by the donor operator as a result of the porting of a subscriber number. For this reason, it may actually qualify as a ‘set-up cost’ under the ambiguous definition of this notion referred to in the contested *IBPT* decision.

However, in the case that the more common ‘direct routing’ solution is applied to facilitate the number porting process, both the donor and recipient operators will be required to incur certain costs associated with the establishment and maintenance of a central database containing data on the network to which the number has been ported. As in the case of elements No. 1) and 2) above, and in conformity with the

\textsuperscript{34} A call may be directed to a number ported onto a recipient operator’s network by either of the following two means: (1.) direct routing (which may be realised by means of an ‘all-call query’ or ‘query on release’ system) and, (2.) onward routing. In the former case, the network operator originating the call first queries the location of the number called with the donor operator, or in a central database, before routing the call directly to the network to which the number has been ported. Under the direct routing system, the operator originating a call pays the recipient operator for terminating this call in accordance with the binding termination rates as set out under a standard interconnect agreement. In the case of onward routing, however, the call is automatically directed to the network of the donor operator, from where it is then forwarded to the recipient operator’s network. While the recipient operator receives the termination charge for terminating the call, it is nonetheless required to reimburse the donor operator for the cost of routing the call to the ported number. This fee, known as the ‘donor conveyance charge’, covers the switching, engineering and transmission costs incurred by the donor operator in conveying the call to the recipient operator’s network.

\textsuperscript{35} The ‘donor conveyance charge’, as a typical interconnection related cost, may only be passed on directly by the recipient operator to its subscriber under the ‘bill and keep’ pricing system. Under the more usual ‘calling party pays” arrangement, such a charge would be included in the termination rate set for the termination of an off-net call, and would, therefore, ultimately be borne by the subscriber of the network operator originating such a call.
definition of ‘set-up costs’ established by the ECJ in its Mobistar decision, the costs borne by the recipient operator in this respect may ultimately be passed on, either by direct or indirect means, to the subscriber that has ported his/her number. It is therefore apparent that the recipient operator’s costs associated with the implementation and functioning of the ‘direct routing’ system may thus also fall within the scope of the ‘set-up costs’ as defined in Mobistar.

It is important to recall that the ECJ expressly acknowledges in its PTC ruling that the practical implementation of the number porting process by telecoms operators includes the precise three elements identified in the earlier Mobistar ruling. Owing to the fact that the costs associated with the provision of at least two of these three elements (and possibly all three elements) may ultimately fall within the scope of the ‘set-up costs’, the costs referred to by the Court in PTC are thus, by implication, largely (or absolutely) synonymous to the ‘set-up costs’ as considered in Mobistar. This supposition is supported by the fact that the ECJ expressly acknowledges in Mobistar that the ‘set-up costs’ referred to in that judgment represent a large part of the costs that may ultimately be passed on to the subscriber by the recipient operator. It is important to remember in this regard that, while the ECJ decision in Mobistar relates exclusively to the recovery of the ‘set-up costs’ at wholesale level, that Court’s ruling in PTC concerns the setting of customer number porting charges at retail level.

(ii) Reconciling the practical consequences of PTC with the principles as enunciated in Mobistar:

The reference by the ECJ to the same set of costs in PTC as in Mobistar may seem an innocuous consequence of the fact that similar issues are essentially under consideration in both judgments. It must, nevertheless, be remembered that, owing to the expansive interpretation accorded by the Court in Mobistar to both the requirements of Article 30(2) and to the notion of “set-up costs”, this ruling unequivocally requires that NRAs subject all tariffs for the costs recovered at wholesale level in the number porting process to a strict cost orientation obligation. At the same time, the Court’s decision in PTC obliges NRAs to take the same costs into consideration when assessing the appropriateness of subscriber tariffs (thus implicitly acknowledging that such costs may equally be recovered at retail as well as wholesale level), while simultaneously requiring that the subscriber fee for number porting services be set at a level which

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36 See: Mobistar, para. 24, and PTC, para. 16. The wording used in both paragraphs is exactly the same.

37 The fact that the costs incurred at wholesale level may potentially constitute an important element of the subscriber charge imposed at retail level is even acknowledged by the ECJ in both rulings. The Court in PTC recognises that the ‘costs for interconnection’ as referred to under Article 30(2) and the amount of the direct charge levied on the subscriber are, in principle, connected. It is expressly accepted in Mobistar that these wholesale costs must be fixed in such a way that subscribers are not dissuaded from number porting as required under Article 30(2). See: PTC, para. 22, and Mobistar, para. 37.
may be below the actual costs incurred, if a higher fee is likely to dissuade users from availing of this facility.\(^{38}\)

It is acknowledged that the ECJ clearly seeks to accord a literal interpretation to Article 30(2) in both judgments by setting out a harmonised regulatory approach to be adopted by NRAs with respect to the costing of number porting services. Nonetheless, it is argued that the practical consequences of the PTC ruling may be difficult to reconcile with the principles as enunciated in \textit{Mobistar}. A clear regulatory anomaly arises if it is considered that, depending on whether or not the operator costs incurred in the number porting process are recovered at wholesale or retail level, the tariffs levied for these costs may or may not be subject to the principle of cost orientation. This issue becomes a direct problem considering that, in practice, no uniform model exists in the EU regarding the levying of tariffs for the porting of subscriber numbers. In certain MS (including Poland),\(^ {39}\) national law precludes the setting of a direct retail tariff for the provision of number porting services, and costs are therefore only recovered at wholesale level by means of an inter-operator tariff. This is not the case in other MS, however, where the imposition of retail charges is still provided for under national regulation, and where operators may recover the costs borne in the number porting process at both wholesale and retail levels.

It is therefore submitted that the ECJ’s judgment in \textit{PTC} inadvertently risks placing operators who are required to recover some, or all, of their ‘set-up costs’ at retail level at a disadvantage \textit{vis-à-vis} their competitors who are guaranteed a full return on these costs at wholesale level under the principles as enunciated in \textit{Mobistar}. This issue becomes particularly problematic where, for example, a donor operator would levy a fee on a recipient operator at wholesale level for the ‘set-up costs’ incurred, which the latter would then seek to recover at retail level by setting a direct subscriber charge (as was the case under Belgian law prior to the \textit{Mobistar} dispute). Following from the Court’s reasoning in \textit{PTC}, an NRA may, in such a scenario, require that the subscriber fee be set below the level of the costs actually incurred, if a higher charge would be likely to dissuade customers from using the number porting service. Importantly, and in accordance with the ECJ’s rationale in this judgment, such a requirement would apply notwithstanding the fact that the recipient operator would, in accordance with the principles set out in the \textit{Mobistar} judgment, be required to pay for these services ‘in full’ at wholesale level under the cost orientation principle. The same logic may also apply in the case where a donor operator recovers the ‘set-up costs’ incurred in the number porting process directly at retail level, rather than at wholesale level through the imposition of an inter-operator charge on the recipient operator. In the light of the \textit{PTC} decision, such an operator would be at a disadvantage \textit{vis-à-vis} a donor operator established in another MS if the latter can recover such costs at wholesale level from the recipient operator.

\(^{38}\) \textit{PTC}, pars. 26–27.

\(^{39}\) Article 71(3) of the Telecommunications Law has been amended to provide that number porting services be provided to subscribers free of charge.
The discordant application of the cost orientation principle therefore risks placing operators at a competitive disadvantage, not only vis-à-vis other undertakings established in the same MS (e.g. recipient versus donor operator), but also with regard to those established in other MS (e.g. under a particular regulatory framework, a donor operator from MS ‘A’ may be required to recover some, or all, of the costs incurred in implementing the number porting facility at retail level, while a donor operator in MS ‘B’ may be able to recover the same costs at wholesale level subject to the application of the cost orientation requirement).

Conclusion

Rather than mandating the implementation of one universal cost methodology that would apply to the setting of number porting charges at both wholesale and retail levels, Article 30(2) (prior to its amendment in 2009) only required that the wholesale interconnection costs that are incurred during the number porting process are subject to the principle of cost orientation. No provision is made for the application of a definite cost control methodology at retail level, and NRAs were (and still are) therefore guaranteed a certain measure of discretion when ensuring that retail charges do not constitute a ‘dissincentive’ to subscribers to use a number porting service.

In *Mobistar*, the ECJ accorded an expansive interpretation to the notion of the ‘set-up costs’ incurred by an operator during the number porting process, while simultaneously confirming that such costs fall within the cost-orientation requirement of Article 30(2) of the Directive. The Court also identified three practical elements that make up the number porting process, each of which, it is argued, may actually constitute a so-called ‘set-up cost’ under the ECJ’s lose understanding of this notion. Likewise, the Court in *PTC* acknowledged that the actual implementation of the number porting facility consists of the same three practical elements as identified in the earlier *Mobistar* decision, while simultaneously confirming that retail number porting charges must be set below the level of the costs actually incurred in providing this service in the case that the setting of a higher customer fee would risk dissuading end-users from availing of the number porting facility. It would therefore seem that, notwithstanding that each decision mandates the use of a different (and ultimately conflicting) standard for the recovery of costs at varying levels of the supply chain (i.e. wholesale/retail), the ECJ is inadvertently referring to the recovery of the same set of costs in both judgments.

In the light of the above, it is thus apparent that the Court’s reasoning in both judgments may inexorably give rise to the implementation of discordant and irreconcilable regulatory practices at national level concerning the costing of number porting services. Considering the lack of a uniform practice at MS level regarding the levying of number porting charges, the implementation of divergent cost control methodologies in this manner is potentially dangerous, and may ultimately lead to the situation whereby potential competitors are subjected to inconsistent regulatory requirements. This risk is accentuated by the fact that the number of subscribers using the number porting facility is increasing significantly on a year to year basis, and the
The regulation of number porting services in the EU...

provision of this service thus accounts for a growing part of the costs incurred by a
telecoms operator on a national market\textsuperscript{40}.

It is, however, acknowledged that the above-described conundrum is not the result
of an error of interpretation on the part of the ECJ, but is rather the result of a genuine
attempt on the part of that Court to accord a literal interpretation to the requirements
of Article 30(2) itself. In seeking to grant the NRAs maximum discretion when
regulating retail charges (presumably in consideration of the diverse circumstances
that characterise national markets), the EU legislator thus chose not to provide for the
application of a uniform price control principle (in this case cost orientation) at retail
as well as wholesale levels. It is submitted that, in so doing, it inadvertently facilitated
the application of potentially conflicting regulatory requirements by both courts and
NRAs towards the costing of number porting services in the EU\textsuperscript{41}.

It is argued that the obligation to provide number porting services free of charge to
subscribers does offer a potential solution. Importantly, as noted by Advocate General
Bot in his opinion to the PTC case\textsuperscript{42}, the universal availability of free number porting
services would give customers the opportunity to reap the greatest benefit from the
advantages presented by this facility\textsuperscript{43}. As also noted by the Advocate General, such
a solution would create a harmonised and uniform system across all MS for the

\textsuperscript{40} Moreover, and notwithstanding that this discussion goes beyond the scope of analysis
of this paper, the choice by the ECJ in PTC to facilitate the decoupling of a number porting
subscriber fee from the costs actually incurred when providing this service is also questionable.
While constituting a departure from the regulatory principle of cost-orientation that is normally
applied with respect to \textit{ex-ante} price regulation on the EU electronic communications market
(the Bottom-up Long Run Incremental Cost (BU-LRIC) model is clearly favoured by the
Commission as the cost-orientated pricing methodology that should be applied on electronic
communications markets in the EU), the requirement that NRAs, in certain circumstances, set
retail subscriber fees below the level of the costs actually incurred in the number porting process
may also be difficult to reconcile with the perceived right of a profit orientated economic
undertaking operating in a market economy to (at least) recover the costs incurred when
providing a particular product/service.

\textsuperscript{41} It is interesting to note that the EU legislator chose to regulate the provision of the
number porting facility under Chapter IV of the Directive (End-User Interest and Rights), rather
than including it as a separate market susceptible to \textit{ex-ante} regulation under the Commission
Recommendation on Relevant Markets. Importantly, the range of complementary \textit{ex-ante}
regulatory tools available to an NRA under the market definition and analysis procedure, which
may be applied in conjunction with the application of a price control remedy (transparency,
cost accounting and price control obligations), is very wide. It is submitted that the definition
of the number porting facility as a separate service market could therefore have facilitated the
establishment of a more effective legal framework for the regulation of this service at national
level than that provided for under Article 30(2).

\textsuperscript{42} See par. 72 of the Advocate General’s Opinion.

\textsuperscript{43} Interestingly, Bühler, Dewenter and Haucap argue that an inefficient over-use of number
porting services will occur if subscribers are not required to pay for this facility (this problem
is generally known as the ‘tragedy of the commons’). See: S. Bühler, R. Dewenter, J. Haucap,
\textit{Mobile Number Portability in Europe}, University of the Federal Armed Forces Hamburg (Dept.
levying of tariffs for number porting services. It is only regrettable, therefore, that, notwithstanding the important amendments made with regard to the porting process in the 2009 review of the Universal Services Directive (such as the new requirement that number porting process must take a maximum of one working day), the above issue was not adequately addressed in this context\textsuperscript{44}. Until the time that the practice of setting retail charges for number portability is either abolished or withdrawn\textsuperscript{45}, NRAs and national courts alike should exercise caution when considering the pricing methodologies and regulatory arrangements in place at national level regarding the provision of this service.

\textit{Cathal Flynn}
\textsuperscript{44} A possible way to remedy this problem would be for the Commission to issue a Recommendation, under Article 19 of the Framework Directive (as amended), recommending that the imposition of retail fees for number porting services be abolished. The likelihood of this happening is, however, doubtful, as the issuing of such an act may be difficult to reconcile with the principle of minimum harmonisation. See: 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, OJ [2002] L 108/33, Article 19 (as amended).

\textsuperscript{45} It is argued that the introduction of free of charge number porting services in the EU would not lead to significant regulatory/practical problems, considering that the retail cost for this facility is already set at either zero, or at a symbolic level, in at least twenty one of the twenty eight MS. See: Commission Staff Working Document accompanying the 15\textsuperscript{th} Implementation Report (March 2010), p. 63. http://ec.europa.eu/information_society/policy/ecom/comm/doc/implementation_enforcement/annualreports/15threport/15report_part2.pdf

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Freedom of competition or environmental safety
– what should a municipality prioritize?
Case comment to the judgment of the Supreme Court of 3 March 2010
– Katowice Commune
(Ref. No. III SK 37/09)

Introduction

The Supreme Court delivered on 3 March 2010 an important judgment that concerns competition in local markets for waste management. According to this ruling, the limitation by a municipality of the number of landfills where municipal waste can be disposed of does not constitute an abuse of its dominant position. The Supreme Court held that such an action is justified by the Act on Waste\(^1\) whereby priority in determining the number of usable landfills should be given to the best technology available rather than distance from the place where waste was created. The judgment concerns the relationship between the Act of 16 February 2007 on Competition and Consumer Protection\(^2\) (hereafter, Competition Act) and other Polish legislation – an issue which has been dealt with by the Supreme Court on a number of occasions already. The interest level of this particular case is high because it relates to the hierarchy of the responsibilities of municipalities for ensuring the competitiveness of local markets and their responsibility for environmental safety.

Facts

The amended Act on Waste, which entered into force on 13 October 2005\(^3\), obliged municipalities to adopt their own rules to maintain tidiness and order within 3 months from the date of its entry into force. Mayors were also obliged to determine within 6 months the requirements to be met by a business seeking a permit to collect municipal waste from local property owners. Pursuant to the Regulation of the Mayor of Katowice of 13 April 2006, a business is required to prove the readiness to accept waste from the city of Katowice by waste disposal utilities (landfills) listed in the Provincial waste

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1. Journal of Laws 2010 No. 185, item 1243, as amended.
3. Act of 29 July 2005 amending the Act on waste and amending certain other laws (Journal of Laws 2005 No. 175, item 1458, as amended).
management plan (hereafter, Provincial Plan) and the Waste Management Plan for the City of Katowice (hereafter, Municipal Plan). The Municipal Plan adopted on 25 July 2005 by Katowice City Council determined that its waste will be stored at 2 out of the 11 landfills specified in the Provincial Plan: Siemianowice Śląskie and Tychy Urbanowice. In making its decision, the Council followed the criteria set out in Article 9 Paragraphs 3 and 4 of the Waste Act, i.e. the requirement to dispose unsorted municipal waste recovered or treated in the Silesia Province and the fact that the facility intended for the recovery or treatment meets the requirements of best technology available.4

The President of the Office of Competition and Consumer Protection (in Polish: Prezes Urzędu Ochrony Konkurencji i Konsumentów; hereafter, the UOKiK President) issued a decision5 stating that the limitation of the number of usable landfills (2 out of the list of 11) constituted an abuse of the Katowice municipality’s dominant position on the market for organizational activities to maintain tidiness and order in this municipality. The abuse was said to have taken the form of: ‘acting counter to the creation of the conditions necessary for competition to emerge or develop’ [Article 9(1) and (2) of section 5 of the Competition Act]. The municipality appealed the decision of the UOKiK President to the Court of Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK). SOKiK repealed the decision stating, inter alia, that the relevant market on which the municipality operates is considered a ‘regulated’ market and as such, service provision therein is largely determined by central and local government authorities. Since the competition restriction at hand arose from national legislation, a municipality acting in accordance with its provisions cannot be accused of a breach of the Competition Act. However, the SOKiK judgment was quashed by the Court of Appeal on 27 May 2009 on appeal lodged by the UOKiK President. Ultimately, the municipality brought a cassation to the Supreme Court against the entirety of the judgment of the Court of Appeal.

**Key legal problems of the case and key findings of the Supreme Court**

**Disposal of waste with the best technology available**

This dispute surrounded the issue whether the municipality applied properly the selection criteria for landfills specified in the Act on Waste. Pursuant to its Article 9(1) and (2), waste should first be recovered and treated at its source, and if that is not possible, it should be transported to the closest place where it can be recovered or treated with the use of the best technology available. In the Supreme Court’s opinion, Article 9(2) of the Act on Waste specifies that the choice of the usable landfill should

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4 The most effective technology to achieve a high general level of environmental protection meets specific requirements set out in Article 143 of the Environmental Protection Act of 27 April 2001 (consolidated text: Journal of Laws 2008 No. 25, item 150).

5 Decision of the UOKiK President of 8 November 2007, RKT-54/2007.
be determined primarily by reference to the best technology available, rather than the
distance to the landfill from the place of the waste’s origin. The distance criterion is
of secondary importance, especially since the Act on Waste does not specify how to
identify the closest facility. In determining the requirements to be met by undertakings
applying for an authorization to collect municipal waste, the municipality must indicate
the landfill assigned for the particular service area in the Provincial Plan. At the
same time, the Supreme Court ruled that the municipality may indicate an additional
landfill if it offers better technology than the landfill assigned to the municipality in the
Provincial Plan. The Supreme Court held also that it is justified to limit the number
of usable landfills not only in order to reduce environmental risks and transport costs,
but also to ensure an adequate network of landfills to meet the proximity principle at
the provincial level. A limitation of the number of sites which can accept waste from
given municipalities allows local governments to control the flow of local waste and
increase the efficiency of their waste management system.

According to the Supreme Court, if waste from one municipality could be
transported to all landfills available in the province (as expected by the UOKiK
President), the municipality would lose control over the flow of waste from its territory,
would have no incentives to reduce its amount (since waste could be stored in other
municipalities) nor the motivation to expand or create new landfills within their own
area or in neighboring municipalities. As a result, sustainable waste management
would be impossible. Given the circumstances, the Supreme Court ruled that a
municipality may limit the number of landfills which may be used for waste disposal
by providers of municipal waste collection services. Such actions shall not constitute
an abuse of a dominant position of the municipalities.

**Threats to competition**

The Katowice municipality holds a legal monopoly in the relevant market for
organizational activities undertaken to maintain tidiness and order in the area including
Katowice. As part of this monopoly, the municipality determines the conditions for
the provision of municipal waste collection services from property owners in the
Katowice municipality (interdependent market). The municipality issues permits to
provide waste collection services and determines the requirements that are to be met
when applying for a permit. To be approved, a service provider must provide evidence
in its application that a landfill designated by the municipality to receive its waste is
ready to do so.

According to the UOKiK President, businesses involved in the waste collection
services in Katowice should have the right to choose freely which landfill to use
(located within the province of Silesia). Their choice should thus not be limited to the

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6 In this case, it was a landfill in Siemianowice Śląskie.
7 In this case, it was a landfill in Tychy Urbanowice.
8 Article 7(1) and (6) of the Act of 13 September 1996 to maintain order and cleanliness in
2 sites designated by the municipality. Such limitation restricts businesses in the scope of municipal waste collection from local property owners and creates barriers for the development of unrestricted competition between waste collection service providers, to the detriment of the end users of these services. Since the service providers can choose between 2 landfills only, price competition is reduced. The effects of this limitation affect all businesses currently engaged in the collection and transport of waste in Katowice or seeking to enter this market. As a consequence, consumers suffer because they must choose from among a smaller number of providers. In addition, the restriction of competition in the waste collection market adversely affects the quality and price of the services.

According to the UOKiK President, favoring the owners of the Siemianowice Śląskie and Tychy Urbanowice landfills created barriers to the development of undistorted competition in landfills in the province of Silesia. The choice made by the City of Katowice allowed those managing the 2 designated landfills to dictate contract conditions for the storage and disposal of waste. As a result, price competition was limited, an essential component of which is the cost of waste offtake. Market mechanisms cannot function properly, and all pressure to offer lower prices or better service terms is removed from the privileged landfills.

The primacy of environmental safety over free competition

The Supreme Court held that even though the action of the municipality may hinder competition, it is justified in this case by the rules determining their responsibilities as regards environmental safety. Thus, the Supreme Court referred to the place of the Competition Act in Poland’s overall legal system. It ruled that the Competition Act ‘is applicable to conduct business to such an extent that the legislature has allowed the operation of the market mechanism, leaving market participants autonomy of will to shape their own market behavior. This means that in the case of an activity which consists of organizing the market, as in this case, the Act applies only to those activities of the market organizer, to which it can use a certain margin of freedom. In this light, the provisions of the Act to Maintain Tidiness and Order in municipalities and the Act on Waste may affect the ability to effectively allow the claimant to abuse a dominant position as the market organizer’.

Is purely hypothetical harm to competition sufficient?

The judgment of the Supreme Court is of interest also because it considered the standard of proof that the UOKiK President must present in order to deem a practice a violation of Article 9(2)(5) of the Competition Act\(^9\). The doctrine challenges the legitimacy of this premise, because due to its wide scope, it may cover other premises included in Article 9(2) of the Competition Act. The exact forms of antitrust violations

covered by Article 9(2)(5) of the Competition Act are thus expected to be clarified by
the decision-making practice of the UOKiK President and the jurisprudence of the
Polish courts. In this case, the Supreme Court concluded that the UOKiK President
did not meet the standard of proof required because the antitrust decision did not
demonstrated that the scrutinized behavior had run counter to the creation of the
conditions necessary for competition to emerge or develop. Indeed, following earlier
jurisprudence, the decision of the UOKiK President was based solely on the finding
that ‘(...) for it to be considered an anticompetitive practice, including the practice
indicated in Article 9(2)(5) of the Competition Act, it is not necessary for a negative
effect of the use of market power in conditions of limited competition to arise. It is
sufficient that there was a threat of such an effect’10.

According to the Supreme Court, the analysis of the UOKiK President should go
further than finding a priori an anti-competitive effect of the actions of the Katowice
municipality – it should have relied on a deeper economic analysis instead. In the
Supreme Court’s opinion, a restriction of competition could be demonstrated if
a wider choice of landfills could significantly affect the possibility of existing and
potential new entrants providing waste collection services inside the municipality as
well as affect the price level for waste disposal and for waste offtake services. The
UOKiK President could have compared the costs of providing communal waste offtake
services by the Siemianowice Śląskie and Tychy Urbanowice landfills with the prices
charged at alternative sites and show whether they were so high that they prevented
the offtake of waste or substantially restricted its financial viability. The Court clarified
therefore that the application of Article 9(2)(5) of the Competition Act should not
only be based on purely hypothetical assumptions, but on a competition analysis of
the local market. It is striking that the Supreme Court seems to have challenged
the traditional approach applied by the UOKiK President whereby ‘(...) merely an
attempt by an undertaking with a dominant market position to achieve a particular
effect constitutes an anticompetitive practice’11. It is apparent from the judgment that
the Supreme Court found it insufficient to merely show that there was an attempt to
achieve a certain effect. The UOKiK President must show I addition, by means of an
economic analysis, that the risk of a certain anti-competitive effect was high.

Final remarks

According to the ruling under review, the Katowice municipality was allowed to
prioritize environmental safety over free competition while determining the number of
landfills to be used for the disposal of municipal waste. The position of the Supreme
Court in this case is consistent with its earlier ruling of 15 July 2009 (Ref. No. III SK
34/08)12 where it was stated that other legislation may affect both the extent of the
anticompetitive practices that the UOKiK President may object to as well as clear

12 (2011) 7-8 OSNP 117.
a business from a charge that is has abused its dominant position. The commented ruling demonstrates however that it is often inherently difficult for municipalities to clearly determine which values may legally justify a limitation of competition. Hence, municipalities are exposed to a significant risk of breaching the Competition Act.

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Intersection between the activities of two regulators – shall prior actions taken by the National Telecoms Regulator exclude the ability to intervene by the Competition Authority?

Case comments to the judgment of the Supreme Court of 17 March 2010 – Telekomunikacja Polska S.A.
(Ref. No. III SK 41/09)

Background

The commented judgment of the Polish Supreme Court concerns Telekomunikacja Polska S.A. (hereafter, TPSA)¹ and the fines imposed upon the incumbent operator by the President of the Office of Competition and Consumer Protection (in Polish: Urząd Ochrony Konkurencji i Konsumentów; hereafter, UOKiK) for the abuse of its dominant position. TPSA is a Polish telecoms provider formally established in 1991. It is a public company – its shares are traded on the Warsaw Stock Exchange with the controlling stake owned by France Télécom². TPSA is often the subject of competition law decisions issued not only by the UOKiK President but also by the European Commission, particularly with respect to dominant position abuse³.

Facts

The UOKiK President issued on 29 December 2006 a decision⁴ (hereafter, Decision) that concluded antitrust proceedings concerning TPSA’s conduct. The investigation was initiated by the Competition Authority ex officio. The UOKiK President established therein that TPSA infringed Polish competition law provisions contained in the applicable

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¹ For more information about TPSA see: http://www.tp.pl/prt/pl/o_nas/o_firmie/profil_dzial?a=502783.
² France Télécom holds about 49,78 % of TPSA shares, for more information about the shareholders of TPSA, see: http://gielda.onet.pl/tpsa,18648,101,7,507,profile-akcjonariat.
⁴ Decision DOK–166/06; available at www.uokik.gov.pl.
at the time Act of 15 December 2000 on the Competition and Consumer Protection\(^5\) (entered into force in April 2001; hereafter, Competition Act 2000). TPSA was also found to have infringed the Treaty establishing the European Community (hereafter, TEC)\(^6\), now the Treaty on the functioning of the European Union (hereafter, TFEU).

In particular, the UOKiK President established that TPSA infringed Article 8(2)(5) of the Competition Act 2000. The incumbent was found to have abused its dominant position on the national market for telecoms services provided to consumers via fixed-line public telephone networks because it only offered telephone plans inclusive of connection charges. The UOKiK President established that the said infringement had ceased as of 1 March 2006. As a result, proceedings based on the alleged breach of Article 82 TEC (Article 102 TFEU) were discontinued. The UOKiK President imposed on TPSA a fine for the established offence in the amount of 1,000,000 PLN (approx. EUR 500,000).

In addition, the UOKiK President established that TPSA had violated Article 8(2)(4) of the Competition Act 2000 and Article 82 TEC by abusing its dominant position on the national market for broadband internet services. In this context, the abuse was said to have taken the form of tying arrangement whereby the conclusion of an agreement on broadband internet access (Neostrada TP) was conditional upon the acceptance or fulfillment of a condition having neither substantial nor customary connection with the subject of such contract. The UOKiK President established that TPSA required customers wishing to use Neostrada TP (broadband) to also use the analogue telephone services provided by TPSA. The infringement was ordered to be brought to an end. For this offence, TPSA was fined 10,000,000 PLN (approx. EUR 2,500,000) for this offence.

TPSA appealed the Decision of the UOKiK President to the Court of Competition and Consumer Protection in Warsaw (in Polish: Sąd Ochrony Konkurencji i Konsumenta: SOKiK) which acts as the court of first instance for competition law matters in Poland. SOKiK upheld the decision of the UOKiK President in its judgment delivered on 28 February 2008 dismissing all TPSA's objections. The courts held, inter alia, that the UOKiK President had the authority to intervene with respect to TPSA's telephone plan because prior actions taken by the telecoms regulator, the President of the Office of Electronic Communications (in Polish: Urząd Komunikacji Elektronicznej; hereafter, UKE), approving the tariffs of TPSA (de facto charges included in these tariffs)\(^7\) were based on Telecommunications Law and that is why they did not infringe the Competition Act 2000. SOKiK stated subsequently that for consumers to whom TPSA only ever offered telephone plans that already included its connection charges, having to make payments for the use of telephone connections of other operators would simply mean more expenditure. Needless to say, SOKiK found that TPSA customers were reluctant to use other telecoms operator because they would have to pay twice

\(^5\) Journal of Laws 2005 No. 244, item 2080 as amended.


\(^7\) The basis for the actions taken by the UKE President is the Article 48 of the Telecommunications Law of 16 July 2004 (Journal of Laws 2004 No. 171, item 1800, as amended).
Intersection between the activities of two regulators...

for the same service. SOKiK confirmed moreover the correctness of the relevant market definition formulated by the UOKiK President. TPSA’s argument that tying arrangements (internet and telephone) are common in other countries was found inadequate in as far as the Polish social-economic situation is concerned.

TPSA appealed SOKiK’s judgment to the Court of Appeals in Warsaw. The second instance court confirmed however the earlier judgment using similar arguments to those presented by SOKiK. The Court of Appeals declared that the UOKiK President conducted an ex post control of Polish telecoms markets and assessed the results of the implementation of the conditions set forth in the tariffs and regulations previously approved by the telecoms regulator (UKE President). TPSA’s objections as to the definition of the relevant market concerning the tying arrangements were also dismissed.

TPSA filed a cassation appeal to the Polish Supreme Court claiming that the Court of Appeals infringed both procedural as well as material rules. The Supreme Court ultimately dismissed the cassation as unfounded.

Key legal problems of the case

The Supreme Court considered three legal issues in light of the circumstances of the case. The first consideration was of procedural nature and referred to Article 228 § 2 of the Polish Code of Civil Procedure8 (in Polish: Kodeks Postępowania Cywilnego; hereafter KPC). According to its provisions, facts known to courts do not require proof. Courts are nevertheless obliged to draw the attention of the parties to the proceedings to those facts at a hearing so that they can submit their own observations on those facts. The Supreme Court answered the question whether courts may, without infringing KPC, recall in their judgments (justifications) circumstances that were not the subject matter of a hearing. The second issue considered by the Supreme Court was of a greater overall importance and concerned the intersection between the scopes of the activities of two regulators – the UKE President and the UOKiK President. The Supreme Court analyzed, in particular, whether prior actions taken by one regulator, namely the UKE President, preclude another regulator, the UOKiK President, from also taking actions. Finally, the Supreme Court considered whether there is a customary relation between broadband internet access and telephone service in fixed networks in the context of tying arrangements.

Key findings of the Supreme Court

The Supreme Court agreed with the opinion of TPSA (plaintiff) concerning the alleged procedural infringement of Article 228 § 2 KPC by the Court of Appeals.

The Supreme Court stated that the provisions of KPC was breached by a court not recalling at a hearing facts to be subsequently declared as known to that court ex officio. As a result, recalling by the court in its judgment (justifications) circumstances

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8 Journal of Laws 1964 No. 43, item 296, as amended.
that were not the subject matter of a hearing, infringed Article 228 § 2 KPC. The Supreme Court established in this context the conditions applicable to the recalling at a hearing of facts considered to be known to a given court ex officio. Accordingly, courts must meet three separate requirements: (i) to recall a particular fact; (ii) to indicate the case where this fact was established and; (iii) to let the parties know that the court intends to treat this fact as known to the court ex officio.

In response to the claim of the plaintiff, the Supreme Court stated that the Court of Appeals did not meet the aforementioned test. The Court of Appeals was said to have only briefly let the parties know that it intended to use a particular decision issued by the UKE President. The remaining two conditions were omitted altogether.

The Supreme Court proceeded to determine whether the established violation of Article 228 § 2 KPC has in fact affected the outcome of the case. The Supreme Court analyzed therefore how the procedural infraction affected the factual basis of the subsequent judgment. The Supreme Court found in this context that the facts recalled by the Court of Appeals in its judgment (a particular decision and report of the UKE President), helped the second instance court to establish that TPSA’s market share in the relevant market exceeded 40%. As a result, it was possible for the Court of Appeals to determine that TPSA held a dominant position in the relevant market, based on the presumption resulting from Article 4(9) of the Competition Act 2000. The Supreme Court found also however that even if the contested sources were not recalled in the judgment, the Court of Appeals would have been in the position to establish that TPSA holds a dominant position on the basis of other facts. Therefore, the proven violation of the provisions of KPC had no actual effect on the outcome of the case.

On the other hand, TPSA’s claim that the Court of Appeals has also committed a violation of substantive law was declared as unfounded by the Supreme Court.

It was stated, on the basis of an earlier Supreme Court judgment of 19 October 2006 (III SK 15/06), that prior actions taken by a sectoral regulator exclude the ability to intervene by the Competition Authority to the extent that its intervention would address issues covered by the earlier regulatory decision. In line with the treatment of the tariffs of energy undertakings, the Supreme Court declared therefore that it would be unacceptable for the UOKiK President to treat the price list (tariffs) already approved by the UKE President as a competition restriction. All this notwithstanding, the Court of Appeals determined in the case at hand that the abusive practice contested by the UOKiK President referred to the fact that TPSA’s offer did not contain a price list for telecoms access only (its offer contained only a combination of telecoms access and connections). According to the Supreme Court, the fact that TPSA’s tariffs were approved by the UKE President did not exclude the possibility of actions being taken by the UOKiK President according to the Competition Act 2000 for services (only telecoms access) not actually included in the pre-approved tariffs.

The Supreme Court agreed on the other hand with the methodology suggested by TPSA for the determination of the relevant market. The Supreme Court declared however that the case concerns the market situation for broadband internet access services existing in a specified period of time and that the relevant market was
determined properly in relation to the time period under assessment, because the Court of Appeals explained what factors it relied upon while determining the relevant market (e.g. differences in installation, operation, mobility, operating costs, noise, and safety) for broadband internet access service.

Finally, the Supreme Court did not share the opinion of the plaintiff that there is a relevant customary relation between broadband internet access and telephone services provided via fixed networks. According to the Supreme Court, there is no doubt that they constitute two separate commodities (services) designed to meet diverging consumer needs. A customary relation can be shown with reference to the practices common in a given market but with the exception of situations where the source of the practice lies in the behavior of a dominant undertaking. The Supreme Court agreed in this respect with the position of the lower instance courts whereby it is insufficient in this context to show customary relations by reference to foreign markets. The practice in question must be a custom adopted in the very relevant market (relevant markets) in which tying actually occurs.

**Final remarks**

The Supreme Court judgment under consideration raised at least three important issues. First, it confirmed its position expressed in the Supreme Court ruling of 19 October 2006 which deals with the intersection between the scopes of the activities of the UOKiK President and the UKE President. It stressed that prior action taken by the telecom regulator (the UKE President) preclude the Competition Authority (the UOKiK President) from intervening to the extent that it would address issues covered by the decision of the telecoms regulator. The ruling under consideration here confirms therefore the rules to be applied when establishing the authority to act of two separate regulators – the UOKiK President and the UKE President. By doing so, it establishes a sound scheme for the division of their competences and improves legal certainty for interested telecoms undertakings.

Second, the judgment established that three separate requirements must be fulfilled by a court with respect to recalling at a hearing of facts considered by that court to be known to it *ex officio*. As a result, all courts must: (i) recall a particular fact; (ii) indicate the case where this fact was declared and; (iii) let the parties know that the court intends to use this fact as known to it *ex officio*. However, even if a court violates the above requirements, its findings with regards to these facts shall be upheld unless they were established as the basis for the ruling.

Finally, the Supreme Court addressed the issue of customary relation (link) between broadband internet access and telephone service in fixed networks in the broader context of tying arrangements. It concluded that a customary relation may be shown by the practice generally applied in the relevant market with the exception of

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9 The Supreme Court recalled the judgement of the Court of First Instance in the *Microsoft* case, where it was found that there can be no formation of trade customs when the entity applying tying has a strong dominant position (T-201/04 *Microsoft v Commission*, ECR [2007] II-3601, para. 940).
situations where the source of that practice is the behavior of an undertaking holding a dominant position. Moreover, the aforementioned practice must be established in so far as each relevant market is concerned. In line with European level decisions\textsuperscript{10}, the Supreme Court declared that it is impossible to establish a customary relation with respect to an entity holding a dominant position and using tying arrangements.

Although the Supreme Court decision was based on the Competition Act 2000, especially with respect to tying arrangements, it is equally applicable in the light of new Competition Act of 16 February 2007\textsuperscript{11}.

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\textsuperscript{11} Journal of Laws 2007 No. 50, item 331, as amended.
More economic approach to exclusivity agreements: how does it work in practice?

Case comment to the judgment of the Court of Appeals in Warsaw of 25 February 2010 – Lesaffre Polska (Ref. No. VI ACa 61/09)

Introduction

No other topic draws as much attention in competition law as the need for an economic approach and yet, it is still a ‘deficit’ approach. Authorities enforcing competition protection rules are still very attached to the formalistic approach and this is an affliction not only of the Polish but also of the EU authorities and courts.

The judgments delivered in 2010 by the Polish first and second instance courts responsible for competition matters in the Lesaffre case appears here as an exception.


3 Judgement of the Court of Competition and Consumer Protection of 18 August 2008, XVII Ama 83/07.

4 It should be noted that the UOKiK President issued (after the contemplated judgment) decision DOK-8/2010 of 26 August 2010 in Wrigley Polska case, where the authority analyzed in detail, applying the economic approach, the possibility of an anti-competitive effect resulting
Facts and overall assessment of the decisions

Lessafre Bio Corporation S.A. with a seat in Wolczyn is a Polish manufacturer of yeast and improvers with a strong position in the national market – its share in both the production market and wholesale sales exceeds 30%5. In a decision dated 29 December 2007 (DOK-164/2007), the Polish Competition Authority – the President of the Polish Office of Competition and Consumer Protection (in Polish: Urząd Ochrony Konkurencji i Konsumenta; hereafter, UOKiK) established that Lesaffre and its 45 distributors engaged in an anti-competitive practice, as set forth in the applicable at that time Article 5(1)(6) of the Act on Competition and Consumer Protection6 of 15 December 2000 (hereafter, Competition Act 2000). According to the Competition Authority, the banned practice took place in connection with the execution by Lesaffre of its distribution agreements which contained an exclusivity clause concerning the purchase of baking yeast by its distributors. In the conclusions of the decision, the UOKiK President stated that ‘the purpose and effect [of the contested contractual provision] was to restrict access to the market of baking yeast sales to undertakings not covered by the agreement’.

The Polish Court of Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumenta; hereafter, SOKiK) and later the Court of Appeal in Warsaw (in Polish: Sąd Apelacyjny: SA) both disagreed with the approach of the Competition Authority and indentified a number of errors in its analysis of the notion ‘object and effect of restricting competition’. These errors can be divided into three groups, those associated with: 1) the standard of the analysis performed in the case, 2) evidence deficiencies, and 3) burden of proof. As a result, SOKiK performed, subsequently confirmed by the Court of Appeal, a constructive analysis of the case by indicating which factors need to be evaluated before the Competition Authority (and in the business practice – an undertaking) qualifies an exclusive purchase clause (non-compete clause) as restricting competition on the relevant market.

As a result of the evaluation performed by SOKiK and confirmed by the Court of Appeal, the original administrative decision issued by the UOKiK President was changed. The judgments denied therefore that Lesaffre had actually engaged in the alleged competition restricting practice.

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5 A higher market share deprives the party of the possibility to benefit from the block exemption referred to in the Regulation of the Council of Ministers on the exemption of certain vertical agreements from the ban on agreements restricting competition (Regulation of 30 March 2011 currently in force; Regulation of 19 November 2007 in force during the Lesaffre proceedings).

6 This provision corresponds to Article 6(1)(6) of the current Act on Competition and Consumer Protection of 16 February 2007 (Journal of Laws 2007 No. 50, item 331, as amended).
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Key legal problems and key findings of the courts

*Competition law assessment of exclusive purchasing agreements in competition law*

Article 6(1)(6) of the current Act on Competition and Consumer Protection of 16 February 2007 states that an agreement may be prohibited on account of its competition restricting object or effect. The possibility to demonstrate that the agreement had both an anti-competitive aim and result is not excluded however. Not unlike other antitrust bodies, the Polish Competition Authority is often not satisfied with demonstrating the anti-competitive purpose of an agreement only (although such assertion is obviously sufficient to qualify it as prohibited) and thus tends to establish its actual or potential anti-competitive effects also.

Pursuant to such classification, there are agreements which can be clearly qualified as prohibited due to their anti-competitive object (hard core restrictions such as price agreements, market divisions, etc.) as well as those, which can be deemed prohibited because of their potential or actual anti-competitive effects. The latter include exclusive purchase agreements (as in the said case) and other exclusivity agreements. The growing rationalization of antitrust enforcement policies has led (among others) to exclude such agreements from the scope of conducts which restrict competition by their very object. That is, under the fundamental condition that the parties to the agreement do not exceed (according to the current legal status) a 30% market share in the supply and purchase markets respectively.

In light of these obvious assertions, it is all the more surprising that the UOKiK President assumed that the scrutinized agreement restricted competition due to its anti-competitive object. Interestingly, the theoretical possibility of such a classification was not ruled out by the Polish court of first instance. Contrary to the views of the European judicature and the position of the European Commission, SOKiK stated that ‘the Court does not accept as justified the plaintiff’s statement that such clauses in mutual agreements are not treated as violating competition law on account of the purpose but only on account of the effect of restricting access to the market. Assessment of the agreement between the manufacturer and distributors, which contains an exclusivity clause, as being contrary to antimonopoly

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8 The Vertical Block exemption previously in force made its use for agreements containing an exclusive supply obligation conditional on not exceeding by the purchaser and its capital group of the share threshold, § 4.2 of the Regulation of 19 November 2007.

9 See footnote 4 above.

10 See European Commission Guidelines on Vertical Restraints, OJ [2010] C 130/01, exclusive purchase agreements classified as ‘single branding’ or as a form of ‘non-compete’.
law, may result from the finding that the parties had intended to exclude or restrict competition.\(^\text{11}\)

This view is rather controversial, given the currently applicable approach to such agreements. Fortunately, this interpretation has not ultimately led the Polish courts to any erroneous conclusions. Both courts adjudicating in this case stated in the end that the examination of both the object and effect of the scrutinized agreement should take place ‘after a comprehensive legal and economic analysis’ was performed.

**The standard of the analysis of exclusivity agreements and evidentiary insufficiencies in administrative proceedings**

The judgments delivered by SOKiK and the Court of Appeal contain a critical assessment of the formalistic approach taken by the Competition Authority. In this respect, SOKiK stated first of all that: ‘the authority has contended its assessment of the agreement to its formal aspect’ and ‘the allegations concerning agreements with such an exclusivity clause […] should not only be supported by a formal assessment of the contract, but also, and most of all, by the consideration of the specific economic context in which this took place’ \(^\text{12}\). This criticism, as well as the refusal to accept the use of the formalistic approach by the UOKiK President, should be by all means approved.

Both courts have identified the necessity to analyze the challenged clause (its object and effect) and its practical operation, that is, to consider the economic and market context applicable during the time it was in force. SOKiK emphasized also that ‘Without reference to the economic situation on the wholesale baking yeast market, it is impossible to determine whether, and if so when, the agreement could have negatively affected competition on this market…’. ‘In the Court’s opinion, depending on the commercial context existing in the market, the contractual clause in question may either show the anti-competitive purpose of the agreement or suggest Lesaffre’s intention to form – by legal means – a specific distribution network’ \(^\text{13}\).

Both courts have identified a number of factors that the Competition Authority should have considered before qualifying the agreement as prohibited due to its object or effect. The UOKiK President has either completely overlooked those issues during the administrative proceedings or ignored the counter-evidence provided by the applicant (Lesaffre) in their context. The indication by the courts of these circumstances is of dual significance. First, it reveals how the ‘economic approach’ may be applied to specific economic situations. Second, it holds a meaningful educational value as it analyzes a specific type of an exclusivity agreement/clause – *nota bene* a very

\(^{11}\) Judgment of the Court of Competition and Consumer Protection of 18 August 2008, XVII Ama 83/07.

\(^{12}\) Page 13 of the SOKiK judgment; the issue is continued by the Court of Appeal in a less unequivocal manner, see pp. 20–21 of the judgment of the Court of Appeal in this case.

\(^{13}\) SOKiK judgment, p. 15.
More economic approach to exclusivity agreements: how does it work in practice?

Thus, it may prove very useful to undertakings.

Speaking of the first important factor that has escaped the UOKiK President’s notice, SOKiK ascertained that ‘… in order to limit access to the baking yeast wholesale distribution market, Lesaffre would certainly need to conclude the agreement with a large number of contractors…’. This condition is defined as tied market share. The court of first instance considered in this respect evidence presented by the applicants which demonstrated that 77% of yeast distributors were not bound by the exclusivity agreements in question (‘Data presented in Appendix 1 convinces that the exclusivity clause had not had a significant impact on the distribution structure’).

The number of entities active on the market overall and the number of those not bound by the scrutinized exclusivity on the distribution level may be, in fact, of greater significance to the evaluation of the clause than the market power of the entity applying the restriction. In the Dutch Heineken case, the scrutinized beer producer held a market share exceeding 50% in the Horeca channel. However, the Dutch Competition Authority, confirmed later by the adjudicating apples court, ascertained therein that the contested agreement did not foreclose the beer distribution market in the Horeca sales channel to other potential producers. This decision was based on the fact that 40% of the market was not bound by exclusive agreements with any of the competing beer suppliers as well as the fact that all Heineken buyers could easily withdraw from the contested exclusivity (upon a two-month notice).

In its judgment, SOKiK has carried out an even deeper analysis of this issue. It stated that the potential purpose of the agreement may be implied from the selection criteria of the distributors covered by it, that is, their market power and the scale of the cooperation with the supplier. In order to determine foreclosure, SOKiK found it insufficient to rely on the number of contractors covered by the agreement and Lesaffre’s market shares. SOKiK’s approach represents its discerning assessment of the original decision. It puts also the economic approach to practical use replacing the formalistic method applied by the Competition Authority which relied simply on ‘statistics’.

Second, both SOKiK and the Court of Appeal emphasized that the ‘attractiveness’ of the scrutinized exclusivity clause should also be subject to an analysis. In other words: when determining the ‘restriction of access’ prerequisite, SOKiK stressed the necessity to analyze whether the clause in question was actually capable to create an economic barrier to entry for other baking yeast producers. Based on the evidence gathered in the proceedings before the court of first instance, SOKiK considered this issue in light of an analysis of the potential anti-competitive object and later, anti-competitive effect of the agreement. When establishing the lack of a restrictive purpose, SOKiK referred to circumstances demonstrated by Lesaffre. These factors

14 Van Bael and Bellis, op.cit., p. 286.
16 The share in the production market was almost identical to the share assigned to Lesaffre.
concerned the mutual benefits resulting from the policy for both the producer and its distributors covered by the contested agreement (circumstances not challenged by the Competition Authority). This evidence has in fact excluded the existence of the alleged anti-competitive object of the agreement. As regards its anti-competitive effect, SOKiK has again pointed out that the Competition Authority has not demonstrated the grounds for its findings. The UOKiK President was also said to have failed to challenge (by way of certain evidence) the applicant’s assertion that ‘...entry into the yeast distribution market does not require significant expenditures nor specific technical efforts’ (p. 18 of the judgment).

Third, as correctly noted by SOKiK, the binding effect of the exclusivity clause determined the object and effect of the agreement as well. The court of first instance justly noted here that Lesaffre’s evidence demonstrating the short duration and flexibility of the exclusivity obligation (possibility to withdraw from the exclusivity upon resignation from the associated bonus) has not been disproven by reference to its ‘commercial nature’.

Fourth, it is very significant that SOKiK recognized that ‘... the finding of a large market share in the relevant market is in itself insufficient to demonstrate the existence of an anti-competitive purpose or/and effect of the agreement’. This statement touches upon the notion of the ‘competition structure’ of the market, a concept translated by commentators as the need to consider, as a major factor in the assessment, not only the market power of the supplier but also the buying power of the distributors. SOKiK has additionally indicated that the existence of a competition restriction can be assumed on the basis of market shares alone only with respect to super-dominance. Any other market ‘configuration’ requires full analysis ‘... with reference to the entirety of the legal and factual context, with particular consideration to the economic situation’ at hand.

SOKiK has also addressed another meaningful aspect of the overall assessment of the case: the potential negative effect of a situation where exclusivity is also applied by other suppliers (cumulative foreclosure). The Competition Authority has ignored this issue despite numerous guidelines in this respect deriving from European case-law.

Notwithstanding the courts’ use of the economic approach which is, in itself, a fact of great significance in view of Polish case law, neither of the judgments is free from defects. Most importantly, SOKiK’s analysis does not seem consistent. It

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17 Richard Whish draws attention to this aspect of exclusivity [in:] Competition Law, op.cit., by stating, that such clauses introduced for a period of less that one year are unlikely to restrict competition; a high probability of such restrictions exists when clauses are in force for five years or longer; detailed analysis should be conducted in cases where a period 1-5 years is concerned.

18 SOKiK’s assessment was even more far-reaching stating that ‘The freedom of entering the exclusive contract, the possibility of withdrawal upon notice and the variability of the distribution model as found by the Authority, rather contradicts the finding concerning the foreclosure of the distribution market and the restriction of the possibility to conduct business activity or to start it by baking yeast producers (importers)’.

19 Page 17 of the SOKiK judgment.

linked economic indicators to the anti-competitive object of the agreement, which lead to a repeated analysis of the same circumstances from different perspectives, i.e. perspective of the anticompetitive object and effect. SOKiK ultimately failed to convincingly lie down its analysis and in fact avoided making any final conclusions about the case. It seems, SOKiK stopped its assessment half-way and concluded that insufficient evidence has to result in concealment of the decision as it was adopted by the President of the UOKiK while the facts that were analyzed by the court definitely gave the grounds to judge the case in its entirety. Following this cautious approach, the Court of Appeal concluded that the Competition Authority’s decision was unfounded as the prerequisites determining the existence of a restrictive practice (market foreclosure or competition elimination) had not been properly demonstrated by the UOKiK President.

**Burden of proof in the judicial part of antitrust proceedings**

Polish courts adjudicating competition law cases frequently consider the issue of the burden of proof. This is so because standard procedural rules are to be applied to situations very different to normal commercial proceedings (where one business sues another and hence bears the burden of proving the grounds of its legal action). The discussed peculiarity is a consequence of the procedural model applicable to juridical proceedings in competition law cases in Poland. The model assumes the initiation of court proceedings before SOKiK with a challenge of the administrative decision issued by the Competition Authority. As envisaged in the Polish rules of civil procedure, it is the appeal that initiates first instance contradictory proceedings ‘in the matter of the appeal of the decision of the UOKiK President’

The course of the judicial proceedings starts with an administrative decision issued by the Competition Authority which qualifies a given conduct as anti-competitive. When justifying such finding, the UOKiK President should put forward evidence reflecting the Authority’s conclusions. If a party to the administrative proceedings disagrees with that decision, it can appeal the decision to SOKiK. Submitting the appeal has to be equated therefore to a summons in standard civil proceedings. Thus, the appealing party should challenge either the facts or legal qualification applied by the Competition Authority in its decision. The appealing party usually identifies the deficiencies of the decision or presents new evidence meant to challenge the conclusions reached in the decision. Despite those initiatives, SOKiK (being the defendant in the judicial proceedings) should not remain passive. First, it is entrusted with the enforcement of competition protection priorities under the Act on Competition and Consumer Protection. Second, the conclusions of the Competition Authority do not bear any special evidentiary value in the court proceedings. To the contrary – its

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statements must be properly grounded. Thus, when responding to an appeal, the Authority should present evidence (as applied in the decision or found at a later stage) that confirms the correctness of the conclusions of its administrative decision.

In the discussed judgments, both courts (SOKiK and the Court of Appeals) explicitly marked the roles to be played by both parties to the judicial proceedings, that is, Leseffre and the UOKiK President. They concluded that the burden to prove facts and their qualification applied in the contested decision lies on the Authority. In their judgments, not only did the courts note the shortcomings of the assessment performed by the UOKiK President but, after conducting its own evidentiary proceedings, SOKiK actually found that the facts of the case were in contradiction to the facts asserted by the Authority. Such ‘active’ approach in evidencing before SOKiK is indispensable for procedural reasons because, as concluded by the Polish Supreme Court in its judgment of 25 May 200422, ‘the nature of administrative proceedings makes it impossible for a civil court to base its judgment on the facts established by the administrative authority’.

Judicial proceedings in competition law matters cannot be qualified as a typical litigation where it is the plaintiff who makes ‘claims’ and provides evidence to support them. To the contrary: since the Authority is the ‘claiming’ party in its decision, the burden of proof to evidence the grounds for its conclusions lies also on that UOKiK President. This duty is to be derived from the Act on Competition and Consumer Protection as well as Article 6 of the Polish Civil Code. This rule is not altered by the mere fact that the term ‘defendant’ is used in relation to the UOKiK President in judicial civil proceedings.

Since the Authority failed to prove the grounds of its decision, SOKiK changed it and concluded that no prohibited agreement took place. The Court of Appeal additionally emphasized that ‘… in a situation when the President of the Office imposes a serious fine on an anti-competitive agreement, qualified as a violation of Article 5(1)(6) of the Act on Competition and Consumer Protection of 15 December 2000, and the plaintiff denies applying such agreements by putting forward evidence justifying a different object and effects of the agreement, as well as proposing evidence demonstrating figures reflecting the market situation and concluding that there was no market access restriction for undertakings not covered by the agreement, which could limit the competition on the baking yeast’s production market, the obligation was on the defending authority to prove that its assessment contained in the administrative decision was justified [emphasis added]’.

One more issue should be addressed in this context: what is the scope of evidence to be presented by a plaintiff in order to successfully challenge a decision issued by the UOKiK President. It can be claimed that it is sufficient for an appellant to deny the decision and by doing so, to ‘activate’ the burden of proof on the side of the Authority. The latter should then fully evidence its decision before the courts. Interestingly, European judicature consider this issue in the following way: it is sufficient for a challenging party to present an alternative explanation in order for the burned of proof to move to the Commission, the latter will then have to prove

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that the explanation contained in its decision is the only reasonable one and that other alternatives should be excluded\(^{23}\).

The explicit confirmation of the assignment of the burden of proof in competition law cases is of great interpretative value. Undertakings struggle to appeal the decisions issued by the UOKiK President since they must evidence that the facts of the legal qualification applied therein are erroneous. Alternately, they must provide the court with evidence that the Competition Authority failed to conduct the administrative proceedings in a fair and legal way. From this perspective, the court’s role may be incorrectly shifted to the assessment of the grounds of the appeal rather than to the assessment of the actual practice attributed in the decision to the appealing undertaking. The accurate assignment of the burden of proof in juridical proceedings helps the adjudicating courts to make their assessment from the correct perspective.

Final remarks

The approach applied by both of the adjudicating courts in the Lessafre case demonstrates that the use of a truly ‘economic’ approach is possible at every stage of competition law proceedings. The courts performed a valuable task in presenting a number of factors belonging to the ‘economic context’ toolbox. These factors should cast some light onto the legal qualification of exclusivity agreements concluded by non-dominant undertakings. They could be universally applied in other ‘exclusivity cases’. Legal practitioners would have preferred to have had a similar approach taken at an even earlier stage of the proceedings, that is, already by the Competition Authority. And finally, the courts confirmed that the UOKiK President is to prove both: an anti-competitive object and effect. This burden is not shifted away from the Authority merely due to the ‘change of roles’ in judiciary proceedings.

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The very relevant market.
Case comment to the judgment of the Court of Appeals in Warsaw of 22 April 2010 –
Interchange fee
(Ref. No. VI ACa 607/09)

Introduction

Although almost five years have gone by since the issue of the first decision of the President of the Polish Office for Competition and Consumer Protection (in Polish: Urząd Ochrony Konkurencji i Konsumentów; hereafter, UOKiK) regarding multilateral interchange fees, the case is yet to be resolved. In 2010, the Court of Appeals in Warsaw annulled the judgment of the Court for Competition and Consumer Protection1 (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK), which in turn overruled the original decision issued by the UOKiK President. The antitrust decision and following judgments reflect varying views on how to apply competition law to payment card systems. In addition, they appear to mirror the various approaches adopted by the European Commission in its subsequent decisions with respect to Visa and MasterCard.

It should be mentioned, as a way of introduction, that there is no general consensus as to the definition of the multilateral interchange fee (hereafter, MIF). For the purpose of this case comment it is sufficient to denote some of its characteristics from the description contained in its very name. First of all, the MIF is multilateral because it is set jointly and because it applies in a multi-party setting. The players in a payment card system include: cardholders, issuers (i.e. banks that issue cards), merchants and acquirers (i.e. banks which provide merchants with infrastructure and services necessary to accept payment by cards). Interactions between all these players are made possible thanks to the platform (for instance Visa or MasterCard), which intermediates between the actors and supplies technical infrastructure to settle the transactions. Secondly, MIF constitutes a fee because it consists of a transfer of monies from merchants to issuers. Finally, it is an interchange, as it is relates to the functioning of a platform described above and designed to facilitate the exchange or meeting of two groups of customers and serving their respective needs.

1 Judgment of SOKiK of 12 November 2008, XVII Ama 109/07 (not reported).
On 29 December 2006, the UOKiK President adopted a decision (hereafter, UOKiK decision) directed at various Polish banks that issue payment cards. Anticipating the decision of the Commission in the MasterCard case (hereafter, the MasterCard decision), the Polish antitrust authority first defined the relevant market as the market for acquiring payment cards and second, considered the practice, consisting in a joint setting of the MIF by the scrutinized banks, as a restrictive agreement. The original decision was appealed by its addressees on a number of grounds, the most interesting of which included: flawed choice of addressees – it should have been directed at appropriate associations of undertakings (banks) rather than individual banks separately; incorrect delimitation of the relevant product market – a separate market for acquiring services does not exist; failure to consider the fact that the contested agreements are necessary for proper and effective functioning and development of payment card systems in Poland; failure to consider the fact that cross-subsidization is a common market practice. The decision was challenged also because the Polish antitrust authority did not conduct a sufficient analysis of the efficiency gains brought about by the contested agreements.

The appealed decision was modified by SOKiK on 12 November 2008. The first instance court annulled the original findings due to an incorrect definition of the relevant market. SOKiK asserted that since the MIF does not occur on the acquiring market, the decision should have been addressed to the organizations or associations which set the MIF rather than to individual banks. The SOKiK judgment was appealed to the Court of Appeals in Warsaw, which ruled on the case on 22 April 2010.

The Court of Appeals began by emphasizing that despite the EU character of the case, the conditions were not met for stalling the proceedings until the Court of First Instance (now the General Court) reaches its own verdict in the appeal case concerning the MasterCard decision. Despite its ‘declaration of independence’ from the European case, the Polish Court of Appeals has come close to the position adopted by the European Commission in its MasterCard decision.

Key legal problems

The key legal problem of this case concerned the definition of the relevant product market since solving this controversy would, to a great extent, predetermine the outcome of the entire proceedings. Even the European Commission has reached different conclusions with respect to the definition of the relevant market at various
points in time with respect to Visa and MasterCard. The same is true for the UOKiK President and the Polish courts.

As noted, the UOKiK President used the market definition applied later by the Commission in its *MasterCard* decision, namely that the relevant product market is that for acquiring payment card transactions, i.e. the acquiring market.

SOKiK on the other hand, allegedly following the Commission decision in the *Visa* case (hereafter, *Visa* decision), took the view that defining the relevant market as that for payment card systems is more appropriate. This was not to say that the acquiring market does not exist, considering that an economic market can indeed be identified where services are bought and sold that enable merchants to receive card payments. According to SOKiK however, the MIF does not have any impact on the acquiring market because it does not influence competition between acquirers in their relation to merchants. MIF cannot be considered as compensation for services rendered by acquirers to merchants because the acquirers do not pocket the MIF themselves but transfer its full amount to the issuers instead. For SOKiK, the MIF constitutes an element of the issuers’ remuneration for providing an electronic payment instrument in the form of the card. SOKiK identified particular services rendered by card issuers, which include: transaction settlement, payment warranty, deferring payment or free of charge granting of short-term credit to cardholders. Unfortunately, SOKiK did not explain why it is the merchant that should pay for this assistance by way of the MIF seeing as most of the aforementioned services are actually provided to the benefit of the cardholder. More surprisingly even, SOKiK ultimately concluded that the MIF should be viewed as a price for the joint service rendered by the entire Visa or MasterCard system. It remains unclear how can the MIF simultaneously constitute a payment for the services rendered by one of the participants of the system (i.e. card issuers) and at the same time payment for the use of the system. Further confusion is brought about by SOKiK’s statement that both merchants as well as cardholders are on the demand side of the market from the perspective of card issuers and should thus be treated in a uniform manner, as consumers. Although it is true that payment card systems, as an example of two-sided markets, are characterized by the existence of two categories of consumers but both groups center around a platform, which enables their interaction. It is thus not the perspective of card issuers that should be adopted to notice the two-sidedness of the market and the balancing need resulting therefrom, but the perspective of the platform. Issuers merely enable cardholders to participate in the platform but without the Visa or MasterCard system and its second side (i.e. acquirers and merchants), they are not attractive for cardholders. Thus, although SOKiK moved in the right direction by focusing on payment card system as a whole, it did not manage to identify all the characteristics of two-sided markets and their consequences.

It is also worth presenting the position of the parties regarding the character of the MIF and their postulated definition of the relevant product market. Visa and

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5 *MasterCard* decision, para. 316.
6 *Visa* decision of 24 July 2002.
MasterCard see the MIF as a balancing mechanism necessary for the system as a whole to function. The MIF ensures stability by equilibrating the costs and benefits between the beneficiaries of the system (i.e. card holders and merchants). Thus, to appreciate fully the MIF’s balancing function; the relevant market should be defined as that for payment card systems.

Another important legal problem that was touched upon in the analyzed case is the potential efficiency gains brought about by MIF. Efficiencies are relevant since they could lead to an exemption on the basis of Article 101(3) TFEU or Article 8 of the Polish Act on Protection of Competition and Consumers. The insufficiency of Polish antitrust authority’s analysis in this respect was listed among the many appeal grounds. However, SOKiK finished its evaluation at the stage of market definition and thus did not proceed to the problem of a potential exemption.

Key findings of the Court of Appeals

Unfortunately, the Court of Appeals has not resolved the inconsistencies as to the definition of the relevant product market despite the fact that it has rejected SOKiK’s approach. The Court of Appeals first contested the opinion that the Commission has assessed the MIF in its Visa decision on the basis of the relevant market for all payment card systems. The Court of Appeals deemed this conclusion as erroneous and resulting from an inaccurate lecture of the EU case. It is true that the Visa decision is not very clear in its part devoted to relevant market definition: it mentions the two different types of competition, which function in payment card systems (i.e. inter-system and intra-system competition) and it analyses in detail the substitutability of payment cards with other means of payment (such as cash, checks etc.). However, the conclusion ultimately reached by the Court of Appeals appears incorrect. It seems that the European Commission has indeed decided that the relevant product market is that for payment card systems, albeit it took into account not only the competition between different systems, such as Visa and MasterCard, (inter-system) but also among the banks within each system (intra-system). Paragraph 52 of the Visa decision, to which the Court of Appeals refers in order to support its assertions, does not invalidate this conclusion.

On the other hand, the Court of Appeals quite rightly noticed the different relations, streams and connections that take place inside every payment card system. Visa or MasterCard, as the owners of their platforms, interact first of all with banks (both issuers and acquirers). Second, the issuers interact with acquirers in the course of the authorization process. And finally, issuers interact with their clients – cardholders, while acquirers interact with their clients – merchants. However, the existence of these relation streams was not sufficient for the Court of Appeals to conclude that a single market for ‘payment card systems’ exists. The Court of Appeals agreed with the European Commission’s MasterCard decision that, since the various services rendered within payment card systems differ, they constitute distinct relevant markets. According to the Court of Appeals the definition of the relevant product

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7 Journal of Laws 2007 No. 50, item 331, as amended.
The very relevant market

market adopted by SOKiK would have been appropriate only when the inter-system competition was at stake. But since this case concerned intra-system competition, the correct definition of the relevant product market should have been the acquiring market.

However, in order to avoid the potential pitfalls of identifying anticompetitive effects in a relevant market (acquiring market) distinct from the one on which the restrictive agreement took place (issuing market – the MIF was agreed upon between issuers and acquires), the Court of Appeals advanced the theory of related markets. It asserted that the MIF has a significant impact on the acquiring market (even though the court did not explain any further what the character and manifestation of this effect was) and thus these two markets are related. This assertion, coupled with the identification of a vertical element in every payment card system, that is the relation between Visa and MasterCard on the one hand and banks on the other, has allowed the Court of Appeals to detect anticompetitive effects in a relevant market distinct from the one on which the agreement was concluded.

SOKiK’s failure to consider the substance of the case has led the Court of Appeals to annul the first instance judgment and refer the case back to SOKiK.

It appears that the adoption of a different relevant product market definition would have made it possible to conduct a full assessment of the competitive effects of the MIF that would encompass the special characteristics of payment card systems as an example of a two-sided market. The most apt definition would have been that the relevant product market is that for payment card systems, albeit also taking into account intra-system relations and competition. This is the only definition which makes it possible to consider the balancing function of the MIF, its meaning as a mechanism of maximizing the number of users (both cardholders and merchants) and can be a good starting point for the assessment of its potential efficiencies. An artificial separation of payment card systems into their issuing and acquiring segments gives a false idea of the market in question. It does not demonstrate what convinces customers to pay by cards and why are merchants willing to accept card payments. It also does not explain why issuers sometimes give cards without a charge and even provide cardholders with free credit. Finally, it does not show why merchants are ready to accept card payments without requesting an additional charge.

In addition, the ‘related markets’ theory followed by the Court of Appeals is not entirely all-encompassing and convincing. It is true that in vertical agreements a restriction of competition can appear in a related market when undertakings under scrutiny have some degree of market power, which enables them to influence another market. The Court of Appeals has failed however to mention or identify this element. Also not clear is its understanding of the character and nature of the inter-relation between the acquiring and issuing market. Accepting that the relevant product market is that for payment card systems, with all their internal relations and two types of

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competition (inter-system and intra-system), would reflect the true nature of this market. It would also save the unnecessary trouble of proving that the conditions are satisfied for identifying restrictive effect in a distinct market from the one on which agreement is concluded.

Interestingly, the Court of Appeals has also criticized SOKiK for ignoring Article 81(3) TEC considerations (currently Article 101(3) TFEU). Unfortunately, the second instance court did not give many indications as to how should such analysis proceed. It merely reminded that the burden of proving the existence of efficiencies is to rest on the undertakings concerned and that evidence is to be supplied at the outset of the proceedings (following the principle of preclusion of evidence in economic proceedings). Finally, the Court of Appeals suggested that even if the fulfillment of the prerequisites of Article 101(3) TFEU is not proven to the requisite standard, such allegations can be taken into account at the later stage of the assessment when the correctness of the fine level is evaluated.

It should be emphasized that market definition problems will also influence the assessment of potential efficiency gains because one of the conditions that must be met for a restrictive agreement to be exempted, is the existence of counterweighing consumer benefits. These gains must, as a rule, arise *in the same relevant market* in which the anticompetitive effects occurred. It seems clear however that potential efficiencies of the MIF go to the participants of the system as a whole (cardholders and merchants) rather than being associated with consumers only. There is a risk therefore that a narrow, one-sided definition of the relevant market will lead to an unjustified disregard for these potential benefits.

**Final remarks**

Although neither SOKiK nor the Court of Appeals have managed to provide a workable solution to the market definition problem in this case, it appears that SOKiK was moving closer towards the most appropriate answer. However, its reasoning was not entirely consistent because it saw the MIF as an element of the issuers’ fee for providing cardholders with an electronic payment instrument (payment card) but at the same time, it viewed the MIF as remuneration for the services of the system as a whole. Still, its comprehensive treatment of payment card systems, which makes it possible to assess the overall effect and influence of the MIF, should be appreciated.

The Court of Appeals tried to mirror the solution adopted by the European Commission in its *MasterCard* case. Unfortunately, it has failed to demonstrate why it finds this line of reasoning convincing. Not persuasive is, in particular, its reference to the distinct character of the services rendered on the issuing and acquiring market. Indeed, the Court of Appeals struggles in the following sections of the judgment to show an inter-relation between these markets. It is precisely for this inter-relation that payment card systems should have been considered as a single relevant market.

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Simple procedural infraction or a serious obstruction of antitrust proceedings – are fines in the region of 30-million EURO justified?

Case comment to the decisions of the President of the Office for Competition and Consumer Protection of 4 November 2010

Polska Telefonia Cyfrowa Sp. z o.o. (DOK-9/2010)

and of 24 February 2011 Polkomtel SA (DOK-1/2011)

Facts

This case comment concerns two decisions issued by the Polish antitrust authority with respect to inspections carried out in December 2009 as part of an ongoing antitrust investigation relating to the Polish mobile television market. Simultaneous inspections were carried out in the premises of five Polish telecom companies: Polska Telefonia Cyfrowa Sp. z o.o. (PTC), Polkomtel SA (Polkomtel), P4 Sp. z o.o., Info-TV-FM Sp. z o.o. and NFI Magna Polonia S.A.

The first decision (DOK-9/2010) was issued by the President of the Office for Competition and Consumer Protection (in Polish: Urząd Ochrony Konkurencji i Konsumentów; hereafter, UOKiK, antitrust authority) on 4 November 2010 against Polska Telefonia Cyfrowa Sp. z o.o. (hereafter, PTC). The Polish antitrust authority imposed here a fine of 123-million ZŁOTY (equal to EUR 30 million) for preventing UOKiK officials from contacting the person or persons authorised to represent PTC as well as for refusing entry to the company premises during a dawn raid carried out on 2 December 2009. The inspection was conducted pursuant to an authorization in the form of a decision to carry out a control procedure issued by the UOKiK President and a search authorisation issued by the Court of Competition and Consumers Protection (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK)1. After the inspection, PTC refused to sign a post-control protocol because some of the company’s comments to its content were not taken into account2.

According to the facts set out in the PTC Decision, the inspectors and the police entered the building where the seat of PTC is located at 10:10 A.M on 2 December 2009. The officials were not allowed to proceed to the company offices and were left waiting in the downstairs lobby. Twenty minutes after entering the building, they were repeatedly denied entry by the reception and security employees. The building personnel

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1 Order of the SOKIK of 26 November 2009, XVII Amo 22/09.
2 Par. 10 of the PTC Decision.
refused even to accept the authorization documents issued by the antitrust authority and court. The refusal was justified by the statement that as staff members they ‘must respect their internal procedures’. At 10.45 A.M., an employee of PTC’s Department of Corporate Security appeared and accepted the authorisations documents. After an hour, two employees of PTC’s legal department appeared in the lobby to speak with the officials. Still, the inspectors were not allowed to enter the premises.

It was not until 11:30 A.M., one hour and twenty minutes after the officials entered the building, that they were finally allowed to proceed to the PTC offices and started the dawn raid ten minutes later. Even then however, they were not allowed to speak with any of the members of PTC’s Managerial Board and thus the inspectors started to search for authorised PTC personal on their own. While searching, they found out that a meeting concerning mobile phone television was actually in progress in the offices being inspected. The information given to the officials by PTC staff concerning the possibility to meet their board members was not coherent. The company justified the long delay by the necessity to contact those authorised to represent it. According to PTC, ‘the visit of the inspectors was far from standard circumstances’. The fact that two-thousand employees work at the company offices made it difficult, according to PTC, to include such a situation (i.e. dawn raid) in the relevant company procedures.

PTC argued that even though the proceedings were carried out in its opinion without a legal basis, the company cooperated with the officials during the entire inspection. The scrutinised undertaking claimed also that no procedural violations occurred since the inspectors were allowed to enter the premises. PTC argued furthermore that the prerequisites of Article 106(2)(3) of the Competition and Consumer Protection Act of 17 February 2007 (hereafter, Competition Act) were not fulfilled, among other things. This provision concerns imposition by the UOKIK President of a fine of the equivalent EUR 50,000,000 on an undertaking if the undertaking, even unintentionally, does not collaborate during the inspection performed within proceedings.

The company stated that the hypothesis of Article 105d (1)(2) of the Competition Act was not fulfilled primarily because entry was actually granted. The fact that the

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3 Para. 21 and 22 of the PTC Decision – the members of the managerial board have a meeting (the same argument is repeated at para. 67). Para. 32 of the PTC Decision indicates that the employees tried to establish which member of the board was present in the company premises. In the same paragraph, there was only one member of the board present at the time of the inspection (the same is repeated in footnote no. 12).

4 Journal of Laws 2007 No. 50, item 331, as amended.

5 Article 105d states as follows:
1. The inspected party, the person authorised thereby, the holder of the apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 shall be obliged to:
   1) provide the requested information;
   2) provide access to the site and buildings or other premises and means of transportation;
   3) provide access to files, books and all kinds of documents or other data carriers.
2. The persons referred to in paragraph 1 may refuse the provision of information or collaboration only when that could lead to criminal responsibility for themselves or their spouses, ascendants, descendants, brothers and sisters as well as relatives in
inspectors were kept wait was not sufficient, according to PTC, to ‘automatically’ establish that the prerequisites of Article 106(2)(3) of the Competition Act were fulfilled.

The UOKIK President listed in its decision several procedural infractions committed by PTC during the inspection including: the refusal by its receptionist to accept the authorisation documents; refusing entry to the premises; delaying contact with authorised company representative(s). Such behaviour fulfilled, according to the PTC Decision, the prerequisites of Article 106(2)(3) of the Competition Act because it violates its Article 105a and following. Specifically, Article 105d (1)(2) of the Competition Act imposes an obligation upon a scrutinised company to give access to its premises.

The UOKIK President did not agree with PTC’s argument concerning the need to respect its internal procedures regulating the work of its two-thousand staff. The antitrust authority refuted also the fact that no member of the Managerial Board was available to meet the inspectors, nor to authorise any other person to interact with the officials. According to the UOKIK President, even if PTC’s behaviour was not ‘intentional, it is beyond a shadow of a doubt that it made the control more difficult’\(^6\). The antitrust authority stressed also that not only were its officials refused entry to the company premises, but a meeting concerning the object of the main investigation took place in the PTC office at the time when they were kept waiting. The UOKIK President considered therefore that the delay was intentional and meant to postpone the beginning of the dawn raid.

According to Article 106(2)(3) of the Competition Act, the UOKIK President may impose by way of a decision a fine of up to the equivalent of EUR 50,000,000 on an undertaking if the latter, even unintentionally, does not cooperate with an inspection carried out within proceedings pursuant to Article 105a. This rule is subject to an exception provided by Article 105d paragraph 2 which makes it possible to refuse to provide the requested information or to cooperate in the event that one has a special relationship [defined by the law] with a person to whom criminal responsibility may be established.

In calculating the level of the fine, according to Article 111 of the Competition Act\(^7\), the UOKIK President took into account that PTC’s behaviour must have been considered a serious infringement of the public interest. It could not be excluded also, according to the UOKIK President, that a significant part of the evidence sought could have been lost during the delay. The maximal fine that can be imposed for procedural violations in Poland is 50,000,000 EUR, an amount not linked to the turnover of the

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\(^{6}\) Para. 68 of the \textit{PTC} Decision.

\(^{7}\) When determining the level of a fine referred to in Articles 106 to 108, the duration, gravity and circumstances of the infringement of the provisions of the Competition Act as well as previous infringement should be taken into account in particular.
company concerned. The penalty imposed upon PTC constituted 60% of the maximal possible fine – an adequate level, according to the PTC Decision, in view of the degree of the law infringement at hand. This amount would have, in the opinion of the antitrust authority, fulfilled the repressive and deterrent function of a procedural fine without however being overly excessive when compared to the turnover of PTC.

In the course of the same antitrust proceedings concerning the Polish mobile television market, the UOKIK President issued on 24 February 2011 another decision (DOK-1/2011) imposing a fine of 130,689,900 PLN (33,000,000 EURO) on Polkomtel SA (Polkomtel Decision) – a competitor of PTC. Polkomtel was fined for its conduct during a dawn raid conducted simultaneously to the inspection carried out at PTC. Polkomtel was penalised because it prevented the inspectors and police from establishing contact with a person authorised to represent it; delaying the dawn ride; not fulfilling the inspectors’ request to provide all the documents concerning its participation in the contested mobile television project (rather than only those documents chosen by Polkomtel); and refusing to hand over a hard-drive containing data from Polkomtel’s servers.

The inspection was carried out pursuant to a decision of the UOKIK President as well as an authorisation of the SOKIK8. The dawn raid started on 2 December 2009, simultaneously to that at the PTC office; the inspection lasted overall until 31 January 2010. On the contested day, UOKiK officials waited for an hour and fifteen minutes to meet the President of Polkomtel’s Managerial Board even though he was, alongside other board members, present in the company premises9. The inspection begun only after the officials met with the President.

The inspectors copied onto a hard-drive the e-mails of five Polkomtel employees that had participated in the mobile television project under investigation. After copying them, the officials have secured the hard-drive in a closed and sealed closet inside the company premises. The following day, all the data was copied onto a disc belonging to the UOKIK President. Subsequently, the inspectors asked the representative(s) of Polkomtel to give the copied disc to the policeman who was assisting the inspection. However, the company’s proxy stated that she would not permit the disc to leave the office. The disc was thus left in the sealed closet in the room that was secured by both the officials and Polkomtel staff.

Two days after the beginning of the inspection, Polkomtel submitted to the UOKIK President a complaint against the carrying out of the inspection on the basis of Article 84c (1) of the Freedom of Economic Activity Act10. The company claimed in its submission: (1) the lack of objectivity of the inspectors; (2) the attempt to commence the dawn ride with a controller – a UOKIK employee; (3) the suspicion of starting the inspection without a legally valid authorisation; (4) the fact that the inspection carried out exceeded the scope of the authorisation for instance, by attempting to remove from the premises a hard-drive containing private data of company employees

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9 Polkomtel Decision, p. 27.
10 Consolidated text: Journal of Laws 2010 No. 220, item 1447.
and PTC secrets; (5) the disproportionate nature of the inspection with respect to the subject matter of the primary proceedings and; (6) the carrying out of the inspection after company working hours. The complaint was rejected by the UOKiK President on 8 December 2009 and thus the control proceedings continued. Polkomtel appealed the UOKiK President’s refusal to accept its submission to SOKiK but the court rejected the appeal11.

On 9 and 14 December 2009, prior to SOKiK’s ruling, the company provided the antitrust authority with the requested documents. After the rejection of the appeal, the inspection continued. However, the contested hard-drive remained at the company premises and has never been handed over to the UOKiK President. During the proceedings, Polkomtel submitted a number of evidentiary motions including proof concerning the meaning of the notion of ‘a copy of an e-mail inbox’. The scrutinised company questioned also the allegation of how long the inspectors actually waited to begin the dawn raid. In addition, Polkomtel argued that the UOKiK President had not actually synchronised the dawn raids of the scrutinised telecoms operators. Thus, any allegation that Polkomtel had interfered with the simultaneous start of all dawn rides would be unfounded. The company claimed finally that the procedural fine imposed on it was disproportionate to the object of the proceedings.

In the justification of the Polkomtel Decision, the UOKiK President stressed the lack of cooperation of the company during the dawn raid which made it impossible for the officials to commence the inspection. The authority stated also that Polkomtel delayed contact with those authorised to represent it, who were in fact present in the company premises at the time the controllers tried to begin the dawn raid.

Key legal issues of the case

It should be stressed that the current legal basis for inspections is not free from ambiguity12. First of all, inspections are carried out pursuant to the provisions of four different legal acts: the Competition Act, the Freedom of Economic Activity Act, the Code of Administrative Procedure and the Code of Penal Procedure. In the Polish theoretical literature, it is postulated that UOKiK President publishes the guidelines including the principles governing inspections13. However, the soft-law act issued by the UOKiK President is criticized by the doctrine as not having a sufficient legal basis14.

11 Order of SOKiK of 22 December 2009, XVII Amz 54/09/A.
12 B. Turno, [in:] J. Baehr, J. Krüger, T. Kwiecien, M. Radwanski, A. Stawicki, E. Stawicki, B. Turno, A. Wędrychowska-Karpinska, A. Wiercińska-Krużewska, A. Wierciński, Komentarz do art. 8 ustawy o ochronie konkurencji i konsumentów [Commentary to Article 8 of the Competition and Consumer Protection Act], LEX, Art. 105(a).
13 Ibidem.
Antitrust inspections were covered already by the provisions of the Act of 28 January 1987 on counterfeiting the monopolist practices in national economy\(^\text{15}\). Their current legal basis was set up by the Act of 2004\(^\text{16}\), amending the Competition Act of 2000\(^\text{17}\) (which introduced into Polish competition law the principles established in Regulation 1/2003) and by the Competition Act of 2007. The latter set out a number of practical issues that had arisen in the earlier decisional practice of the UOKiK President including questions such as who can the authorization to carry out an inspection be handed to, police assistance and recording of the control\(^\text{18}\).

The very aim of carrying out an inspection by an antitrust authority is to obtain evidence which can often not be attained by any other means, and which is in danger of being destroyed by those participating in illegal conduct (the so-called ‘smoking gun’). This aim justifies the unexpected character of a dawn ride and the necessity to provide the requested documents as soon as possible after its commencement. In cartel cases, the UOKiK President’s ability to carry out simultaneous\(^\text{19}\) inspections in the premises of multiple competitors suspected of collusive behavior is of great importance. Cartel agreements are often known to only a few individuals in each of the participating companies as their conclusion and performance are kept in secret.

As far as fines are concerned, the UOKiK President may pursuant to Article 106(2)(3) of the Competition Act impose by way of a decision a fine of the equivalent of EUR 50,000,000 on an undertaking if the latter, even unintentionally, does not cooperate during an inspection performed within antitrust proceedings pursuant to Article 105a subject to Article 105d(2) of the Competition Act. The fine, even if it concerns a procedural violation within the main proceedings, has in itself an autonomous character\(^\text{20}\). In procedural terms, separate proceedings concerning the imposition of a fine for the lack of cooperation must be instituted.

The aim of fines imposed for procedural infractions is to ensure the correct course of proceedings before the UOKiK President\(^\text{21}\). Lack of cooperation during an inspection may make it impossible to verify the existence of evidence\(^\text{22}\). Moreover,

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\(^\text{15}\) Journal of Laws 1987 No. 3, item 18, as amended.
\(^\text{16}\) Act of 16 April 2004 on the amendment of the competition and consumer protection act and some other acts (Journal of Laws 2004 No. 93, item 891).
\(^\text{17}\) Act of 15 December 2000 on competition and consumers protection (Journal of Laws 2000 No. 122, item 1319).
\(^\text{18}\) B. Turno, [in:] J. Baehr and others, Komentarz do art. 8..... LEX, Art. 105(a).
\(^\text{22}\) Compare SOKiK judgment of 11 August 2003, XVII Ama 130/02, concerning the refusal by an undertaking to respond to UOKiK’s demand for information. M. Król-Bogomilska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), Ustawa..., Art. 106, Nb 55, p. 1622.
a decision imposing a fine is always subject to judicial control. The court will verify whether all the legal obligations placed on the scrutinized undertaking were fulfilled during an inspection. The imposition of a fine does not depend on the question of guilt\textsuperscript{23} but upon the scrutinized undertaking’s conduct during the inspection and its compliance with the law.

Polkomtel argued that the procedural fine imposed on it was disproportionate in view of the fact that the main antitrust proceedings concerned the market for mobile television – an economic field of minor importance which is only beginning to emerge. It must be emphasized however that the principles governing inspections are of procedural character and concern the particular relationship between the inspector and the inspected\textsuperscript{24}. It is thus difficult to sustain Polkomtel’s argued concerning the proportionality of the fine in relation to the subject of the main proceedings. However, this is a point of general relevance, in other words, whether the legal basis for such a high level of procedural fines (up to 50,000,000 EUR) is at all justified.

Polkomtel claimed also that the inspection was not carried out in the course of existing UOKiK proceedings as required by Article 105a of the Competition Act. This argument may difficult to accept. The UOKiK President initiated explanatory proceedings concerning the Polish mobile television market on 25 November 2009. Explanatory proceedings is a preliminary investigation meant to ascertain whether it was necessary to open full antitrust proceedings\textsuperscript{25} (i.e. whether an infringement of the material provisions of the Competition Act took place and whether the case had an antitrust character). The scrutinised company does not need to be informed about the institution of explanatory proceedings\textsuperscript{26} – it is also not considered to be a party to the preliminary investigation. Indeed, dawn raids are in practice most commonly performed in the course of explanatory proceedings because this is when they are most efficient\textsuperscript{27}. SOKiK issued its authorisation of the inspection on 26 November 2009 and the dawn ride was carried out on 2 December – the day when the officials presented the relevant authorisations to Polkomtel’s President.

Polkomtel’s argument concerning the character of the data saved on the contested hard-drive is also difficult to sustain in court. The general practice of transferring digital files from the computers of a scrutinized company has never been questioned and the use in antitrust proceedings of data obtain wherefrom has been repeatedly accepted by SOKiK.


\textsuperscript{24} Ibidem, Nb 7, p. 1530 and the literature there quoted.

\textsuperscript{25} A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), \textit{Ustawa…}, Art. 48, Nb 2, p. 1193.

\textsuperscript{26} Judgement of the Supreme Court of 7/04/04, III SK 22/04 (2005) 3 OSNAPiUS 46.

Finally, it must be pointed out that the authorization issued by the NCA cannot be a subject of judicial control, which is critically assessed by commentators. In the case of the Polkomtel Decision, the company submitted a complaint according to the procedure provided for in the Freedom of Economic Activity Act which was the subject of judicial review but subsequently rejected by SOKiK. It is impossible to uphold therefore Polkomtel’s claim that its right to the equivalent of a ‘fair trial’ was infringed.

Significance of the decisions

The commented decisions concern the rights of the UOKIK President to carry out inspections and the right of defense of companies under investigation. The aforementioned UOKiK decisions are respectively the third and the fourth example of a fine being imposed for the lack of cooperation during an antitrust inspection in Poland. Undoubtedly, these are the highest fines ever to be imposed by the UOKiK President. Hence, they send a strong message to the market that any obstructions of an antitrust inspection will be severely punished. The commented decisions illustrate also that any infractions committed in the course of an inspection are extremely difficult to justify and sustain by the company concerned.

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28 B. Turno, [in:] J. Baehr and others, Komentarz do art. 8..., LEX, Art. 105(a). (consulted 13th July 2011).
29 According to www.uokik.gov.pl the fines were imposed on: PTK Centertel in 2002 and on Cementownia Ożarów in 2007 (2 mln PLN).
The work under review entitled: *Common European Union competition rules* is part of the textbook series: *The system of European Union Law*. As its Volume XXIV, it successfully carries out the intentions of its Authors and publisher of this series, Publishing Institute EuroPrawo, to ‘present in a professional and modern way – and yet approachable and transparent – the key institutional and systemic issues of the European Union’¹. Common competition rules are undoubtedly one of their fundamental principles, essential to the achievement of a single internal market. As such, they relate both to private and public entities, and to almost all sectors of the economy in the internal market. The knowledge of EU competition rules is becoming increasingly necessary to the wider public. Benefiting from their rich scientific and teaching experience, the Authors present a comprehensive, highly reliable and informative textbook tailored to the needs of law and administration students of Polish universities, which can also be useful to students of economics and management, European studies and political science. The book can also be a valuable aid for practitioners: lawyers, officials, entrepreneurs and politicians, who want to learn about this area of EU law.

The textbook is quite extensive – it counts 431 + 26 pages (425 pages of the text itself). It contains six chapters divided into more detail-oriented points and sections (up to fourth degree division). They are preceded by an Introduction, and supplemented by a list of acronyms, abbreviations and a subject index. Each chapter is concluded by a list of supplementary literature, basic legal acts and documents as well as a set of revision questions. The latter not only summarize the key information contained in each chapter but also allow readers to independently verify the degree of understanding of the material. The most important legal rules and quotes from key EU court rulings are presented in a distinctive text format enclosed by a frame. This layout further increases the transparency of the content.

The scope and arrangement of the textbook corresponds to the main directions, which European competition policy focuses on. The first chapter, *Basis and scope of common European Union competition rules*, introduces the readers to the foundations of EU competition law and organises its basic terminology. It presents the axiological

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¹ See: [http://www.iweuroprawo.pl/fol_spue_struktura.html](http://www.iweuroprawo.pl/fol_spue_struktura.html)
basis and types of common competition rules, as well as their sources, nature and development. The next chapter, *Prohibition of competition – restricting practices*, deals with the EU ban on restrictive agreements, and the applicable exemptions, as well as with the prohibition of the abuse of a dominant position. This chapter covers also the rules on the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union. The third chapter, *Preventive control of concentrations of undertakings*, presents the EU merger control system. It defines its subject matter, jurisdictional issues and scope, the criteria used in the assessment of concentrations and finally, the proceedings before the European Commission. The fourth chapter, *Member States and national trade monopolies and public undertakings*, covers EU Member States’ obligations to ensure free competition in the area of national monopolies and public entities. The last two chapters, *Common rules of competition in relation to state aid* and *Sectoral competition rules*, touch upon the issue of state aid covering its form and acceptability at the EU level, jurisdictional issues and proceedings, and the issue of competition protection in particular industry sectors such as: energy, media and transport.

The textbook is largely a new development, both in relation to its Authors’ previous work and to other textbooks available on the Polish publishing market, while it takes into account both current legislation as well as recent case law developments and doctrine. In the Introduction, the Authors themselves stress the inclusion of a new Chapter VI (*Sectoral competition rules*), emphasizing its relevance to a separate textbook entitled: *European Union policies. Policies of Infrastructure Sectors. Legal aspects*, edited by the same Authors which was published as Volume XXVIII of the same series (*The system of the European Union Law*). In fact, sectoral competition rules are part of the common competition policy and particular EU sectoral policies, and as such, they are the most frequently used in practice.

Another instance of the ‘added value’ of this textbook is attributable to the inclusion of a presentation of the solutions contained in EU acts and documents which are not sources of law as referred to in Article 288 of the Treaty on the Functioning of the European Union, generally characterized as soft law. This approach fits well with current trends in the development of EU law, in accordance with the adopted strategy of better regulation.

The textbook presents the legal status as of 30 September 2010. It thus takes into account the reforms introduced on 1 December 2009 by the Lisbon Treaty, which set up a unified European Union and established its legal basis in two separate documents: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFUE). The value of this timeline is especially important because the Lisbon Treaty changed the titles of the Treaties and the numbering of their Articles, as well as some of their basic terms. The fact that this textbook takes account of these developments is of particular importance for the teaching process. One must admit that the Authors have successfully found a way out from the terminological confusion characterizing recent literature resulting from both the reforms themselves and the varying quality of EU law translations across the continent. What deserves special emphasis here is the clear and easily comprehensible explanation style of the
often quite complex issues, a factor essential to any textbook, which makes it possible to broaden the circle of its readers also to those who do not have a legal background.

Let me make a suggestion from the perspective of an economist about the potential further development (new textbook) of this constantly evolving topic by the Authors.

In the Introduction (xxx p.) the Authors conclude: ‘This textbook is primarily the representation of the course on common European Union competition rules, designed mostly for law and administration students of Polish universities. If it will also prove useful to students of European studies, political science or economics and management, the greater will be our satisfaction’. In light of the intentions of the Authors, the content of the course presented in this textbook is of a strictly legal nature.

It seems to me however that students would understand better the inseparability of economic and legal aspects of competition protection if they book was enriched with an introductory chapter on the economic theory of competition, which would present the major schools of economic thought, and if each chapter included a short descriptions of relevant economic problems. It would also help lawyers to better diagnose the economic problems connected with competition law. Actually, such elements are present in western textbooks in the field of competition law, particularly in American ones (albeit not in all). The addition of economic considerations into the existing legal text would align this book with contemporary antitrust analysis, which increasingly uses the tools of economic examination. It is the increasing use of these very economic tools that make the line of case-law evolve as antitrust authorities (like the entrepreneurs themselves) reach for new, more precise assessment tools. The Authors note this issue, highlighting the explicit economization of competition policy (for instance, in Clause 1.1. Axiological basis of common rules of competition of the European Union, XXIV-3 p.). It would be worth developing this idea further.

The obligation of a reviewer should also be to make critical remarks and to point out any shortcomings of the reviewed work (the Authors ask for it) and it is here that I have to admit defeat. Even if we consider that the extensive size of the textbook (425 pages of text) can be subjectively perceived by some students as a great hurdle (the pace of life!), this objection is successfully countered by its transparent and detailed structure which helps the readers to select the correct parts of reference as well as revisit a specific topic. I am confident that the vast majority of readers will be drawn into reading this textbook and become absorbed in the study ‘from cover to cover’.

On my part, I would wholeheartedly recommend Common European Union competition rules by Agata Jurkowska-Gomułka, Ph.D. and Professor Tadeusz Skoczny to all those interested in current competition law issues – a work unique in the Polish publishing market, original due to its substantial value and very good form of communication.

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Sławomir Dudzik seminal work, Cooperation between the Commission and national competition policy agencies in enterprise concentration control, was published and issued in 2010 by Wolters Kluwer. It consists of a Preface, six chapters, and a separate Conclusion, totalling 355 pages. Mr. Dudzik’s work is devoted to a very important element of competition law, which while theoretically complicated is of great practical significance. Already in the Preface the author relates, in a convincing fashion, that as a result, inter alia, of the processes of globalisation ‘cooperation between governmental competition policy agencies in various jurisdictions in the matter of control over enterprise concentration has assumed a special significance in recent years’ (p. 16). They have assigned to themselves the difficult task of defining the ‘principles governing the division of competences between the European Commission and the national competition policy agencies of the member states of the EU with regard to enterprise concentration control, as well as delineation of the scope of EU jurisdiction in this area and related matters with regard to non-EU states’ (p. 17). In the opinion of this reviewer, Mr. Dudzik fully realises the difficult task he set for himself.

Chapter 1 is of an introductory nature. The development of EU law concerning the control of enterprise concentration is set forth in a clear and accessible manner. The author points out that, contrary to the European Coal and Steel Community, ‘the creators of the founding treaties of the European Union . . . did not introduce into the treaties specific provisions which would definitively delegate control to EU institutions, at the European level, over the process of concentration of enterprises in the economy’ (p. 19). In this context the author demonstrates the role played by the Court of Justice of the European Union (hereafter the ‘Court’) in the process of building up a Community (EU) system of enterprise concentration control. S. Dudzik properly asserts that, by issuing decisions which recognised, in this area, that it was appropriate to apply legal norms and solutions prohibiting enterprises from abusing their dominant market position and from concluding agreements among themselves which would have the effect of limiting competition, the Court ‘took on the role of a specific catalyser’ of the development of Community legislation in the area (p. 22). The
author next describes the path which led to the passage of Commission Regulation No 4064/89 and its further amendments, along the way sketching out the main features of Commission Regulation No. 139/2004 and the supplemental Commission Regulation No. 802/2004 (p. 29).

Chapter II is entitled ‘The principle of exclusivity in Commission Regulation No 139/2004 and the principle of the European Commission’s exclusive jurisdiction in assessing concentration in its Community dimension’. In further sections the author discusses: the concept of concentration; issues connected with the community dimension of concentration; the doctrine of exclusivity contained in Commission Regulation No. 139/2004 and the exclusive competence of the European Commission; followed by analytical research into the relationship between EU control over concentration and the Agreement on the European Economic Area.

Of particular interest are the author’s arguments concerning the application, to concentration issues which fall within the confines of Commission Regulation No. 139/2004, of the prohibitions against abuse of dominant position and the conclusion of agreements limiting competition envisioned in Articles 101 and 102 of the Treaty on the Functioning of the European Union. Mr. Dudzik’s point of departure for his considerations is the statement that ‘the Commission Regulation, as an act of secondary law, cannot, without a clear authorisation in the basic treaties, change a provision of primary law’, and that such an authorisation ‘cannot be found in Commission Regulation No 139/2004’ (p. 50). Next the author provides a very satisfying description of the theoretical debate over this issue in European jurisprudence. He cites, among others, the publication of authors C.J. Cook and S.J. Kerse, who maintain that ‘the provisions of Article 21, sub-paragraph 1 of Commission Regulation No. 139/2004 concerning the exclusive jurisdiction contained in Commission Regulation No. 1/2003 do not exclude the jurisdiction of national courts with regard to the prohibition against cartels and abuse of dominant position in connection with enterprise concentration’ (p. 51). S. Dudzik also presents the arguments of A. L. Schild, A. Jones and B. Sufrin and M. Szydło in further support of this position. The opinions of these authors also take into account the approaches and sentiments of D. G. Goyder, P. Roth, and V. Rose. S. Dudzik postulates that ‘these authors exclude the possibility of the European Commission or national competition policy agencies applying Articles

4 See M. Szydło, Stosowanie art. 81 i 82 Traktatu ustanawiającego Wspólnotę Europejską do operacji koncentracyjnych (Application of Articles 81 and 82 of the Treaty on the Functioning of the European Union to concentration operations) Państwo i Prawo 2006, zeszyt 1, pp. 64–66. Mr. Dudzik indicates that the author’s position is very radical.
101 and 102 of TFUE to concentration ( . . . ), acknowledging that national courts are not authorised to apply, with regard to issues of concentration, Article 101 of TFUE’, while adding that ‘it is commonly accepted that Commission Regulation No 139/2004 did not deprive the national courts of the possibility of applying Article 102 of TFUE’ (pp. 52–53). S. Dudzik appropriately acknowledges the position of O. Koch, who accepts the premise that ‘the will of the EU law givers that concentration (in its community dimension – MKK) be assessed solely on the basis of the provisions of Commission Regulation No. 139/2004 has significance for ( . . . ) the application of Articles 101 and 102 of TFUE’ (page 53), and that based on this, as well as on an analysis of the Court’s decisions, it may be postulated that the provisions of Art. 21 of Commission Regulation No. 139/2004 do not forejudge “the issue of the applicability of Articles 101 and 102 of TFUE to the question of concentration in its community dimension”. The same author also questions the possibility of applying, with regards to the issue of concentration in its community dimension, Art. 101 and 102 of TFUE in the Commission and national courts (p. 54).

However one may assess the propriety of the positions taken by Mr. Dudzik, it is beyond question that he presents the European jurisprudence and the Court’s decisions on the issue in a composite and faithful manner, and furthermore that he does not hesitate to offer his own well-reasoned opinions in his discussions. In Chapter II the author also points out the problems associated with the manner in which the undefined normative concept of ‘interested enterprises’ is understood, and in addition provides a critical analysis of the community (EU) criteria for gauging concentration (p. 44 and following).

Chapter III is devoted to issues surrounding the cooperation between the Commission and the national competition policy organs of the member states in matters involving enterprise concentration control. The author begins by presenting the principle of loyalty in cooperation, followed by his research analysis into specific aspects of the issue, such as cooperation within the framework of proceedings undertaken by the Commission, the system for referral of matters between the Commission and national organs, and the protection of the legitimate national interests of the member states, taking into account as well the protection of their national security interests.

In the opinion of this reviewer, the most interesting part of S. Dudzik’s monograph is Chapter IV, which is entitled ‘Extra-territorial application of EU control over enterprise concentration’. The author quickly captures the reader’s interest with his assertion that ‘the extra-territorial application of competition law, including control over concentration, gives rise to a number of disputes between interested states and international organisations’ (p. 161). S. Dudzik then undertakes a successful probe to research the subject matter, both at the level of generally applicable principles of international public law as well as on the ‘legal plane established by the European Union itself’ (p. 161). One element of S. Dudzik’s considerations which particularly enriches Polish scientific discourse revolves around his comparative law analysis concerning United States antitrust law. The author presents a clear and concise analysis of the evolution of American case law and legislation, from the adoption of the Sherman Act through to and including the most current court decisions. Noteworthy

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is his observation that ‘the assessment of American antitrust organs concerning the influence of a projected merger on concentration within the appropriate market does not always correlate to the same assessment carried out by organs of other governments and the European Commission’ (p. 194).

Section 4 of Chapter IV is devoted to issues surrounding the extra-territorial application of EU competition law. Two fundamental concepts are presented concerning the application of EU competition law to ‘enterprises outside the European Union (earlier the EC)’; to wit, the doctrine of effects *utile* and the principle of single enterprise. It should once again be observed that in these considerations the author makes effective use of comparative law analysis. S. Dudzik concludes that ‘with regard to the jurisdictional issues, EU control over enterprise concentration is heading in the same directions contained in American law and practice’ (p. 226). The author adds his own interesting propositions *de lege ferenda* and critically researches the postulates of EU legislative formulations with regard to competition doctrine (p. 220 and following). Chapter IV ends with a ‘bridge section’ to Chapter V, which concerns cooperation between the Commission and non-EU states (third parties) on the basis of bi-lateral agreements. The author notes at the conclusion of Chapter IV that ‘a way to reduce (...) conflicts would involve the use of bi-lateral and multi-lateral international agreements concerning competition law’ (p. 227).

In his Introduction to Chapter V Mr. Dudzik asserts that, in addition to the avoidance of international conflicts over jurisdiction, the use of international agreements should be aimed at assuring ‘the effective functioning of those organs involved in enforcing competition law in instances where its application has an international dimension’ (p. 228). In particular the book under review presents a detailed analysis of the treaties between the European Union and Canada, Japan, Korea, and the United States. As regards the latter, in addition to the 1998 treaty between the EU and the United States, a series of so-called ‘second generation’ agreements have been concluded concerning matters such as notification of ongoing proceedings, exchange of disclosed information, consultations, and the use of mechanisms designated as *positive comity* and *negative comity*. The 1998 Treaty between the EU and the United States is very precise (considered to belong to the ‘third generation’) and envisions, for example, the exchange of confidential information.

S. Dudzik devotes the most attention to cooperation between the European Union and the United States. It should be emphasised that the author does not limit himself to a mere recitation of the contents of the treaties, but illustrates their place in the theoretical discussions concerning this area of collaboration and presents the most important current legal disputes concerning the topic.

The development of Polish legal science is also aided by the considerations in Chapter VI concerning the cooperation between the Commission and competition policy agencies in third countries in light of standards developed by selected international organisations. The comments concerning the World Trade Organisation (WTO) are particularly edifying. Following a sketch of the basic information necessary to understand the role of the WTO in the process, the monograph under review presents the on-going state of international cooperation concerning competition law.
within the structure of the WTO, including discussion of current initiatives aimed at strengthening and deepening said cooperation. In the end however the author concludes that ‘one should not expect that the WTO will return to work on this issue in the near future. The idea of a global anti-monopoly treaty has become more distant’ (p. 290). In further sections of Chapter VI the author reviews cooperation in the area of competition law within the framework of the Organisation for Economic Cooperation and Development (OECD) as well as the International Competition Network. The conclusion of the monograph is concise and composite, constituting a summary of the results of the research presented in the work.

The seminal work reviewed herein is highly recommended both to theorists of the topic as well as practising lawyers. The former will find quite satisfactory the author’s approach to argumentation concerning the difficult topics raised, as well as his professional use of the scientific tools available. It should be emphasised that S. Dudzik’s work has obviously been prepared with great attention to detail, that the structure is logical and precise, and the conclusions presented are based on solid bibliographical research.

From the aesthetic point of view the book cover is attractive and readable. Some fragments of S. Dudzik’s work could well serve as a detailed textbook on the topic, although this in no way detracts from its fully scholarly dimension.

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The publication under review here edited by Dr. Agata Jurkowska–Gomulka from the University of Warsaw (Centre for Antitrust and Regulatory Studies) is a collection of case studies concerning European competition law prepared by a number of individual authors both academics and practitioners. As a presentation of landmark judgments of EU courts, it is a continuation of the 2007 publication entitled: *Jurisprudence of the European Community Courts in competition matters in years 1964–2004* edited by Professor Tadeusz Skoczny and Dr. Agata Jurkowska (hereafter, Volume I). The current book (hereinafter, Volume II), commences with 1 May 2004 – an important date for this publication for two key reasons: first, because of its correlation with Poland’s EU accession and second, because of its correlation with the entry into force of Regulation 1/2003. However, the presented judgments do not refer to Regulation 1/2003 primarily due to the lengthy nature of judicial proceedings. There was thus no chance, before the publication of Volume II, to discuss any jurisprudence based on this act.

The subject matter of this study concerns topics such as: standard of proof in merger control proceedings; EU liability for damages resulting from incorrect decisions issued in merger cases; private enforcement of EU competition law; application of competition law in the sports field and pricing agreements.

Before analyzing the substance of the book, some comments on its methodology should be made. The publication is divided into three parts. It commences with an introduction by Agata Jurkowska-Gomulka, where the editor summarizes the quantitative and qualitative characteristics of the recent jurisprudence of EU courts noting among other things that 135 judgments were issued overall between 1 May 2004 and 30 April 2009. The second part of this publications contains 10 rulings delivered by the Court of Justice of the European Communities (hereafter, ECJ) and 5 judgments of the Court of First Instance (hereafter, CFI). All judgments under review are presented in a chronological order. The scope of the jurisprudence covered by Volume II is clearly much smaller than that of Volume I mainly because of the expensive coverage of the earlier publication. Despite the fact that the selection of the judgments to be assessed must have been challenging, the result is praiseworthy.
The case comments were created by 15 different authors, including the editor. The last part of Volume II contains not only a list of all judgments of ECJ and CFI in competition matters in years 2004-2009 but also a helpful index of acts, subject index and sector index.

The studies were made primarily with respect to the Polish-language versions of the judgments available in the Eur-Lex and the Curia databases. However, due to the low quality of the official translations, the editor indicated that authors have made use of other language versions of the judgments as well. Summaries of two previously unpublished ruling were made by the authors themselves, other studies used the official text available in Eur-lex. Readers familiar with the set of judgments covered by Volume I, will notice two main differences in Volume II – while it contains a significantly smaller number of cases, each judgment is analyzed in much greater detail than those covered by Volume I. Importantly also, each study contains an index and final summary. The commentaries are composed of the factual and procedural background of each case as well as the authors’ assessment of their key findings – indicating the importance of each judgments is extremely helpful to the readers.

The jurisprudence under review covers the activities of both the ECJ and the CFI focusing primarily on Article 81 and 82 of the Treaty of the European Community (hereafter, TEC), currently Article 101 and 102 of the Treaty on the functioning of the European Union (hereafter, TFEU). Considered also are Article 86 TEC (powers of the European Commission), currently Article 106 TFEU, and Article 288 TEC (guarantee of a fair trial), currently Article 340 TFEU, as well as the more specific provisions of Article 18 Regulation 4064/89 (Regulation 2008/48). In terms of this publications layout, ECJ rulings are presented first followed by the chosen judgments of the CFI. Despite the current applicability of the Treaty on the Functioning of the European Union, this book review will refer to the provisions of the EC Treaty because most of the judgments covered by Volume II were based on the older Treaty.

The first judgment to be assessed is Tetra Leval BV discussed by Rafal Stankiewicz. The ECJ commented here on some of the key issues of EU competition law such as: 1) the standard of proof and scope of the Commission’s recognition during the consideration of individual cases; 2) the scope of EU jurisdiction over Commission decisions; 3) the method of assessing the prerequisites concerning concentrations and; 4) assessing conglomerate concentrations. The ECJ clearly indicated that it is unacceptable for the Commission to manipulate the provisions of European legislation so as to apply them to circumstances which they do not cover. It was confirmed also that without sufficient evidence to support its concerns, the Commission is not allowed to prohibit a merger solely because of its reservations about the future and uncertain behaviors of dominant companies. As correctly noted by the author, the Tetra/Leval BV ruling had a direct impact on the settlement of the General Electricta / Honeywell case pending before the CFI. It was stated therein as a result, that the Commission

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1 Case C-12/03 P Commission of the European Communities v Tetra Laval BV (no. 1 in Volume II, p. 37).
2 Case T-210-01 General Electricta/Honeywell v Commission of the European Communities.
was obliged to demonstrate that the intended concentration would be able not only to transfer practices to other markets, but also that this particular behavior is actually likely in the relatively near future.

Procedural issues are not usually the main consideration of the presented judgments with the notable exception of the *T-mobile* case, analyzed by Arwid Mednis, which relates to Article 86(3) TEC in so far as it concerns the competences of the European Commission. On its basis, the Commission is obliged to ensure that Member States fulfill their duties based on Article 86 TEC. For this purpose the Commission is equipped with powers to intervene against the offending countries by issuing appropriate directives or decisions. Nonetheless, the *T-mobile* judgment clarified that the obligation to oversee Member States is not actually equivalent with a duty to take actions. Undertakings have therefore no subjective right to force the Commission to take a specific stand. Arwid Mednis’s analysis of the principle of ‘good governance’ developed on the ground of this judgment is particularly interesting.

Ewa Wojtaszek-Mik assesses the *Volkswagen II* judgment where the ECJ considered if a request made by a motor vehicle manufacturer directed at car dealers could constitute a competition restricting agreement covered by Article 81 TEC despite being seemingly unilateral. The ECJ clarified here that such an act can qualify as such an agreement only if it is an expression of the common will of at least two parties, and that the form of the unilateral act is not critical for the evaluation of the agreement. Ultimately, the ECJ changed the contested decision because it found that no competition restricting agreement took place in the presented case. Unfortunately, the ECJ did not give any clear guidance on how to determine the existence of an agreement in cases of seemingly unilateral practices. The above judgment could thus not gain the status of a jurisprudential milestone, confining only the general need to consider all relevant factors of the case at hand.

The *Manfredi* case, presented by Maciej Bernatt, has greatly influenced the directions of EU law. The ECJ established here first that agreements which constitute an infringement of national competition rules can also constitute an infringement of Article 81 TEC. This is possible if, due to the characteristics of the national market, there is a sufficient degree of probability that the agreement can have direct or indirect, real or potential influence on the sales of Civil Liability insurance, particularly membership, performed by entities with a registered seat in other Member States, and this influence is not insignificant. The author stresses the substantial connection between the *Manfredi* judgment and the *Courage* case as far as the possibility is concerned of claiming compensation by those harmed by an anti-competitive acts of an entity infringing competition rules. The judgment does not sanction a particular

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3 Case C-141/02 P *Commission of the European Communities v T-Mobile Austria GmbH, formerly max-mobil Telekommunikation Service GmbH* (no. 2 in Volume II, p. 55).
4 Case C-74/04 P *Commission of the European Communities v Volkswagen AG*.
5 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* (no. 4 in Volume II, p. 76).
procedure within this scope – the ECJ indicated only that private enforcement procedures must be based on national legislation. Once again however, it emphasized the rights of those injured by a competition law violation, provided they can prove a causal relationship between the damage and the illegal practice. The author indicates however, following the opinions expressed by ECJ, that some categories of entities, such as consumers for instance, are in fact very unlikely to be able to prove such relationship because of their inability to access the necessary evidence. The remaining issues covered by the judgment are also presented including: the method of calculating the limitation period for anti-competitive acts; the influence of how is the concept of effectiveness defined; the possibility of making claims and; the scope of compensation. It is worth noting that with respect to the latter, the ECJ stated that compensation must cover not only *damnum emergens* but also *lucrum cessans*.

Agata Jurkowska-Gomulka presents the *Meca-Medina* judgment – the first conclusive ruling determining whether EU competition law is applicable to sports rules. The author notes that the so-called ‘sporting exception’ has already been embraced by past EU jurisprudence indicating that the principles associated with the organization of sports competitions are not regulated by the Treaty. Truthfully, no Polish court has ever had to face this issue but an antitrust case of that type can arise in the future. The importance of the *Meca-Medina* ruling is emphasized in this case comment because it shows the relationship between sports rules and EU competition law, even if only, as the author notes, as an attempt to strengthen the EU impact on the sports field. Still, as far as subjecting anti-doping rules to EU competition rules is concerned, a discrepancy in the perception of this issue among courts is visible when tracing this case’s particular stages. However, the ECJ has broken here the ‘special’ treatment associated so far with the activities of professional athletes. Agata Jurkowska-Gomulka gives a very interesting presentation of the position of the doctrine relating to this judgment both in plus and minus. The overall presentation allows readers to analyze the problem in detail as well as form their own opinion in this context.

Antoni Bolecki presents the *Asnef-Equifax* case of 2006 concerning the exchange of client information by loan institutions – a judgment that provided essential guidance for loan institutions until the issue of the Directive of European Parliament and The Council 2008/48/EC of 24 April 2008 on consumer credit agreements. The legality of creating and using a credit database results now directly from the directive. The above judgment contains an extremely interesting summary of past jurisprudence on information exchange by entrepreneurs. From the point of view of readers, the author’s references to other relevant EU rulings, such as *John Deere* or *Wissenschaftsvereinigung Stahl* may also be helpful. Still, the content of the judgment is not without ambiguity.

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8 Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL Asnef-Equifax, and Administración del Estado Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (no. 6 in Volume II, p. 108).
and thus there may still be some doubts concerning the legality of exchanging even anonymous client information on concentrated markets.

An analysis of Article 81 and 82 TEC and Article 18(3) Regulation 4064/89 is contained in the sentence of Bartelsmann and Sony9 (hereafter, Impala II) discussed by Tadeusz Skoczny. This part of the review constitutes a wide-ranging study of the procedural institution of the ‘standard of proof’ covering both English as well as continental doctrine. Found in the study can also be the views on the ‘standards of argumentation’ expressed by D. Bailey, O. Budziński or A. Christiansen. The impression arises that the conclusion of this case constitutes in fact the beginning, rather than the end, of a wider discussion on evidentiary issues in concentration cases, within the scope of not only Impala II but also earlier judgments such as: Impala I and Tetra Laval II. The importance of this ruling is not limited however to procedural considerations only but covers also the notion of collective dominance.

Łukasz Grzejdziak analyses the Syfait II10 judgment presented by Dawid Miąsik states, first of all, if the assessment of the refusal to realize the orders of entities taking part in parallel trade is compliant with the EU competition law (to determine whether it is a competition restricting practice within the meaning of Article 82 TEC).

Among rulings concerning Article 82 TEC, Konrad Kohutek takes up the analysis of the multithreaded Wanadoo Interactive12 judgment concerning primarily the problem of ‘predatory pricing’. The author indicates that the ECJ reconfirmed here past jurisprudential tests making it possible to determine if a dominant company deliberately sacrifices its profits in order to exclude its competitors from the market. Also discussed is the possibility of using the ‘meeting competition’ defense. ECJ judgments in AKZO and Tetra Pak II are used as reference as far as average variable cost and average total cost. Finally, the British Airways (C-95/04 P) case is noted with respect to the idea of market competition protection itself, not the idea of competition protection through protecting the consumer’s interest. Konrad Kohutek presents numerous references to European specialist literature on this subject.

The third part of this publication covers CFI rulings presented in a chronological, rather than thematic, order.

9 Case C- 413/06 P Bartelsmann and Sony v Commission of the European Communities (no 7 in Volume II, p. 126).
10 Joined cases C-468/06 do C-478/06 Sot. Léllos kai Sía EE i in. v GlaxoSmithKline AEVE Farmakeftikon Proiōnton, former Glaxowellcome AEVE (no. 8 in Volume II, p. 155).
Grzegorz Materna takes up once more the issue of ‘sport’ analyzing the Laurent Piau judgment. Considered here is the status of sports federations such as FIFA as the addressee of the prohibition of competition restricting agreements stipulated in Article 81 TEC. Discussed also is the applicability of the prohibition of dominant position abuse contained in Article 82 TEC, with reference to associations of undertakings as well as the criteria for the determination of collective dominance elaborated on in Airtours plc (T-342/99). Most importantly, the CFI indicated in the Laurent Piau case that entities performing activities connected with sport may be, in particular situations, considered as ‘undertakings’ within the meaning of EU competition law and must thus be subjected to the limitations contained therein. According to the CFI, the status of an undertakings can be associated with sport agents, for example, as well as sport clubs and national football federations with respect to their business activities in situation when they participate in sport events organized by FIFA and profit from the exclusive sale of transmission rights to their matches.

Michał Będkowski-Kozioł analyses the now invalid Regulation 4064/89 (replaced by Regulation 139/2004) in relation to the General Electric Company judgment. This particular case was widely publicized because the Commission decided to prohibit the concentration of General Electric and Honeywell due to its expected conglomerate results. The Commission was concerned that competitors might be excluded from their markets because the merging companies produced complementary products. Although the CFI sustained the merger prohibition, the judgment became a warning light for the Commission.

The O2 (Germany) GmbH & Co. OHG case concerning the interpretation of Article 81 TEC was presented by Małgorzata Modzelewska de Raad, who noted the significance of this judgment for the application on the ground of EU law of the originally American doctrine of the ‘rule of reason’. The extreme importance of this case was associated also with its findings on the standard of proof and allocation of the burden of proof in Article 81(1) TEC cases as well as the method of assessing the consequences of agreements on the basis of a detailed market analysis of the situation before, and after the operation. The author indicates that the O2 judgment sees the CFI adopt more of an economic approach to the assessment of agreements on the basis of Article 81(1) TEC.

Krystyna Kowalik-Bańczyk analyses the Schneider III case concerning the non-contractual liability of EU institution for mistakes made by the Commission within merger proceedings leading to the prohibition of a concentration. Including this ruling in this publication is most appropriate because it is the first EU judgment obliging

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15 Case T-328/03 O2 (Germany) GmbH & Co. OHG v Commission of the European Communities (no. 13 in Volume II, p. 263).
16 Case T-351/03 Schneider Electric SA v Commission of the European Communities (no. 14 in Volume II, p. 279).
the Commission to compensate an undertaking for part of its damage incurred by an incorrect merger prohibition. The CFI indicated in this case that a violation by the Commission of the basic procedural right of a fair trial, stipulated in the Article 288(2) TEC, can justify a compensation claim. As noted by the author, the approach of the CFI gives hope that damage claims directed at EU institution could constitute an effective tool for disciplining the Commission in concentration cases.

Tomasz Bagdziński analyses the Microsoft Corp.\textsuperscript{17} case concerning intellectual property rights issues. The issue concerned the possibility to refuse granting a license by the right owner holding a dominant market position. This ruling was perceived as a chance for the CFI to define the relationship between competition law and intellectual property rights reaching beyond established jurisprudence. Objectively however, the CFI must be criticized for failing to refer to the mutual relations of competition law and intellectual property rights or to the justification of Microsoft’s refusal to grant a license.

Concluding, the authors present interesting references to other jurisprudence showing their extensive knowledge of European competition law. It is fair to say that their presentation of both approving and disapproving opinions in this matter is helpful to the readers not only because of the transparency of the structure of the overall case comment but also because of its coverage of the doctrine. Other relevant matters are also considered as is the jurisdiction of both the ECJ and the CFI as well as the jurisdiction of the Court of Competition and Consumer Protection in Warsaw.

\textit{Marlena Kadej-Barwik}
Faculty of Law, University of Bialystok

\textsuperscript{17} Case T-201/04 Microsoft Corp. v Commission of the European Communities (no. 15 in Volume II, p. 308).
On 7 June 2010, a conference under the title *New Amendments Introduced to European Union Competition Law Due to the Expiration of Block Exemption Regulations* took place at the Lazarski University in Warsaw.

The conference was opened by Professor Zbigniew Lasocik, the Dean of the Law Faculty of the Lazarski University, who started his speech by introducing the University and emphasizing the Faculty of Law’s aim to ensure high quality legal education.

During the conference, four panels addressed the following issues: 1) EU competition law – reform and why? 2) Pricing strategies and self-compliance procedures; 3) The economic approach to distribution law of the European Union – myth or necessity? 4) The future of EU competition law in relation to the distribution sector. The conference was attended by academics, private legal practitioners and judges from Polish competition courts.

**First session**

The first panel presented the background of the reform introduced by Regulation 330/2010 and the actual state of play concerning different aspects of vertical agreements. The session was chaired by Mr. Carlos Rapallo from Garrigues who welcomed the speakers: Prof. Valentine Korah from the University College London, Mr. Andrei Gurin from the European Commission and Ms. Malgorzata Kozak from Lazarski University.

The preliminary remarks made by Ms. Kozak concerned the general overview of Article 101(1) and (3) of Treaty on the Functioning of the European Union (TFEU). The speaker emphasized the difficulties in the application of Article 101 TFUE to vertical agreements including the questions surrounding the standard of proof in ‘vertical cases’. She outlined also the general legal basis of the EU block exemptions system.

Prof. Valentine Korah gave a presentation on the retrospective analysis of vertical agreements in the EU. She emphasized the necessity to introduce an economic assessment, including efficiencies, into the approach of the European Commission’s to vertical agreements and the resulting key policy change. She explained that the assessments of the 1960s centered on a strict legal *ex post* analysis without taking into
account issues such as incentives and investment costs. Early cases focused therefore on exclusive distribution, single branding and export bans. The first block exemption regulations were introduced in the 1980s and contained formalistic definitions. The use of individual exemptions led at the same time to an overburdening of the Commission’s sparse resources. The economic approach was introduced in the 1990s when Klaus Dieter Ehlermann became director General of DG IV (now DG Comp). This major policy shift was reflected in the new vertical block exemption issued in 1999 and the accompanying Commission Guidelines. This regulation became the model for subsequent block exemptions. Prof. V. Korah concluded that the regulation of 1999 has worked well, and expressed the hope that the current revision would not change much. Still, she considered that the justifications of the recent reform are less helpful than those prepared in 2000.

As the next speaker, Mr. Andrei Gurin emphasized positive past experiences associated with the vertical block exemption from the perspective of someone who has worked on the preparation of Regulation 330/2010 and the accompanying Guidelines. The objective of the reform was to update the effects-based approach and not to revolutionize the system. Mr. Gurin analyzed the key change in the new act – the introduction of a new condition concerning its applicability. Accordingly, Regulation 330/2010 is applicable to vertical agreements where the threshold market share of the buyers does not exceed of 30% with respect to the market where they purchase the contract products from their suppliers. The speaker explained that this new requirement is necessary in order to counterbalance the impact exercised on vertical relations by powerful buyers. The new market-share threshold for buyers is thus particularly beneficial to small and medium sized enterprises. Mr. Gurin stressed also that Regulation 330/2010 does not fundamentally change the list of hardcore resale restrictions. He referred to the US Legeen case that abolished the per se approach to Resale Price Maintenance (hereafter, RPM) and emphasized that it is indeed possible to show efficiencies even in a case of a hardcore restriction (by object). Mr. Gurin proceeded to present the issue of Internet sales and noted that the new act was meant to refine the notion of active and passive sales in the on-line environment. He emphasized in this context that distributors should be free to have a website and engage in Internet sales. During the closing discussion, Dr. Marta Sendrowicz commented on the Polish Competition Authority’s policy to treat RPM as illegal per se.

Second session

The second panel was moderated by Mr. Jarosław Sroczyński from Markiewicz & Sroczyński and concerned pricing strategies and self-compliance procedures. Dr. Marta Sendrowicz from the University of Warsaw, Dr. Katarzyna Karasiwcz of Sołtysiński, Kawecki, Szlęzak and Ms. Dorothy Hansberry-Bieguńska of Wardyński & Partners discussed how a company’s distribution strategy must be prepared in order to achieve compliance with competition law requirements especially with respect to pricing policies.
Dr. Marta Sendrowicz spoke of competition compliance and pricing strategies. She discussed the various factors relevant to competition compliance programmes. The first issue she addressed was what competition law compliance actually is. She referred to efficiencies and fairness defining the latter as taking the right choice in objectively justifiable terms. She emphasized the role of lawyers in teaching their clients to carry out their business fairly – to take justified business decisions based on appropriate considerations. She stressed that there is no contradiction between fairness and efficiencies. The second issue commented on by Dr. Sendrowicz was the transparency in the policy pursued by competition law enforcement agencies. She welcomed in this context the work of the European Commission in preparing new enforcement guidelines. She referred also to the policy of the Polish Competition Authority which still treats RPM as illegal *per se* without taking into consideration its possible efficiencies.

Dr. Katarzyna Karasiewicz talked about in-house procedures and how to create them. She emphasized the importance of transparency in the activities of competition authorities. She continued on to discuss the role of internal competition compliance audits and the methods of identifying the risks of potential non-compliance. She noted the necessity to monitor the effectiveness of all compliance procedures including not only those within the company but also those affecting its communication with its contractors and competitors. Dr. Karasiewicz stressed that compliance procedures must be in line with antitrust rules but also allow the company to do business comfortably. Compliance programmes should use tools such as workshops and seminars for their employees and managers which must be dedicated to particular tasks performed within the company. Proper communication during dawn raids must also be ensured. According to the speaker, good compliance programmers should not be limited to antitrust lawyers but should cover all areas of legal expertise whereby good implementation is the key to success here. Dr. Karasiewicz concluded that it is ultimately better to prevent than to cure.

Ms. Dorothy Hansberry-Bieguńska talked about the recognition and avoidance of competition restricting conduct within a company. She emphasized the importance of pricing strategies pointing to the risks that high profit expectations could act as an incentive for possible competition law violations. She noted that it is the role of managers to monitor the situation in their companies. She analyzed also in what way should managers oversee the internal workings of their business in order to prevent any illegal price information sharing,. Ms. Hansberry-Bieguńska pointed out finally that it is possible in Poland to apply for leniency in vertical agreements also.

**Third session**

The third panel was moderated by Dr. Agata Jurkowska from the University of Warsaw and concerned the economic approach to distribution law of the European Union. Dr. Jurkowska-Gomulka emphasized in particular the necessity to use the economic approach in the application of competition law.
Mr. Maciej Fornalczyk from Comper Fornalczyk & Partners commented on the meaning of the economic approach to competition law. He stressed that the new vertical block exemption maintains the policy line introduced by its predecessor. He concluded that the act does not leave any room for an economic analysis since the 30% threshold limits the scope of its application. The speaker pointed out that the definition of the relevant market is the very first step of defining the existence of market power. With reference to geographical markets, Mr. Fornalczyk identified the price (including sales, transportation and implementation price) as a key factor for the definition of a relevant market. He finished his presentation with the question whether it is possible to apply the same analysis in vertical cases as in the assessment of dominance. He ultimately concluded that Regulation 330/2010 does not leave much space for an economic analysis, save the market definition stage, except for ‘the good-old 101(3) TFUE analysis’, which is left” outside the Regulation 330/2010.

Ms. Małgorzata Modzelewska de Raad from Wierzbowski Eversheds focused in her speech on RPM pointing out that price competition is one of the most important forms of competition. She posed the question whether it is really fair to outright ban RPM and presented the history of the RPM prohibition. She continued on to name a number of the positive aspects of RPM as well as some distribution systems where it is justified. She also noted that despite the EU presumption of the illegality of RPM, the latter is nevertheless subject to an efficiency analysis (albeit in a limited scope). By contrast, RPM is subject to a presumption of illegality in Poland without efficiency analysis. Ms. Modzelewska de Raad welcomed the increasing use of the economic approach to RPM where an effects-based analysis is performed and consumer benefits and technical/ distribution development assessed.

Mr. Jarosław Sroczyński of Markiewicz & Sroczynski proceeded to analyze network distribution and the economic approach. He concentrated on the example of a distribution system posing the question: ‘at which “melting” point will every subsequent exclusive distribution agreement adversely affect competition?’ On the basis of a practical example, he showed that an analysis without an economic approach leads to an enigma. Mr Sroczyński referred to the Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH case as providing key guidelines for the assessment of anti-competitive effects in a vertical case.

Restrictions in Internet distribution were discussed by Dr. Bartosz Targański of the Warsaw School of Economics and Salans. He commenced his presentation by emphasizing how much does e-commerce benefit consumers. He pointed out also however that consumer benefits can be costly for suppliers since additional competitive pressure comes from distributors who do not participate in the costs of the upkeep of a distribution network and promotional activities in a given area. He also noted the discrepancy between the growth of domestic and cross border e-commerce and analyzed the main obstacles to the latter as well as the new Commission Guidelines of 2010. Dr. Targański posed the question whether the distinction between active and passive sales make at all sense in the on-line environment. He then presented the requirements that can be imposed on Internet distributors.
Fourth session

The future of EU competition law in relation to the distribution sector was discussed in the panel moderated by Mr. Morvan Le Berre of Wardyński & Partners. The panel included Mr. Andrei Gurin from the European Commission, Dr. Piotr Milczarek of Clifford Chance and Mr. Maciej Gaca of Garrigues.

Mr. Maciej Gaca presented selected issues associated with the recent reform from the perspective of a private legal practitioner. He posed the question whether competition lawyers working on particular transactions should not be accompanied by economists. He addressed three issues: on-line retailing, buyer power and RPM. Mr. Gaca analyzed passive sales in on-line retailing from a practitioner’s point of view. With respect to buyer power, he posed the question how to protect medium and small suppliers. He emphasized also the need to consider the input of competition economics in the application of competition law.

Mr. Andrei Gurin commented on Mr. Gaca’s remarks on Internet distribution. He recalled the two major exceptions to the rule that resale restrictions are anti-competitive by object, that is, exclusive and selective distribution. He addressed the proposition that every Internet sale is in fact an active sale. In his opinion, websites for each individual country must be specially prepared, advertised etc. and so the Commission had to adapt the concept of active and passive sales to modern developments. Mr. Gurin noted also that the issue of compliance costs was overestimated during the public consultation procedure preceding the new vertical block exemption. He considered that the majority of vertical agreements do not contain any competition restraints therefore they do not engage any compliance costs.

Dr. Piotr Milczarek of Clifford Chance talked about the consultation procedure that preceded the adoption of Regulation 330/2010 referring in particular to the observations submitted specifically by law firms – 25 opinions in total. He emphasized that practitioners emphasized therein the public interest and how important the clarity of the law is. He noted that law firms commented most commonly on buyers’ market share threshold (22 opinions) and how it can be applied in practice. 9 opinions discussed online sales. He emphasized the difference between the US and the EU. Mr. Milczarek talked also about selective distribution and the modification of distribution. He emphasized the importance of this change in the case of the pharmaceutical industry. He referred to the opinions that concerned agency agreements and the third kind of risk included in the Guidelines. He noted also that some of the opinions expressed in the consultation procedure dealt with category management which could in some cases restrict competition. He concluded that the reform constituted an evolution rather than a revolution.

The conference was closed by Judge Jerzy Stępień of the Lazarski University. He thanked all participants for the interesting discussion. He also emphasized the importance of the topic.

Dr. Małgorzata Kozak
Lazarski University, Warsaw
CARS Activity Report 2010

1. General information

In the fourth year of its activities, CARS focused on the pursuit of the goals specified in its founding documents. 2010 saw the creation of an individual website for CARS (www.cars.wz.uw.edu.pl) and for YARS (Yearbook of Antitrust and Regulatory Studies (www.yars.wz.uw.edu.pl). Both websites contain extensive resources on the activities of CARS improving information access for institutions and persons interested in problems considered in the research and publications of CARS.

2010 was a very active period in terms of CARS’s Open PhD Seminar series – four meetings were held within this year.

Three publications were issued in 2010: the second and the third volume of ‘Yearbook of Antitrust and Regulatory Studies’ [YARS 2009, vol. 2(2) & YARS, 2010 vol. 3(3)] and the fifth publication of the ‘Antitrust and Regulatory Studies and Monographs’ series. The latter was based on the results of a major research project entitled ‘Airport services in the European Union and in Poland – antitrust and regulatory framework’ completed in 2009. Moreover, a new edition of that research project was initiated in 2010 (the project will be completed in 2011).

In 2010, CARS organized one seminar entitled: ‘Airport services in the European Union and Poland – competition law and airports regulations’ and one conference under the heading: ‘Corporate Social Responsibility – a company’s real obligation?’

An expertise on state aid was also prepared by members of CARS in 2010.

2. Open PhD Seminar

2.1. Exchange of information between competitors

A meeting of the CARS Open PhD Seminar was held on 6 January 2010 focusing on the work of Antoni Bolecki, a PhD student of the University of Warsaw, Faculty of Management. The introductory speech concerned the categories and features of anti-competitive information exchange between competitors. Other issues presented by the speaker included: exchange of information as a support scheme for cartels; anti-competitive object and/or effect of information exchange; categories of information causing restrictive effects; relation between market structure and anti-competitive effects of information exchange; information characteristics in the context of restrictive
effects. The problem of information exchange in vertical relations and within networks was raised in following discussion.

2.2. Services of general economic interest and the concept of state aid

During a seminar held on 28 June 2010, Łukasz Grzejdziak, a PhD student from the University of Lodz Faculty of Law, presented the problem of the inter-section of the concept of services of general economic interest (SGEI) and the notion of state aid. The presentation was entitled ‘EU regulation of financial services of general economic interest and the objective concept of state aid; Coherence or dissonance?’ The speaker presented relevant case-law developments on the concept of SGEI in the context of the coherence of the criteria set out in the Altmark test with the concept of objective state aid. Prof. Anna Fornalczyk, the former President of the Polish Antimonopoly Office, was a special guest at this seminar.

2.3. Conditional merger approval in legislation and decision-making in Poland

The third meeting of the CARS Open PhD Seminar was held on 16 November 2010. Professor Tadeusz Skoczny presented therein the results of his individual research project focusing on the qualitative and quantitative analysis of conditional merger approvals. Key issues raised by the speaker and followed up during the resulting discussion included: ratio legis and general rules for granting conditional merger approvals; categories and character of conditions; formulating and imposing conditions and; sanctions for their breach. Among the seminar participants were representatives of academic institutions and many practitioners from large law firms.

2.4. Co-operation agreements in insurance sector

The seminar held on 14 December 2010 centered on the research conducted by Justyna Orlicka, a PhD student from the Faculty of Law of the Adam Mickiewicz University in Poznan. The seminar was dedicated to the problem of sustaining a block exemption for co-operation agreements in the insurance sector. The seminar was held in light of the issue by the European Commission in March 2010 of a new block exemption for the insurance sector (Regulation 267/2010) and the expiry on 31 March 2011 of the analogous regulation for the cooperation in the insurance sector.

3. Publications

3.1. Yearbook of Antitrust and Regulatory Studies (YARS)

The second volume [vol. 2(2)] and third volume of YARS [vol. 3(3)] were published in January and December 2010 respectively. They correspond with the editorial foundations of the periodical and include: academic articles on legal and economic
aspects of antitrust and sector-specific regulation; reviews of Polish legislation in the antitrust and regulatory fields; a review of EU case-law concerning Poland in antitrust and regulatory matters as well as case comments on key Polish judgments in this area; book reviews; reports on Polish events dedicated to antitrust or regulation as well as; a list of relevant Polish publications from the preceding year.

In 2010, the full content of past issues of YARS became accessible through its own website as well as a number of external databases for scientific publications.

In the same year, YARS was enrolled in the official periodical list held by the Polish Ministry of Science and Higher Education with a grade of 6 points.


‘Airport services in the European Union and Poland – competition law and airports regulations’, edited by Professor Tadeusz Skoczny and Filip Czernicki, became the fifth publication of CARS’s ‘Antitrust and Regulatory Studies and Monographs’ series. The publication is based on the final report prepared in collusion of a major research project conducted in 2009 by a team of researchers from the University of Warsaw Faculty of Management and specialists from the ‘Polish Airports’ State Enterprise. The book is divided into five parts concentrating on: scope and results of the research project (chapter 1); airport services markets (chapter 2); providing airport services in the context of competition law rules (chapters 3-5); regulatory aspects of airport services provision (chapter 6-10); relations between airport ownership and airport management (chapter 11-15).

The publication is addressed to those involved in airport management, enterprises providing airport services, air transport companies, representatives of public administration connected to the airport sector and for researchers and students interested in antitrust and regulation.

4. Research

Professor Tadeusz Skoczny and Łukasz Grzejdziak prepared in 2010 under the auspices of CARS an expertise entitled ‘Classification as state aid, within the meaning of Article 107(1) TFEU, of § 10(5) of the draft regulation of the Minister of Economy regulating in detail, among other things, the scope of the duty to obtain and to submit for a cessation of a certificate of origin from cogeneration’. The expertise concerned the legitimacy of the notification submitted to the European Commission of the said draft regulation of the Polish Minister of Economy. The draft was to modify the scope of the national certification system of energy from cogeneration regarding justified production costs and submissions for the cessation of certificates of origin from cogeneration or, making a replacement payment in the calculation of energy prices established in the tariffs of energy companies fulfilling those obligations. The expertise was ordered by a law firm.
5. Seminars and conferences

5.1. Airport services in the European Union and Poland – competition law and airports regulations

A seminar held on 14 June 2010 was dedicated to the presentation of the main results of a research project completed in 2009 jointly by researchers of the University of Warsaw, Faculty of Management and the State Enterprise ‘Polish Airports’ (PPL). A number of presentations were given during the seminar by, among others: Prof. Anna Fornalcyzk, Michał Marzec (Director of PPL), Sylwia Ciszewska (Head of Air Transport Department in the Polish Civil Aviation Office). The following discussion concerned selected aspects of the research project (airport services and competition law; airports in EU Member States).

5.2. Corporate Social Responsibility – a company’s real obligation?

A conference held on 21 June 2010 was organized by CARS in co-operation with the Chair of the Theory of Organization University of Warsaw, Faculty of Management. Its goal was to verify the notion of the necessity for companies to concern themselves with the effects of the economic activities associated with the functioning of companies in a certain social and natural environment. A number of presentations were given during the conference dedicated to issues such as: legal aspects of corporate social responsibility (CSR); relations between employees and employers in the context of CSR; pathologies in relations of companies with their stakeholders and; the role of managers in shaping CSR. The conference gathered many academics and representatives of non-governmental organizations, among them employer organizations and trade unions.

Dr. Agata Jurkowska-Gomulka
CARS Scientific Secretary
I. Introduction

A meeting of the CARS Open PhD Seminar took place on 16 November 2010. It was dedicated to the basic problems arising in relation to conditional merger decisions in Poland. The opening speech delivered by Professor Tadeusz Skoczny was based on his research study concerning the quantitative and qualitative analysis of the decision-making practice of the Polish Competition Authority with respect to conditional merger decisions.

Professor Skoczny presented first the research assumptions underlying his study, the legal justification and basic principles governing conditional merger decisions and the types and nature of merger conditions. In addition, he offered his thoughts on the formulation and imposition of conditions and the sanctions following their violation. Professor Skoczny closed his presentation by outlining his research conclusions and drawing attention to the following issues:

1) the small number of conditional merger decisions in Poland attributable mainly to the limited number of controversial mergers notified,
2) the poor quality of Polish legislation on conditional merger decisions which is not compatible with EU law, lacks clarity as to the type and nature of conditions and employs an imperfect procedure for the formulation and imposition of conditions, and
3) the fact that the practice of issuing conditional merger decisions is improving from the point of view of efficiency (prevention against anticompetitive concentrations).

The speech is available on the CARS website1.

After the introductory presentation, the participants of the CARS Open PhD Seminar took part in a discussion. Their remarks are presented below in order of appearances.

II. Discussion

Jarosław Sroczyński drew attention to the insignificant role of judicial review in merger control proceedings asking: ‘Does the Court have anything to say in merger control proceedings?’ He noted that the minor role of the Court is the result of the goals of the merging parties. Due to the dynamic nature of such transactions, decisions should be well-timed – if they are not issued within the required period of time, judicial intervention at a later date may not be an effective remedy.

Jarosław Sroczyński emphasized also the importance of the ‘economic approach’ in merger control proceedings. In cases where a concentration raises competition concerns, the Polish Competition Authority should open an economic dialogue with the parties. Such approach would be of benefit to the Polish Competition Authority also by partly relieving it from the burden of responsibility for analyzing all of the economic effects of the scrutinized concentration.

Jarosław Sroczyński indicated further that the merging parties are sometimes willing to reshape their transaction so as to address the concerns of the Competition Authority. Voluntary modifications result in unconditional merger clearances. The speaker noted that in such cases the conditions of clearance are formulated in the course of the proceedings before the final decision is issued (a notified concentration is different to a concentration declared compatible). A similar situation can take place with respect to prohibitive decisions when the parties expecting a negative outcome decide to withdraw their notification before the final decision is issued.

In his final remarks, Jarosław Sroczyński drew the attention of the participants to cases where the Polish Competition Authority imposed conditions of a ‘social nature’. The true intention behind such conditions is not the protection of competition but granting of additional compensatory benefits to entities affected by the concentration (e.g.: in the Heineken merger, the parties were obliged to invest into Polish production of hop).

Małgorzata Modzelewska de Raad was of the opinion that the flexibility of Polish merger proceedings should be improved by the introduction of informal elements such as consultations with the parties. ‘Increased flexibility’ should also be understood as diversified approach to concentrations depending on the level of their complexity. The majority of concentrations fall into the category of simple cases that should be analyzed in the framework of a simplified procedure. More complex cases should involve the use of special analytical tools.

Małgorzata Modzelewska de Raad cited the Foodcare/Rieber Foods concentration case as an example of an inadequate competitive assessment conducted by the Polish Competition Authority whereby it analyzed the market entry cost (costs of constructing a factory) but did not consider other important factors such as supply substitutability.

She argued moreover that the wording of the Polish Competition and Consumer Protection Act should reflect the presumptions of merger clearances – the burden of proof of the incompatibility of a concentration should be placed on the Competition Authority. At the same time, the parties should be responsible for providing the economic knowledge because of their better understanding of the economic fields affected by the concentration.
Maciej Bernatt emphasized the issue of procedural justice in merger control proceedings and the role therein of the target undertaking. Since, the Polish Competition and Consumer Protection Act attributes the status of a party in merger proceedings to the notifying entity only, the rights of the target undertaking are not duly protected. In addition, the target entity is also deprived of the right to judicial review.

Maciej Bernatt pointed out that according to Article 6 of the European Human Rights Convention, proceedings concerning anticompetitive practices are considered to be quasi-penal while merger proceedings are civil in their nature. The different nature of these two types of proceedings might justify a different judicial review structure.

Marcin Kolasiński indicated that mistakes committed by the Polish Competition Authority cannot be remedied in judicial proceedings. In particular, the Court is unable to negotiate with the parties about any possible conditions modifying the concentration. This realization goes against the mindset of the officials of the Polish Competition Authority, who believe that their potential mistakes can be remedied by the court.

Marcin Kolasiński drew the attention of the participants to the consultation process available to merging parties before the European Commission which allows them to gather crucial information about the possible final decision already in the course of proceedings. In his opinion, the infrequency of conditional merger decisions in Poland results from the Competition Authority’s inappropriate approach to such cases. The Authority is not obliged to inform entrepreneurs whether its decision will be conditional. Where it considers the possibility of issuing a conditional or indeed prohibitive decision, the Authority should however make it possible for the parties to address its concerns first before a decision of that type is actually issued. A dialogue between the Authority and the merging parties would minimize the risk of economic mistakes.

Robert Gago emphasized the importance of pre-notification consultations seeing as they would facilitate an accurate fact-finding process. If they were to be implemented into Polish procedural rules, they would also give the Authority a chance to conduct market research before the concentration is actually notified. This could substantially reduce the time necessary to review a notification. He further stressed in this context that the time frame prescribed for a merger review should not be extended since the Authority is often unaware of the urgency of the transaction and effective judicial review is not available.

Robert Gago also suggested that third parties should be granted access to merger proceedings. Their participation would stimulate the assessment process hopefully resulting in better evaluation of the economic circumstances of the case.

Jacek Giziński posed two questions: 1) whether the right to concentrate exists and 2) whether the Competition Authority is obliged to consider a conditional merger clearance. He also questioned whether the Court should analyze the possibility of granting a conditional merger clearance. He argued against extending the scope of the entities with the status of a party in merger control proceedings. In his opinion, the interests of the notifying undertaking is crucial here as it is the only entity able
to suggest suitable adjustments in cases where the concentration is found to raise competition concerns.

Jacek Giziński argued also against the aforementioned proposal to introduce more flexibility into merger control proceedings. He noted that the Polish Competition Authority fulfills a public mission and should be able to decide which procedural model – standard or simplified – is appropriate to any given case. He emphasized that only the parties to the operation actually know what the ultimate economic goal of the concentration is. Therefore, while consultations with third parties are helpful, they should not interfere with such goal.

Patrycja Szot suggested that cases ending with a negative clearance, should be open to settlement before the court.

Piotr Borowiec spoke in favor of extending the scope of the entities granted the status of a party in merger proceedings. He was of the opinion that the notifying undertaking should not be the only official participant since the Polish Competition Authority is entrusted with an obligation to protect the public interest.

Robert Gago suggested that the right to be heard should also be offered to ‘the silent part of the market’, that is, entities without the status of a party in given merger control proceedings.

In conclusion, Małgorzata Modzelewska de Raad explained why entrepreneurs are not eager to appeal merger prohibitions associating this fact primarily with their conviction that the chances to obtain compensation are negligible.

III. Conclusions from the discussion

Professor Tadeusz Skoczny summarized the discussion by pointing out that Polish merger control proceedings do not correspond with the requirements for which they were created – they are inadequately designed. A new direction should be found: there is a need to introduce better legislation that will take account of the distinction between simple and complex cases (increased flexibility of proceedings). In addition, third parties should be granted access to the proceedings since their participation motivates the Authority. Moreover, the competition concerns identified by the Authority should not be voiced in the final phase of evidence hearing only. They should be expressed to the parties earlier in the proceedings otherwise the parties’ ability to address the issues identified by the Authority is limited.

Other important issues identified in the discussion included: 1) the necessity to use an economic analysis in merger control proceedings and 2) the inefficiency of judicial review.

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