YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
Vol. 2012, 5(7)

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YEARBOOK of ANTITRUST and REGULATORY STUDIES

Guest volume editor:
AGATA JURKOWSKA-GOMUŁKA

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw
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Editorial foreword

The Editorial Board is pleased to present the seventh volume of the *Yearbook of Antitrust and Regulatory Studies* (YARS 2012, 5(7)). As its ‘regular’ edition, this is the second volume of YARS issued in 2012 following a ‘special’ volume (YARS 2012, 5(6)) which was dedicated solely to entrepreneurs’ rights in antitrust proceedings.

YARS 2012, 5(7) starts a new era in the history of this periodical. For the very first time, its articles focus not only on Polish antitrust and sector-specific regulation but also present antitrust enforcement-related problems in other Central and Eastern European countries. Indeed, we expect considerable growth in the coming years in the number of contributions to YARS from authors from European emerging economies.

The first article of YARS 2012, 5(7) is written by Doc. dr. sc. Jasminka Pecotić Kaufman, a member of the YARS Scientific Board. It presents the state of play of private enforcement of competition law in Croatia analysing a number of procedural and substantive law issues relevant to the facilitation of civil proceedings for antitrust damages. The paper applies a Croatian perspective to this very current issue taking however into account also the recent developments in EU competition law and policy in this area. Similar problems are raised in the article written by Dr. Anna Piszcz. Her paper focuses on the developments in private competition law enforcement in Poland, using European initiatives as an analytical background. The author considers in particular to what an extent are Polish developments responding to the challenges outlined by the European Commission. In his article on limitation periods for sanctions in antitrust cases, Dr. Ondrej Blazo refers to Slovak, and to some extent also Czech experiences in this field. He analyses the question whether limitation periods associated with antitrust sanctions by Slovak competition law also limit the powers of its competition authority to declare the illegality of illicit behaviour or to prohibit it. Further on, Silvia Šramelová and Andrea Šupáková provide a review of the most important judgments rendered by Slovak courts in antitrust cases between the end of 2010 and the beginning of 2012. The jurisprudential developments presented here deal with key issues concerning public enforcement of competition law.
such as: the application of the so-called ‘general clause’; competences of the Slovak competition authority in regulated sectors; and the application of the economic continuity test. The final two papers concern economic aspects of sector-specific regulation. The article written by Dilyara Bakhtieva and Dr. Kamil Kiljański estimates the effects of consumer loyalty as an intangible benefit of USO in the postal sector on the basis of the agent-based modelling (ABM) approach. The paper by Dr. Magdalena Olender-Skorek analyzes a new entry barriers remedy in the telecoms sector – an Indefeasible Right of Use. The IRU model described in this article can be seen as one of the many ways to analyze the consequences of sector-specific regulation.

Aside from its scientific papers, the current volume of YARS contains also a number of legislative and jurisprudential reviews. It opens with a paper written by Anna Moscibroda and Krzysztof Kuik which covers the 2010-2011 developments in EU competition law and regulatory case law with a nexus to Poland. All of the following reviews concern strictly Polish legislation and case law only. They include a review of 2011 legislative and jurisprudential developments in Polish antitrust as well as a series of detailed reviews of primarily legal, but to a certain extent also case law-related, developments in Polish infrastructure sectors (telecoms, energy, rail transport, aviation, postal sector).

Selected European and Polish antitrust jurisprudence is presented next including two judgments delivered in 2011 by the European Court of Justice. The first (C-375/09), discussed by Ilona Szwedziak, regards the competences of a national competition authority in applying EU competition rules with respect to the issuance of ‘negative decisions’ as far as Article 102 TFEU is concerned; the other (C-410/09), discussed by Dr. Inga Kawka, concerns the obligation to publish EU acts in the languages of new EU Member States. The latter case concerns in particular Commission Guidelines on relevant market analysis and the assessment of significant market power in the field of electronic communication. Dr. Tomasz Bagdzinski presents a judgment rendered by the Polish Court of Appeals in Warsaw, concerning a dispute between the President of the Polish Competition Authority on the one hand and the Polish Football Association and the broadcaster Canal + on the other hand (IV ACa 996/10).

The current volume of YARS continues on to present reviews of Polish books in the antitrust and sector specific regulation field published in 2011. Two concern the audiovisual sector (European Audiovisual Policy and regulatory conflict regarding audiovisual media) and the third focuses on the place of broadband networks in telecoms policy. YARS 2012, 5(7) closes with the CARS Activity Report for 2011.

Warsaw, November 2012

Agata Jurkowska-Gomułka
YARS Volume Editor
List of acronyms

POLISH COMPETITION AND REGULATORY AUTHORITIES:

**KRRiT** *(Krajowa Rada Radiofonii i Telewizji)*
- National Broadcasting Council

**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

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

**URE** *(Urząd Regulacji Energetyki)*
- Energy Regulatory Office

**UTK** *(Urząd Transportu Kolejowego)*
- Rail Transport Office

OTHER INSTITUTIONS:

**AMO**
- Antimonopoly Office of the Slovak Republic

**CFI**
- Court of First Instance

**CJ**
- Court of Justice

**ECJ**
- European Court of Justice

**ECtHR**
- European Court of Human Rights

**GC**
- General Court

**NCA**
- National Competition Authority

**NRA**
- National Regulatory Authority
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<th>Acronym</th>
<th>Description</th>
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<tr>
<td>NSA</td>
<td>Polish Supreme Administrative Court</td>
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<tr>
<td>OFT</td>
<td>Office of Fair Trading</td>
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<td>OPC</td>
<td>Czech Office for the Protection of Competition</td>
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<tr>
<td>SCSR</td>
<td>Supreme Court of the Slovak Republic</td>
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<td>APC</td>
<td>Slovak Act on the Protection of Competition</td>
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<td>Competition Act</td>
<td>Polish Competition and Consumers Protection Act of 2007</td>
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<td>CzAPC</td>
<td>Czech Act on Protection of Competition</td>
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<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<tr>
<td>KPA</td>
<td>Polish Administrative Procedure Code</td>
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<tr>
<td>PE</td>
<td>Polish Energy Law of 1997</td>
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<td>PT</td>
<td>Polish Telecommunications Law of 2004</td>
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<tr>
<td>TEC</td>
<td>Treaty on the European Communities</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>ABM</td>
<td>agent-based modelling</td>
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<tr>
<td>AO</td>
<td>Alternative Operator</td>
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<tr>
<td>BSA</td>
<td>wholesale broadband access</td>
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<tr>
<td>CEE</td>
<td>Central and Eastern Europe(an)</td>
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<tr>
<td>DSL</td>
<td>digital subscriber line</td>
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<tr>
<td>IRU</td>
<td>Indefeasible Right of Use</td>
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<tr>
<td>LLU</td>
<td>unbundled access to the local loop</td>
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<tr>
<td>OJEU</td>
<td>Official Journal of the European Union</td>
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<td>RPM</td>
<td>resale price maintance</td>
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<td>USO</td>
<td>Universal Service Obligation</td>
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Reviewers of YARS 2012, vol. 5(6) and YARS 2012, vol. 5(7)

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How to Facilitate Damage Claims? Private Enforcement of Competition Rules in Croatia – Domestic and EU Law Perspective

by

Jasminka Pecotić Kaufman

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* Doc. dr. sc. Jasminka Pecotić Kaufman, University of Zagreb.
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VIII. Limitation periods and the right to claim damages for infringements of competition law
IX. Conclusion

Abstract

Ever since the Croatian Competition Agency started functioning in 1997, public enforcement of competition law has been the norm. Civil actions for breaches of competition law have been the exception in Croatia. The existing legislation in the area of competition law makes no effort to incentivise private enforcement. There are no specific rules in the Competition Act 2009 dedicated to civil actions, except a single provision that assigns jurisdiction over damages claims to commercial courts. General tort law is applicable in order to prove damages. A number of issues arise here mostly due to the complexity of competition cases. These issues were described in the European Commission’s White Paper on Damages Actions for Breach of EC Antitrust Rules (2008). The level of uncertainty as regards the outcome of the claim is high. It seems that special rules need to be adopted in Croatia in order to improve the position of the injured side. The paper deals with a number of procedural and substantive law issues relevant to the facilitation of civil proceedings for antitrust damages. A domestic law perspective is applied taking into account recent developments in EU competition law and policy.

Résumé

Depuis 1997 quand l’Agence croate de la concurrence a commencé à fonctionner, l’exécution publique de droit de la concurrence a constitué la norme. Les actions civiles pour violation du droit de la concurrence ont été une exception en Croatie. La législation en vigueur dans le domaine du droit de la concurrence ne succède pas l’exécution par des particuliers. Il n’y a pas de règles spécifiques dans la Loi sur la concurrence de 2009 consacrées aux actions civiles, à l’exception d’une seule disposition qui attribue la compétence à l’égard des demandes d’indemnisation aux tribunaux commerciaux. La responsabilité délictuelle générale est applicable afin de prouver les dommages. Un certain nombre de questions se posent ici principalement en raison de la complexité des affaires de concurrence. Ils ont été décrits dans le
Livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante (2008). Le niveau d’incertitude quant à l’issue de la demande est élevé. Il semble que des règles spéciales doivent être adoptées en Croatie afin d’améliorer la position de la partie lésée. Le document traite sur un certain nombre de questions de droit procédural et droit de fond relatives à la facilitation des procédures civiles en ce qui concerne les dommages suite à des violations du droit de la concurrence. Le point de vue du droit interne est appliqué en tenant compte des développements récents en droit et politique de la concurrence.

**Classifications and key words:** private enforcement; Croatia; liability for damages; prejudicial question; binding effect; access to evidence; limitation periods; standing; indirect purchasers; passing-on defence; collective protection; harmful act; fault; causal link; types of harm; scope of damages.

**I. Introduction**

The competition process between firms is regulated by certain imperative norms that prohibit competition restricting behaviour. Although the starting point is the constitutional principle of an entrepreneur’s and the market’s freedom (acting as a foundation of the economic system of the Republic of Croatia1), this proclaimed freedom is restricted when an undertaking distorts competition2. The Croatian Constitution itself narrows down the scope of economic freedom by providing that the state gives all undertakings ‘an equal legal position on the market’3. The freedom of undertakings on the market stretches thus only as far as not to endanger the ‘equal legal position’ of other market participants. However, the notion of an equal position of firms should not be understood as giving, for instance, all firms an equal amount of market power. Instead, it is a principle ensuring a level playing field on which the creation or strengthening of market power is not prohibited if obtained by competing on the merits4. The process of competition must not be obstructed by trying to achieve artificial equality of all operators. The system of market

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1 Art, 49 (1) Constitution of the Republic of Croatia (Narodne novine 56/90, 135/97, 113/00, 28/01, 76/10); hereafter, Constitution.
3 Art. 49(2) Constitution.
economy secures in that sense the freedom to compete, but it also provides its boundaries whereby it prohibits conduct that it deems as restrictive.

Not mentioning any other form of competition restrictions, the Croatian Constitution expressly prohibits the ‘abuse of a monopolistic position’\(^5\). Such provision has not been part of the Constitution before 2001\(^6\), the moment when the original text of the constitutional norm from 1990, which prohibited ‘monopoly’ as such, was amended\(^7\). Despite the earlier constitutional prohibition of a monopoly, the first Croatian Competition Act of 1995 provided detailed rules aimed at regulating ‘the abuse of a monopolistic and dominant position’\(^8\). Likewise, the Constitutional Court held that ‘the earlier constitutional provision on prohibition of monopoly implied no prohibition of monopolies as such, but of certain behaviour of those undertakings which have monopolistic position on the market on the basis of the law, as regulated by the legislator in more details by Competition Act’\(^9\).

II. System of public enforcement in Croatia

The Croatian Competition Act provides for two prohibited forms of market conduct: agreements, decisions by associations of undertakings and concerted practice which restrict competition (‘prohibited agreements’)\(^10\), and abuse of a dominant position\(^11\). Restricted agreements are \textit{ex lege} null and void\(^12\). The Competition Agency (hereafter, Agency) has competences as a public law body answering to the Croatian Parliament to investigate and decide on breaches of

\(^{5}\) Art. 49(2) Constitution.

\(^{6}\) Amendments to the Constitution of the Republic of Croatia, Narodne novine 28/01, Article 16.

\(^{7}\) Art. 49(2) Constitution, Narodne novine 56/90.

\(^{8}\) Competition Act (Narodne novine 48/95, 52/97, 89/98). Although it seems that the notion of ‘abuse of monopolistic position’ was put in the amended Constitution in 2001, copying the content of the Competition Act 1995 (cf. Art. 13 and 14 Competition Act), it should be noted that the Competition Act 2003 (adopted after Croatia started aligning its domestic legislation with the acquis) no longer refers to a ‘monopolistic’ position, but only to a ‘dominant’ position (cf. Art. 15 Competition Act 2003, Narodne novine 122/03) and this is also true for the current Competition Act 2009 (Art. 12).


\(^{10}\) Art. 8 Competition Act 2009.

\(^{11}\) Art. 13 Competition Act 2009.

\(^{12}\) Art. 8(4) Competition Act 2009.
the Competition Act\textsuperscript{13}. Firms enjoy court protection before the Administrative Court of the Republic of Crotia (hereafter, Administrative Court) against the decisions of the Agency\textsuperscript{14}. Within 30 days from adopting such a decision, a party may start an administrative dispute ("upravni spor") before the Administrative Court. The administrative plea has a suspensive effect – the contested antitrust decision is not enforceable until the adjudicating court rules on the matter\textsuperscript{15}. However, a two-tier administrative judicial system was introduced in 2012. Four local administrative courts are competent to hear pleas against antitrust decisions in the first instance\textsuperscript{16} while the High Administrative Court acts in the second instance\textsuperscript{17}. The changes introduced as of 1 January 2012 provide for a full-review of administrative decisions of public law bodies in general.

Public enforcement of competition rules is undertaken by the Croatian Competition Agency which initiates proceedings \textit{ex officio} for the purpose of deciding on prohibited agreements and abuse\textsuperscript{18}. Under the Competition Act of 2003, the Agency was empowered to initiate proceedings \textit{ex officio} but also forced to start proceedings on the basis of a request, except in cases where: the allegedly anticompetitive conduct had a \textit{de minimis} effect on the market; if it was unimportant for the development and maintenance of effective competition or; if the initiation of antitrust proceedings was not in the public interest\textsuperscript{19}. The request to start proceedings could have been submitted by any natural or legal person with a legal or economic interest in the case, by professional or economic interest association, by consumer associations, by the Government of the Republic of Croatia, its central state bodies and local and regional self-government bodies\textsuperscript{20}. This has been changed by the Competition Act 2009. The aforementioned groups may still request for the Agency to start proceedings, but the authority is no longer obliged to open proceedings on their initiative\textsuperscript{21}. In other words, opening of antitrust proceedings is now within the sole discretion of the Agency.

\textsuperscript{13} Art. 26 Competition Act 2009.
\textsuperscript{14} Art. 22(2) Administrative Disputes Act (Narodne novine 20/10), in force as of 1 January 2012.
\textsuperscript{15} Art. 67(1) and (4) Competition Act 2009.
\textsuperscript{16} Art. 12(2) Administrative Disputes Act.
\textsuperscript{17} Art. 12(3) 3 Administrative Disputes Act.
\textsuperscript{18} Art. 38(1) 1 Competition Act 2009.
\textsuperscript{19} Art. 41(1) and (2) Competition Act 2003.
\textsuperscript{20} Art. 41 (4) Competition Act 2003.
\textsuperscript{21} Art. 37 Competition Act 2009. Also the condition that any legal or natural person has to have legal or economic interest to do so has been deleted.
III. System of private enforcement in Croatia –
right to claim damages for a breach of competition law

Private law protection from breaches of the Competition Act is granted in Croatia on the basis of the general tort law right to claim damages and is enforced by commercial courts. Indeed, there is an explicit provision in the Competition Act 2009 that grants jurisdiction for antitrust damages claims to commercial courts. As the only provision in the Competition Act related to private enforcement, general rules of the Obligations Act on torts (non-contractual liability for damages) are applicable for antitrust damage claims.

Two options are available for those that suffered damages due to conduct prohibited by the Competition Act: follow-on actions and stand-alone actions. In the follow-on action scenario public and private enforcement of competition rules is combined. First the Agency adopts a decision on a breach of the Competition Act (public law enforcement) after which the injured entity submits a claim for damages before a local commercial court (private law enforcement). The stand-alone action scenario is a solely private law option where the plaintiff does not rely on an existing decision by the Agency, but leaves it to the court to decide both on the breach of the Competition Act and on the claim for damages.

A question may be asked here as to which scenario is more convenient for the plaintiff for effective compensation. The follow-on option is likely to be far more opportune since the existence of a previous decision of a specialised public-law body will make it possible for to court to avoid getting involved in what is frequently a complex exercise of establishing a competition law infringement. However, if only this option was available, injured entities would only be able to get compensation if the Agency adopted a decision finding a breach of the Competition Act. Since the competition authority is no longer obliged to initiate proceedings upon request, the scope for finding infringements is greatly reduced. In order to make compensation possible in

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22 Art. 69(2) Competition Act 2009: ‘Competent commercial courts shall decide on compensation of damage caused by infringements of this Act’.

23 Obligations Act, Article 1045 et seq., Narodne novine 35/05, 41/08.

24 It has been argued that public antitrust enforcement has a strong facilitating effect on private enforcement since follow-on actions for damages are much easier to bring than stand-alone actions since the earlier public enforcement would have established the existence of a violation and is likely to have generated useful evidence as cause and harm. W. P. J. Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32(1) World Competition 3-26, available also at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087, p. 19.
all cases, even if the Agency does not act, it is necessary to secure another option for compensation and that is, the private-private solution (stand-alone actions). As it has already been argued, if private enforcement is primarily seen as an annex or a supplement to public enforcement, the thrust will be to facilitate follow-on actions and to limit claims to strict compensation; if, however, private enforcement was to be seen as a tool to contribute to the enforcement of competition law rules in the public interest, one would have to promote the deterrent effect of private enforcement even beyond mere compensation25.

IV. Competence of commercial courts and breaches of the Competition Act

It is now explicitly clear in Croatia that commercial courts have jurisdiction in damages actions for antitrust infringements26. Although this provision is a novelty when compared with the Competition Act 2003, the competence of commercial courts to deal with such disputes had already been clear from the provisions of the Civil Procedure Act regulating jurisdiction of commercial courts, despite the fact that these rules are not entirely in tune with the language of the Competition Act. Pursuant to Article 34b(9) of the Civil Procedure Act, commercial courts are competent to act in civil proceedings in the first instance ‘in disputes that arise in connection with acts of unfair competition, monopolistic agreements and violation of equality of the single market of the Republic of Croatia’27. Despite the odd language, it is generally believed that actions for damages for breaches of competition rules are covered by this rule28. It should be noted however that none of Croatia’s Competition Acts


26 Art. 69(20 Competition Act 2009. Cf. Art. 175 Public Procurement Act, Narodne novine 90/11 on the basis of which ‘every person who suffered damage for infringements of this Act may claim damages before competent court pursuant to general rules on compensation of damage’.

27 Art. 34b(9), Civil Procedure Act (consolidated text: Narodne novine 148/11). This provision was inserted in 2003 (Narodne novine 117/03). The notion of unfair competition relates to the institution of unfair commercial practices (nepošteno trgovanje) under the Trading Act, such actions are prohibited. See Art. 63 Trading Act (Narodne novine 87/08, 96/08, 116/08,114/11).

so far mentioned the notion of ‘monopolistic agreements’. It is thus unclear how this notion found its way into the Civil Procedure Act. Not mentioning the abuse of a dominant position, it cannot be even said that the Civil Procedure Act uses a more general language that would cover both types of restrictive practices.

Considering these jurisdictional rules in the context of the views of the European Court of Justice (hereafter, ECJ), whereby in the absence of relevant supranational rules it is up to each Member State to allocate competences for antitrust damages claims, no change of court competences will be needed when Croatia joins the European Union in 2013. It seems, nevertheless, that an explicit provision on the competence of commercial courts to hear Article 101 and 102 TFEU cases will have to be inserted into Croatian legislation. In light of the principle of equality invoked by the ECJ, it is only logical that commercial courts should be competent to hear both domestic and EU cases. Moreover, national laws cannot make the enforcement of antitrust damages claims based on domestic rules more advantageous than those based on Articles 101 and 102 TFEU. Finally, in light of the principle of effectiveness, such rules may not make it impossible or excessively cumbersome to exercise EU rights.

V. Breach of competition rules as prejudicial question and binding effect of decisions of the Competition Agency

The way domestic procedural law deals with the issue of solving a prejudicial question is of utmost importance within the context of private enforcement of competition rules. It is relevant, in particular, whether the court which has to decide on damages is bound by the decision of the Agency or the appellate (administrative) court finding an infringement. It is also relevant, once Croatia becomes an EU Member State, whether domestic courts will

29 The notion of ‘monopolistic’ agreements was also unknown to the Competition Act 1995, so the origin of this notion is unclear. Although the Penal Act contained, until its 2011 reform (Narodne novine 125/2011), a crime of ‘creating a monopolistic position on the market’ (Art. 288, Narodne novine 110/97, the provision amended in Narodne novine 129/00), subsequently renamed as ‘abuse of monopolistic or dominant position’ (Art. 288, Narodne novine 111/03), the notion of ‘monopolistic agreement’ was not mentioned there.

30 Joined cases C-295/04- C-298/04 Manfredi and others ECR [2006] I-6619, para. 72.

be bound by an infringement decision of the Commission or an National
Competition Authority (hereafter, NCA) of another Member State finding
a breach of Article 101 or 102 TFEU\textsuperscript{32}. Pursuant to Article 16(1) Regulation
1/2003, decisions adopted by the Commission applying Article 101 or 102
TFEU have a binding effect on national courts\textsuperscript{33}. Where the Commission has
already initiated proceedings but not yet adopted a decision, national courts
must avoid delivering rulings that would conflict with a decision contemplated
by the Commission. To this effect, domestic courts may find it useful to stay
their proceedings. National Competition Authorities are also bound by
a Commission decision applying Article 101 or 102 TFEU and cannot take
decisions which would run counter thereto\textsuperscript{34}. However, the binding effect of
decisions applying Article 101 or 102 TFEU adopted by NCAs or national
courts is not regulated by Regulation 1/2003\textsuperscript{35}.

Obviously, a binding effect of an earlier antitrust decision or judgment
contributes greatly to improving the position of the plaintiff in an antitrust
damages action. Normally, it is the plaintiff who bears the burden of proof
when it comes to proving that the defendant has breached competition rules.
Prejudicial character also helps the civil court to decide more quickly on the
scale of damages and contributes to legal certainty by preventing different
public decisions being issued as regards the same parties and the same conduct.

In civil antitrust damages actions, the preliminary issue (prejudicial question)
for the court to deal with is the question whether an antitrust infringement
actually occurred – it is not possible to decide on damages claim without
previously deciding on the existence of a prohibited agreement or abuse of
dominant position\textsuperscript{36}. A prejudicial question is a concrete legal issue being
the focus of a different judicial, arbitration or administrative proceedings
(which confirms its autonomous legal nature). In this context, it would be
the core question of the antitrust proceedings on whether a competition law

\textsuperscript{32} Cf. Art. 428a(3) Civil Procedure Act: in a retrial, courts must comply with the legal
position adopted in the final judgment of the European Court of Human Rights finding
a violation of a fundamental right or freedom.

\textsuperscript{33} Council Regulation (EC) No. 1/2003 of 16/12/02 on the implementation of the rules on
competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

\textsuperscript{34} Art. 16(2) Regulation 1/2003.

\textsuperscript{35} The Commission proposed that domestic courts should be bound by final decisions of
NCAs finding a violation of Art. 101/102 TFEU as well as by a ruling of a national court which
upheld such decision or found an infringement itself, as this would ensure a more homogenous
application of EU law, increase legal certainty and the effectiveness and procedural efficiency
of actions for antitrust damages (no duplication); White Paper, p. 6.

\textsuperscript{36} For more on prejudicial nature see S. Triva, M. Dika, \textit{Građansko parnično procesno pravo},
infringement took place. This is why a civil court faced with such a question may choose not to deal with it and decide to wait for a decision of a specialised authority competent to decide on that matter as the main question of its own proceedings 37.

The notion of prejudicial questions relevant for civil proceedings is regulated by the Croatian Civil Procedure Act: ‘When for a court decision to be made, it is necessary to previously settle an issue regarding the existence of a right or legal relationship, and no decision on this issue has yet been made by the court or other competent body (prejudicial question), the court may settle this issue on its own, unless otherwise provided for by separate regulations 38. If the court decides not to deal with the question itself, it will order the stay of its proceedings 39.

A court faced with a prejudicial question has thus, in principle, two options: to decide that it will tackle the prejudicial question itself or to solve the issue on its own.

If the court decides not to resolve the prejudicial question, it must suspend its proceedings 40 until a res iudicata becomes available from the competent entity which deals with the issue as the focus of its own proceedings, or until the court finds that there is no longer any reason to wait for such external proceedings to come to a close 41.

Alternatively, a civil court can solve the prejudicial question on its own. The substantive law applicable for finding an antitrust infringement would cover the Competition Act, and related Government regulations as well as, as an auxiliary means of interpretation, EU competition rules on restrictive agreements and the abuse of a dominant position 42. The burden of proof as regards the actual breach of competition law is on the plaintiff. Problems with obtaining appropriate evidence and difficulties in performing complex economic analyses in order to establish an antitrust violation become relevant here. It is not clear under current rules whether a civil court can invite the Agency as amicus curiae to give its opinion on the dispute. Pursuant to the Competition Act 2009, the

38 Art. 12(1) Civil Procedure Act. The ruling on the prejudicial question shall have legal effect only in the litigation in which this issue was settled, Art. 12(2) Civil Procedure Act.
39 Art. 213(1) Civil Procedure Act.
40 Art. 213(1) Civil Procedure Act in connection with Art. 12(1) Civil Procedure Act.
41 Art. 215(3) Civil Procedure Act.
42 See Art. 70(1) Stabilisation and Association Agreement, Narodne novine – Međunarodni ugovori 14/01. For the implementation of this provision into domestic legislation see Art. 74 Competition Act 2009 and Art. 35 Competition Act 2003. See also decision of the Croatian Constitutional Court in case PZ Auto of 13/02/08, Narodne novine 25/08. More on this issue see in: V. Butorac Malnar, J. Pecotić Kaufman, ‘Ocjena koncentracija poduzetnika po kriteriju opadajućeg poslovanja u doba recesije’, (2011) 61(4) Zbornik Pravnog fakulteta u Zagrebu 1253-1294, at 1283 et seq.
Agency must cooperate with competent judicial, regulatory and other bodies in cases related to competition distortions in Croatian territory\textsuperscript{43}. However, there is no explicit provision regulating the status of the Agency as \textit{amicus curiae} before commercial courts deciding on antitrust damages claims.

If a court decided to rule on the existence of a competition law breach as a prejudicial question, and if it found that the defendant infringed competition rules, and if it found liability for damages on the side of the defendant, but the Agency subsequently in its own proceedings decided that no violation occurred, than the defendant may request the court proceedings to be repeated\textsuperscript{44}. By contrast, if the court found a breach of competition rules but denied a damages claim since no liability on the side of the defendant could be established, and the Agency subsequently as \textit{res iudicata} also found an infringement of competition rules (with all public law consequences thereof including a fine), then it would seem that the court proceedings could be repeated only if the decision of the Agency would influence the decision of the court as regards liability. If, on the other hand, the court found, as a prejudicial question, that no infringement took place, then it will refuse the damages claim. However, the plaintiff may request that the court proceedings be repeated if the Agency adopted a decision that established that an infringement did in fact occur\textsuperscript{45}.

\textbf{1. Breach of competition rules as prejudicial question: analysis of possible scenarios}

The following situations could arise in practice:

\begin{itemize}
  \item first, the decision of the Agency is both final in administrative proceedings (this is a decision by which proceedings before the public authority are completed\textsuperscript{46}) and final as \textit{res iudicata} (this means that no appeal or no administrative dispute can be initiated against it\textsuperscript{47}),
\end{itemize}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{43} Art. 66(1) Competition Act 2009. Cf. Art. 90 German Gesetz gegen Wettbewerbsbeschränkungen (GWB) whereby German courts must notify the Bundeskartellamt of any civil actions for antitrust breaches and the NCA joins such proceedings as \textit{amicus curiae}. Art. 15 Regulation 1/2003 regulates conditions under which the Commission and NCAs may act as \textit{amicus curiae} before national courts.
\item \textsuperscript{44} See Art. 421(9) Civil Procedure Act.
\item \textsuperscript{45} Once civil proceedings finish with \textit{res iudicata} refusing the damages claim, a party may request for the to be repeated if the competent body subsequently settled the prejudicial question by a legally effective decision (\textit{res iudicata}) on which the court decision is based. Art. 421(9) Civil Procedure Act.
\item \textsuperscript{46} S. Triva, M. Dika, \textit{Gradansko parnično procesno pravo...}, p. 352.
\item \textsuperscript{47} See Art. 13 General Administrative Procedure Act (Narodne novine 47/09) in force as of 01 January 2010.
\end{itemize}
\end{footnotesize}
– second, the decision of the Agency is not yet final in administrative proceedings (proceedings still pending before the Agency),
– third, the decision of the Agency is final in administrative proceedings, but it is not final as *res iudicata*, since
  a) the deadline for lodging an appeal to an administrative court has not yet lapsed, or
  b) proceedings before the administrative court are still pending, and
– fourth, the proceedings before the Agency have not been initiated.

1.1. First scenario

The Civil Procedure Act is not explicit when it comes to the issue of prejudicial effects of administrative acts. Article 12(1) does not specify what quality must an administrative act (‘decision by other competent body’) achieve in order to produce prejudicial effects in civil proceedings and in particular, if it is enough that it is final in administrative proceedings or whether it must be *res iudicata*. It has been argued, however, that it is clear from the Civil Procedure Act that only *res iudicata* administrative acts have binding effect as regards civil courts deciding on damages.\(^{48}\) First, proceedings which were stayed because the court decided to await an external decision shall continue when proceedings before another court or competent body are resolved with *res iudicata*\(^{49}\). Second, court proceedings which were closed with *res iudicata* may be repeated if the decision of the court was founded on a ruling of another court or decision by another body which was reversed, set aside, or vacated as *res iudicata*, or if the competent body subsequently settled the prejudicial question on which the court decision is based as *res iudicata*\(^{50}\). This position has also been confirmed by Croatian jurisprudence\(^{51}\).


\(^{49}\) Art. 215(4) Civil Procedure Act.

\(^{50}\) Art. 421(1)(8) and (9) Civil Procedure Act. If for the purpose of repeating the proceedings only a *res iudicata* administrative decision is to be taken into account, it must be concluded, *argumento a cohaerentia*, that any court ruling in connection with which it is requested that proceedings be repeated must be based only on *res iudicata* administrative decisions. M. Dika, “Prethodno pitanje” u parničnom postupku’, p. 45.

\(^{51}\) In civil proceedings the court is not authorised to assess the validity of a *res iudicata* decision adopted in administrative proceedings. Judgment of the High Commercial Court, Pž-904/2009 of 30 July 2009. The court may not resolve as a prejudicial issue dealt with by another competent body in a *res iudicata* decision. See Judgments of the Supreme Court: Rev-1259/01 of 10 October 2001; Rev-288/03 of 05/05/04; Rev-50/2007-2 of 14 February 2007. In civil proceedings the court is bound by a *res iudicata* administrative act and by a judgment of
Although it seems that no jurisprudence of higher instance courts exists relating directly to prejudicial questions in competition law cases, it can be concluded on the basis of the abundant jurisprudence cited above that civil courts are bound by a *res iudicata* decision of the Agency and by a *res iudicata* judgment of the Administrative Court as regards a finding of a prohibited agreement or abuse of a dominant position. They are thus not authorised to question the validity of such decisions or judgments. This prevents a situation where civil courts, the Agency, and administrative courts would all take different positions as regards the same legal issue. Importantly, being bound only by *res iudicata* decisions supports the principle of legal certainty since it prevents unnecessary changes in court rulings due to the fact that administrative acts, which are only final in administrative proceedings but not *res iudicata*, could be reversed before those administrative courts that exercise control over decisions adopted by the relevant authorities.  

It has been argued that courts cannot deal with an issue that has already been resolved as the core matter by another court or competent body because of the *ne bis in idem* principle. It has also been said that deciding all over again on the same issue would be both against the principle of procedural economy and against the principle of legal certainty, since it could result in contradicting decisions. Mutual confidence in adopted decisions is justified in light of the division of competences principle between courts and specialised public bodies.

1.2. Second scenario

If the decision of the Agency is not final in administrative proceedings, the civil court deciding on damages may either rule on the existence of an antitrust infringement, or stay its proceedings and wait until *res iudicata* is available.
or until it decides that there are no longer reasons to wait for the conclusion of external proceedings\textsuperscript{56}. Since the Civil Procedure Act offers no guidance on when the court should decide on the prejudicial question on its own and when to stay its proceedings, it seems entirely up to the court which option to choose. However, some commentators quite rightly argue that courts are not in fact left with such wide discretion because they must obey key principles of civil procedure, in particular the principle of autonomy in adjudication and the principle of procedural economy. As a result, a court should without a doubt stay its own proceedings if the prejudicial question is the core issue in pending proceedings before a competent court or body\textsuperscript{57}. The rationale here is clear: it would not be opportune to invest into the adjudication of a legal issue if a competent court or body is about to adopt a meritorious decision thereon which could be a valid ground for requesting the civil proceedings (which were not stayed and ended in \textit{res iudicata}) to be repeated despite the fact that it would have been appropriate to have stayed them\textsuperscript{58}. The stay of proceedings in order to await the decision of a competent body is thus opportune in particular in situations where the same issue is the focus of another competent court or state body, as well as in situations where parallel proceedings are not yet pending but they can be initiated \textit{ex officio} provided that a party which was instructed by the court to request the initiation of such proceedings will be motivated to start such proceedings without delay\textsuperscript{59}.

If the court decides to deal with the prejudicial question where no alternative \textit{res iudicata} decision is available, the legal effect of its ruling on the prejudicial question is limited to its own civil proceedings\textsuperscript{60} – civil courts are thus not bound by an earlier ruling on the same prejudicial question\textsuperscript{61}. This applies both to the court that has delivered the actual ruling as well as to other courts\textsuperscript{62}. Jurisprudence suggests also that if a judgment in which the court decided on a prejudicial question was rescinded upon appeal, the same court may decide on the prejudicial question differently in the same case\textsuperscript{63}.

\textsuperscript{56} Art. 213(1) and Art. 215(3) Civil Procedure Act.
\textsuperscript{57} M. Pavlović, ‘Značaj prejudicijelnih...’, p. 88.
\textsuperscript{58} Ibidem, p. 89; see Art. 421(1)(6) and (8) Civil Procedure Act.
\textsuperscript{59} M. Pavlović, ‘Značaj prejudicijelnih...’, p. 83–84.
\textsuperscript{60} Art. 12(2) Civil Proceedings Act.
\textsuperscript{61} Judgment of the Supreme Court Rev 54/93 of 07 October 1993 – IO 1/1996-165. Also see M. Dika, “Prethodno pitanje” u parničnom postupku’, p. 10.
\textsuperscript{63} Judgment of the Supreme Court in case Rev 177/82 of 13/03/84 – PSP 25/185.
1.3. Third scenario

If the decision of the Agency was final in terms of administrative proceedings but not yet res iudicata, the civil court considering a damages claim has the same options as in cases of a decision not final in terms of administrative proceedings. In other words, the court is bound by a final decision of the Agency but only if it is res iudicata. However, the aforementioned arguments still apply, and it is thus most likely that civil proceedings will be stayed in order to await res iudicata.

1.4. Fourth scenario

In the absence of antitrust proceedings, a civil court may resolve the prejudicial issue with legal effects limited to the given case. Some authors argue that court proceedings ought to be stopped if the court finds that a party has a legal interest to initiate proceedings before a competent court or body. In such cases, the civil court should instruct that entity to do so before a certain deadline. If such party does not do so, the court should resolve the prejudicial issue on its own. Other commentators note that, if the court decides not to resolve the prejudicial issue, it must instruct the parties to initiate proceedings before another court or competent body or to initiate such a procedure ex officio.

It is questionable however what implications such an approach would have in the context of competition law. Pursuant to the Competition Act 2009, the Agency initiates all proceedings ex officio. Others are merely left with the right to submit a non-binding request for the Agency to act. It is however wholly within the discretion of the competition authority whether to do so. As a rule, the Agency should start proceedings unless the allegedly anticompetitive conduct is de minimis, or if any other conditions for refusal are fulfilled. It is questionable whether a commercial court could request for the Agency to act. There is no explicit provision to this effect in Croatian law.

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64 A civil court may solve the prejudicial issue only if a competent court or body has not yet adopted a decision on that issue; courts are bound by res iudicata administrative decisions. See judgment of High Commercial Court PŽ-2871/01 of 03 June 2003. However, see infra some recent jurisprudence of first instance commercial courts accepting as binding for civil courts the decisions of Competition Agency which are only final in administrative proceedings, but no res iudicata is available.
65 Art. 12(1) and (2) Civil Procedure Act.
68 Art. 38(4) and (5) Competition Act 2009. In practice the Agency has great discretion in rejecting such request.
Under the Competition Act 2009, ‘any legal or natural person’ may submit ‘an initiative’ to open up antitrust proceedings.\(^{69}\) Courts are public bodies which exercise their judicial authority autonomously and independently, within their competences, as prescribed by law\(^ {70}\). As state organs they are not, however, separate legal entities.

2. Jurisprudence of Croatian commercial courts – binding effect of antitrust decisions

There is a scarcity of commercial courts’ jurisprudence in Croatia on disputes related to competition law infringements, and this is an understatement. Since only a small number of commercial court judgments are at all available on-line, searching for relevant rulings is an adventure in itself. It was ultimately possible to identify only a small number of judgments fitting the purpose of this article (most of them not yet final), and hence no wider conclusions can be drawn at this point on jurisprudential trends and focal issues in private enforcement of competition rules in Croatia. Still, scarcity of relevant rulings must be primarily attributed to the lack of plaintiffs lodging antitrust damages claims and not to problems with availability and transparency of Croatian jurisprudence. The identified rulings shed, nevertheless, some light on issues such as: binding effect of antitrust decisions, division of competences between civil courts and the Agency, and the use of expert opinions in follow-on cases.

The only Croatian case with *res iudicata* is very peculiar and although it was not an action for antitrust damages it seems to give quite a few insights for private enforcement of competition law. While it could be expected that a victim would, on the basis of an antitrust infringement decision finding an abuse\(^ {71}\), claim antitrust damages before commercial court as a follow-on action, this case followed the opposite scenario. The case concerned a subsidiary of the company that runs Zagreb Airport, which provided catering services to the national air carrier, Croatia Airlines. This company, which was subsequently found by the Agency to have breached competition rules, sued its ‘victim’ for the fulfilment of contracts (unilateral increase of prices which were found by the Agency to constitute an abuse of a dominant position). It was precisely the very attempt to judicially enforce the contested conduct that the Agency found to be an abuse. Even more interestingly as far as procedural strategy in concerned, the plaintiff (a firm

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\(^{69}\) Art. 37 Competition Act 2009.

\(^{70}\) Art. 2 Courts Act [Narodne novine 150/05, 16/07, 113/08, 153/09, 116/10, 122/10 (consolidated text), 27/11, 130/11].

\(^{71}\) Decision of the Agency of 30 December 2008 (Narodne novine 66/09).
found to have abused its dominant position) filed several lawsuits against its ‘victim’: three lawsuits for different parts of the claim (outstanding invoices from various periods) are known to the author to have been filed within less than a year\textsuperscript{72}. As a result, three judgments exist delivered by three different judges and two different courts related to the same parties and the same factual and legal issues, but regarding different parts of the claim. Analysing all three judgments was interesting since the rationale, arguments and issues that proved relevant to the final rulings vary considerably from one to the other. None of them failed to notice the relevance of the infringement decision of the Agency for the adjudication in the civil case, and none of them allowed the claim.

The fact that the plaintiff in the civil proceedings was found to have abused its dominant position in all three judgments was, more or less explicitly, treated as a prejudicial issue solved by the competent authority and thus seen as having a binding effect on the civil law case. Incidentally, it was not relevant for the courts that the said decision was not yet res \textit{iudicata} since it has been appealed to the Administrative Court, and that the court proceedings were still pending. Nonetheless, the adjudicating commercial courts held that the decision of the Agency was binding in damages actions before them. This approach seems to follow a very extensive interpretation of Article 12 Civil Procedure Act since courts are only bound by res \textit{iudicata} administrative decisions. All three courts took the findings of the Agency for granted notwithstanding the fact that the supervising administrative court had not yet ruled on the matter. However, all of the civil law judgments were primarily based on the fact that it was clear in light of relevant rules of contract law that no concordance of wills existed between the parties as regards the price increase. As a result, the claims of the plaintiff were rejected.

One of the judgments was the most clear in establishing a connection between the illegal conduct of the plaintiff as described in the antitrust decision and the claim relevant in the civil proceedings. In order to assess the validity of the claim, the court treated the issue whether the claim was founded on conduct that was deemed illegal (breach of the Competition Act) as a prejudicial question within the meaning of Article 12 of the Civil Procedure Act\textsuperscript{73}. The court held that the Agency, as a competent body, adopted a decision that concerned the main issue (\textit{meritum}) of the civil dispute, thereby solving the

\textsuperscript{72} Case P-664/2009, Commercial Court in Zagreb of 230/06/10; case P-1185/2009, judgment of Commercial Court in Zagreb of 29/03/10; case P-426/08, judgment of Commercial Court in Varaždin of 25 January 2010. It is not known to the author whether Croatia Airlines filed a lawsuit against Zračna luka Zagreb for antitrust damages. It seems that the plaintiff revoked all three of its appeals against judgments of the first instance commercial courts.

\textsuperscript{73} Case P-664/2009, judgment of Commercial Court in Zagreb of 30 June 2010.
prejudicial question determining the validity of the claim. The court accepted
the findings of the Agency in their entirety, both in terms of legal assessment
as well as the operative part of the decision. Most interestingly, the court
explained that the antitrust decision, which was connected to the object of
the civil action as regards facts and law, could not be ignored for reasons of
‘consistency of public order’: it held that a uniform application of the law and
functional legal protection through a consistent operation of different parts
of the public order system, notwithstanding which level or part thereof is
considered, guarantees legal certainty. Thus the court held that there was no
other option but to accept the decision of the Agency as binding as this would
translate into consistent functioning of the public order system. In this light,
the court accepted that behaviour found as abusive by the Agency was contra
legem, and that such behaviour could not have been granted legal protection74.

One of the other two judgments shows the irritation of the court with the
blatant ignorance of the plaintiff as regards the antitrust decision. As a final
decision in administrative proceedings, the decision created certain obligations
and its implementation represented an obligation under the Croatian legal
order, in particular having in mind the significance of the Agency for the
‘establishment of a legally regulated market economy’75. The court held that
the plaintiff, when attempting to enforce its claim, had no legal grounds to do
so since its lawsuit entirely ignored the antitrust decision. The court warned
of the abuse of the procedural right to file a lawsuit (Art 9 and 10 Civil
Procedure Act), and held that the plaintiff had in fact not only burdened
greatly Croatian commercial courts by filing a number of baseless lawsuits,
but also other competent bodies (Competition Agency, Administrative Court,
misdemeanour court). This kind of behaviour was also said to might have
indirectly influence the economic situation of the defendant disrupting its
business and weakening its ability to focus on its core business.

It is noticeable from the third judgment that the plaintiff argued that
administrative proceedings before the Agency are irrelevant for the civil
law dispute at hand76. The court disagreed and held that its own ruling
depended on how the Agency solved the prejudicial question (Article 12 Civil
Procedure Act). The antitrust decision was thus treated by the commercial
court as the foundation for the adjudication on the object of the damages

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74 Ibidem. The court inter alia invokes the obligation to apply provisions of the Stabilisation
and Association Agreement in view of securing effet utile of Art. 70 Stabilisation and Association
Agreement.


76 Case P-426/08, judgment of Commercial Court in Varaždin of 25 January 2010; became
res iudicata after the plaintiff revoked its further appeal, see ruling of the High Commercial
Court of 30 August 2011, Pž-2735/10.
action. Rejecting the position of the plaintiff, the court stated that the plaintiff unilaterally imposed prices using its dominant position as established by the entity competent to decide on such matters under the Competition Act. The court made also a connection between substantive law (Obligations Act, and Competition Act) and procedural law (Civil Procedure Act). It was noted that the disputed price list (unilateral imposition of unfair prices) was adopted by the plaintiff contrary to basic principles of obligations law (freedom to regulate contractual relations, equality of parties, consciousness and fairness, obligation of parties to cooperate, prohibition of abuse of rights, principle of equality of obligations)\textsuperscript{77} and that the plaintiff was abusing its dominant position as established by the Agency as a prejudicial question on the basis of the Competition Act.

Moving on to a different judgment, a second instance commercial court rejected the view that an antitrust decision would have a binding effect in the given case since the plaintiff invoked a decision that declared certain vertical agreements null and void, but not actually the contract the rescission of which the plaintiff requested from the civil court\textsuperscript{78}. In such circumstances, there was really no need for the court to accept the binding effect of the antitrust decision. Another interesting aspect of this case sheds some light on the division of competences between civil courts and the Agency. The adjudicating court held, and quite rightly so, that only the court itself, and not the Agency, could provide constitutive legal protection to the plaintiff by adopting a constitutive (not declaratory) judgment deciding that a voidable contract is rescinded. The court held that disputes on the existence or non-existence of contracts, as well as whether contracts were voidable, was solely within the competence of the court. Logically from this perspective, the court noted that it was in principle not bound by an antitrust decision in situations concerning the question whether a voidable contract can be rescinded. This reasoning seems in line with the Competition Act whereby the Agency, if it finds an agreement to restrict competition, declares an \textit{ex lege} nullity of the agreement in the operative part of its decision\textsuperscript{79}. On the other hand, as it was in the case here, the voidability of a contract does not produce legal effects \textit{ex lege} but a plea for rescission must be submitted before the court which, if it finds that the contested contact was indeed voidable, adopts a constitutive decision.

\textsuperscript{77} Art. 2 to 7 Obligations Act.

\textsuperscript{78} Case Pž-3220/99, judgment of High Commercial Court of 28 December 1999 which rejected the appeal as unfounded and confirmed the judgment of Commercial Court in Zagreb P-2736/97 of 28 October 1998.

\textsuperscript{79} Art. 8(4) Competition Act 2009.
rescinding it\textsuperscript{80}. This kind of decision cannot be adopted by the Agency, but solely by a civil court.

3. Case law of Croatian commercial courts –
causal link and use of expert witnesses in follow-on damages actions

Although \textit{res iudicata} is not yet available, some important, albeit limited, insights into problems courts face when having to rule in follow-on antitrust damages actions derive from a judgement of the High Commercial Court quashing a ruling of a lower instance court (which rejected the claim of the plaintiff) and remanding the case for a retrial\textsuperscript{81}. On the basis of an antitrust decision which found that a large pharmaceutical wholesaler abused its dominant position\textsuperscript{82}, the victim (owner of a small private pharmacy) sued for damages both the wholesaler and another pharmacy chain, Ljekarne Prima Pharma from Split. The Agency found that the wholesaler applied dissimilar conditions to equivalent transactions placing some of its trading parties at a competitive disadvantage. In this case, the wholesaler was granting longer grace periods to certain pharmacies, such as the chain mentioned above, which drove the plaintiff out of business. The first instance commercial court summarily rejected the claim as regards the wholesaler, relying on the testimony of an appointed court expert for finances who found that there was no proof what caused the fall in turnover and profits of the plaintiff\textsuperscript{83}. In relation to the second defendant, the court rejected the claim on the grounds that the plaintiff and the second defendant were not in any business relationship.

The second instance court found serious errors in this judgment and ordered for the lower instance court to establish during the retrial what was: the exact duration of the illegal conduct of the wholesaler, whether the plaintiff suffered damages during that time, and whether a causal link existed between the illegal behaviour and the damage\textsuperscript{84}. Only after a causal link was found, could the court proceed with establishing the quantum of damages. The second instance court warned of the specifics of establishing facts in an antitrust damages case and suggested the appointment of a “professional

\textsuperscript{80} See Gorenc, \textit{Zakon o obveznim odnosima s komentarom}, p. 156.

\textsuperscript{81} Case Pž-3285/04, judgment of High Commercial Court of 27 March 2007. Case P-6986/01, judgment of Commercial Court in Zagreb of 13 January 2004. The retrial is still pending before the Commercial Court in Zagreb.

\textsuperscript{82} Decision of the Competition Agency of 29 September 2000, \textit{Ljiljana Hrnjak protiv Medika d.d.} (Narodne novine 116/00).

\textsuperscript{83} Case P-6986/01, judgment of Commercial Court in Zagreb of 13 January 2004.

\textsuperscript{84} Case Pž-3285/04, decision of High Commercial Court of 27 March 2007.
institution” as an expert witness. Furthermore, it pointed out that the lower court failed to examine evidence on the basis of which a causal link could be found between the abuse and the damage since the finance expert originally employed was also asked to determine the amount of the possible damage. In other words, the first instance court failed to understand that in this case the damages claim was based on the fact that the defendant distorted competition by abusing its dominant position. The higher court was also alarmed by the fact that the Competition Agency was not asked to inspect the court file. However, more recent judgements, as shown above in the Zračna luka v. Croatia Airlines case, although not typical follow-on actions, show a growing degree of understanding of the role and the function of the Agency in general.

VI. Access to evidence in general and legal treatment of access to corporate statements of leniency applicants

Information asymmetry in antitrust damages cases is obviously a problem that needs to be addressed. The position of the plaintiff would be significantly improved if there were special rules that would make evidence, often concealed and held by the defendant or third parties, available to the plaintiff. However, the risk of abuses needs to be minimised. The specific question of the availability of corporate statements submitted by leniency applicants becomes highly relevant also.

US-style solutions, such as pre-trial discovery, a process in which a defendant in an antitrust damage case must disclose relevant documents, including business secrets, are not available under Croatian law. General civil procedure rules apply here, there are no special rules to make the position of the plaintiff in antitrust damages cases more advantageous.

In Croatian civil procedure, parties are obliged to impart the facts on which their claims are based and propose evidence to establish them. The plaintiff in a civil action for antitrust damages has two options in order to secure relevant pieces of evidence: first, it can propose to the court to obtain the file from the Agency, and second, the plaintiff could make a direct request to the Agency for access to the relevant file, explaining its legal interest as a plaintiff in civil proceedings.

85 Art. 252(3) Civil Procedure Act.
87 Art. 7(1) Civil Procedure Act.
1. The right to access the file

The right to access the file is regulated by the Competition Act 2009. However, no explicit rules on access to the file for the purpose of antitrust damages actions exist. Parties to antitrust proceedings have the right to access the file in its widest scope after they receive the statement of objections. Certain categories of documents are, nevertheless, not available for inspection even to the parties including: draft decisions of the Agency, official statements, protocols and typescripts from the sessions of the Council, internal instructions and notes on the case, communications between the Agency and the European Commission and other competition authorities and their networks, and other documents which are covered by the obligation of business secrecy in the sense of Article 53 of the Competition Act.

The second category of entities that have the right to access the file are those who have submitted ‘an initiative’ to the Agency to open up antitrust proceedings but whose request was denied (the Agency adopted a conclusion to this effect) due to either the lack of a public interest to start proceedings or because conditions to open antitrust proceedings were not met. Entities that requested the opening of antitrust proceedings are also entitled to access the file if the Agency adopts a decision finding that no antitrust infringement occurred. The scope of the entitlement to access the file is narrower here than it is with respect to the parties to the proceedings. Covered is only the right to inspect documentation on which the conclusion or decision was founded, with the exception of documents covered by the non-disclosure rule. Moreover, the right to access the file is not available while the proceedings

88 Art. 47 Competition Act 2009. Art. 53(2) and (3) Competition Act 2009 lists the following as confidential information: all which is defined to be a business secret by law or other regulations; all which is defined to be a business secret by the undertaking concerned if accepted as such by the Agency; all correspondence between the Agency and the European Commission and between the Agency and other international competition authorities and their networks; in particular a business secret is business information which has actual or potential economic and market value, the disclosure or use of which could result in economic advantage for other undertakings. Article 53(5) Competition Act 2009 lists inter alia the following as non-confidential information: publicly available information, historical information, annual and statistical information.

89 Art. 36(2) Competition Act 2009: any legal or natural person, professional association or economic interest group or association of undertakings, consumers association, the Government of the Republic of Croatia, central administration authorities and local and regional self-government units.


are still pending. Entities that requested the opening of antitrust proceedings
can access only a short version of the statement of objections before the
proceedings come to a close.94

The third category of entities that has some access to the file rights are
those who do not have the status of a party to the proceedings but who find
that their rights or legal interests are affected by the antitrust proceedings.
They may claim, in writing, to be recognised as having the same procedural
rights as those upon whose initiative the proceedings were initiated, if such
legal interest is proven legitimate.95 The right to access the file would include
here the right to inspect the documentation on which the conclusion or
decision were founded after the closure of the proceedings, as well as, upon
a written request to the Agency, to obtain the short version of the statement
of objections while the proceedings are still pending.96

In any case, confidential business information is always protected and thus
it is not available even to the parties of the proceedings before the Agency.97

Information access rights of the plaintiff in civil damages actions are not
explicitly regulated by the Competition Act. The right to access the file, either
during pending antitrust proceedings or after their closure, seems to depend
on the status in the proceedings before the Agency of the entity that acts as
the plaintiff in the damages case. If the plaintiff is a party to the proceedings
before the Agency (if the antitrust proceedings were opened against him due
to an alleged antitrust infringement), such company has the right to inspect
the entire file, with the exception of documents covered by the non-disclosure
rule, after the delivery of the statement of objections. However, it is unlikely
that an entity subject to an antitrust scrutiny would act as a plaintiff in a civil
action for damages (it is far more likely to act as a defendant therein).

The Competition Act gives the explicit right to access the file only to parties
in the antitrust proceedings; others (those that requested their initiation or
affected by them) have only the right to inspect the ‘documentation on which
the conclusion or decision of the Agency are founded’ and only after the
closure of the proceedings. However, it is not entirely clear what would the
difference be as regards the scope of the documents that can be accessed
by the parties to the proceedings as opposed to ‘others’. It can be presumed

95 Art. 36(3) Competition Act 2009.
96 Art. 47(6) Competition Act 2009. Against the decision on the basis of which the access
to file or part thereof is denied no appeal is allowed neither may the injured party take any
97 Art. 47(4) Competition Act 2009. Pursuant to Art. 59(1) Competition Act 2009 the text
of the antitrust decision delivered to the parties and those who requested the proceedings will
omitt confidential information.
nevertheless, due to the difference in wording, that the right to access the file is broader than the right to inspect (only those) documents on which the decision was based. Another obvious difference is that procedural parties can inspect the file during pending proceedings while others can do so only after their closure, with the exception of a short version of the statement of objections. Importantly also, persons other than the parties cannot inspect the relevant documents if a decision finding an infringement has been adopted by the Agency – their access right is available only if the Agency refuses to open proceedings or fails to establish a violation98.

Such solution seems logical on first glance since an infringement decision would solve the prejudicial question as to the existence and extent of the antitrust violation as well as provide at least some information for the civil court to use in order to decide on the right of the plaintiff to claim damages. Nevertheless, this solution might mean that documentation which might facilitate the calculation of damages for instance, could be withheld. The question remains whether the Agency would be obliged to grant full access to the file upon request by the civil court in order to decide on damages99. The current normative set-up presupposes that it is not necessary to grant the right to access to the file for those harmed by an antitrust infringement in cases where the Agency adopts a decision finding the infringement. The decision itself is meant to provide sufficient information on which to decide civil damages actions. However, it is a factual question whether the decision of the Agency is sufficient for that purpose or whether full access to the file would be necessary.

2. Access to corporate statements of leniency applicants

The possibility to inspect corporate statements of leniency applicants is very limited in Croatian law100. The right to inspect them is only given to the parties in the antitrust proceedings but not before the statement of objections.

98 If the Agency does not open proceedings, the plaintiff can ask the civil court to find a violation as a prejudicial issue, in particular if the Agency refused to start proceedings due to the lack of a public interest. However, if the Agency finds that there was no infringement, and its decision obtains the quality of *res iudicata*, the civil court would have no other option but to reject the damages claim.

99 Cf. a general provision on the duty of the Agency to cooperate with judiciary in cases related to competition law infringements, Art. 66(1) Competition Act 2009.

100 The notion of a ‘corporate statement’ and its obligatory content are defined in Art. 5(1) and (4) Regulation of the Government of the Republic of Croatia on criteria for immunity and reduction of administrative-punitive measure, Narodne novine 129/10. For oral corporate statements see Art. 6 of the Regulation.
is sent\textsuperscript{101}. Moreover, major restrictions apply in this context: the parties and their legal representatives must declare that the accessed content will be used exclusively in the cartel proceeding in which the corporate statement was given or in the appeal against the antitrust decision before an administrative court; prohibited is also the copying of their content\textsuperscript{102}. If the parties do not respect their obligations as regards the restricted use of corporate statements, the Agency may, depending on the circumstances of the case, take this into account as an aggravating circumstance when setting the fine\textsuperscript{103}. There is, nevertheless, a possibility of voluntary disclosure of corporate statements by the applicant or their legal representatives. If third parties obtain access in this manner, than the obligation of restricted use is no longer valid\textsuperscript{104}. It is not clear when voluntary disclosure is possible. The Commission suggests that voluntary disclosure should be precluded at least until a statement of objections is issued\textsuperscript{105}. Nothing can be said about the Agency’s approach to the inspection of corporate statements since it is yet to receive its first leniency application, despite the fact that relevant legislation was introduced in 2010.

The problem of the interference of the right to claim damages with the effective functioning of leniency (crucial for detecting and prosecuting cartels) has been addressed by the ECJ in the recent \textit{Pfleiderer} case\textsuperscript{106}. It was decided therein that EU cartel law, and in particular Regulation 1/2003, does not preclude a person who has suffered damage by an infringement of EU competition rules and who is seeking to obtain damages, from being granted access to documents relating to the leniency procedure involving the perpetrator. It is, however, for the national courts to determine on the basis of their national laws the conditions under which such access must be permitted or refused by weighing the various interests protected by EU law\textsuperscript{107}.

It seems on first glance that the ECJ gave national courts substantial freedom to decide whether to grant access to corporate statements to plaintiffs in antitrust damages cases or not. Obviously however, granting access would have negative effect on the attractiveness of leniency. If the ECJ judgement is going to be interpreted in a way that jeopardises leniency programmes,

\textsuperscript{101} Ibidem Art. 7(1).
\textsuperscript{102} Ibidem Art. 7(2).
\textsuperscript{103} Ibidem Art. 7(3).
\textsuperscript{104} Ibidem Art. 7(4).
\textsuperscript{105} White Paper, p. 10.
\textsuperscript{107} \textit{Pfleiderer}, para. 23. Still, national rules may not render the implementation of EU law impossible or too difficult. \textit{Pfleiderer}, para. 24.
than legislative actions by the Commission are soon to be expected\textsuperscript{108}. If the German NCA was willing to disclose corporate statements, and if the adjudicating German court would use the ECJ judgement to force it to do so, there is a clear risk that other NCAs or the Commission would be unwilling to exchange information with the Bundeskartellamt. This could in the end endanger the cooperation and case allocation system of the European Competition Network\textsuperscript{109}.

The ECJ was so cautious in approaching this issue that it ultimately failed to formulate a clear message. Any rational court of law is likely to err on the side of caution and not allow the whole system to be jeopardised when balancing the individual interests of antitrust victims and the collective interest of maintaining the effectiveness of leniency in order to maximise the effectiveness of the public enforcement system overall\textsuperscript{110}. This approach is consistent with the position of the Commission whereby corporate statements should be given adequate protection against disclosure in private damages actions regardless of whether the application for leniency is accepted, rejected or leads to no decision by the competition authority. Protection would apply where disclosure is ordered by a court, be it before or after the adoption of a decision by the authority\textsuperscript{111}. The Commission argues at the same time that an effective private enforcement system by way of damages actions should be established to complement rather than replace or jeopardise public enforcement\textsuperscript{112}.

\textsuperscript{108} For integrated proceedings as a solution for resolving conflict between the goals of public and private enforcement see: C. Canenbley, T. Steinworth, ‘Effective enforcement…’, p. 324–325.
\textsuperscript{110} On the basis of the ECJ judgment, the Amtsgericht in Bonn rejected Pfleiderers’ claim and confirmed the decision of the Bundeskartellamt to grant partial access to the file only excluding corporate statements. See Judgment of Amtsgericht in Bonn, 18 January 2012, 51 Gs 53/09 AG Bonn, http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-01-30_PR_Pfleiderer_E.pdf. German Ministry of Economy now intends to amend the GWB in order to codify special protection of leniency documentation and to ensure its confidentiality.
\textsuperscript{111} White Paper, p. 5 and 10.
\textsuperscript{112} White Paper, p. 3. In a preliminary reference proceeding still pending before the European Court of Justice an Austrian court identified doubts as to the compatibility of Austrian antitrust law with EU law concerning third party access to file and has made a reference to the Court to clarify this, Donau Chemie and others, C-536/11. More specifically, the national court asked whether, in the light of the judgment in Pfleiderer, a national provision which only enabled access to file for third persons provided all the parties to the cartel proceedings gave their consent was precluded by European Union law.
VII. Liability for damages for breach of competition rules under Croatian law

1. Legal basis and liability for damages for breach of competition rules

The Competition Act contains no specific provisions on the right to claim antitrust damages except for the provision which allocates jurisdiction for such disputes to commercial courts\(^\text{113}\). The general prohibition clause contained in the Obligations Act which provides that every person is obliged to refrain from taking any actions that may cause damage to others is seen as the appropriate legal basis for antitrust damage claims\(^\text{114}\). The fact that there is no special provision that would establish an explicit legal basis for antitrust damage claims in Croatia is of no importance in the sense of substantive law\(^\text{115}\).

2. Standing – indirect purchasers, passing-on defence and collective legal protection

A general procedural norm of Croatian law provides that any natural or legal person may be a party in civil proceedings\(^\text{116}\). There are no special rules to govern legal standing in antitrust damages actions albeit the plaintiff therein would normally be a person harmed by a breach of competition rules. This could apply to a person who requested for the Agency to initiate antitrust proceedings\(^\text{117}\), a person who already acts as a party in such proceedings or a third person not involved in the proceedings before the Agency. Any natural or legal person who suffered damage by a breach of competition rules can act as a plaintiff in civil proceedings regardless of whether it is seen as an undertaking by the Competition Act. Most plaintiffs are competitors of the infringer but suppliers, buyers and consumers could also act as plaintiffs. In most cases, plaintiffs operate on a relevant market which is in a direct relationship with the defendant\(^\text{118}\).

\(^{113}\) Art. 69(2) Competition Act 2009. Competition Act 2003 did not contain such a provision.

\(^{114}\) Art. 8 Obligations Act.


\(^{116}\) Art. 77(1) Civil Procedure Act.

\(^{117}\) Art. 37 Competition Act 2009. The entity who requests the initiation of proceedings is not considered a party in the proceedings. See Art. 36(2) Competition Act 2009.

\(^{118}\) M. Bukovac Puvača, V. Butorac Malnar, ‘Izvanugovorna odgovornost….’, p. 34.
The entity that inflicted damages (hereafter: tortfeaser; defendant in civil proceedings) is usually deemed to be an undertaking by the Competition Act since only an undertaking can be found to have breached competition rules. Following entities are seen as undertakings by the Croatian Competition Act: companies, sole traders, tradesmen and craftsmen and other legal and natural persons who engage in production and/or trade in goods and/or provision of services and thereby participate in economic activity; state authorities as well as local and regional self-government units where they directly or indirectly participate in the market; any other natural or legal persons, such as associations, sports associations, institutions, copyright and related rights holders and similar which are active in the market\textsuperscript{119}.

Multiple tortfeasors are jointly and severally liable for the damage caused under general tort rules\textsuperscript{120}. If the defendant is a company, it is liable with all of its assets\textsuperscript{121}. Similarly, a sole trader is liable personally with all of his/her assets\textsuperscript{122}. Members of general partnerships (javno trgovačko društvo) as well as general partners (komplementar) in limited partnerships (komanditno društvo) are liable personally, jointly and severally, and with all of their (personal) assets\textsuperscript{123}. Members of economic interest groupings are liable with all of their assets\textsuperscript{124}. By contrast, shareholders in a joint stock company (dioničko društvo), members of a limited liability company (društvo s ograničenom odgovornošću) and limited partners (komanditor) in a limited partnership are not liable with their personal assets. Piercing of the corporate veil is however possible if the fact that one is not liable as a company member for obligations of the company is abused\textsuperscript{125}.

2.1. Direct and indirect claimants

Those who are in a direct relationship with the tortfeaser (competitors and other participants on the relevant market where infringement was committed, as well as direct purchasers) have a clear legal situation as regards their standing in antitrust damages cases. Since their legal interest is not questionable, their standing is also not a problem, including their capability to show a causal link between the action that caused damage and the damage that occurred\textsuperscript{126}.

\textsuperscript{119} Art. 3(1) Competition Act 2009.
\textsuperscript{120} Art. 1107(1) Obligations Act.
\textsuperscript{121} Art. 9(1) Companies Act (consolidated text: Narodne novine 152/11).
\textsuperscript{122} Art. 9(2) Companies Act.
\textsuperscript{123} Art. 10(1) Companies Act.
\textsuperscript{124} Art. 592(1) Companies Act.
\textsuperscript{125} Art. 10(3) and (4) Companies Act.
\textsuperscript{126} V. Butorac Malnar, S. Petrović, ‘Novo pravno uređenje tržišnog natjecanja’, p. 135. Proving a causal link could be very difficult for indirect purchasers: the farther the damage
The position of those who are in an indirect relationship with the tortfeasor is far more complex as regards proving their legal interest. Their standing as plaintiffs, proving a causal link, as well as proving the quantum of damages could all prove challenging.

2.2. Indirect purchasers as claimants and the passing-on defence

The issue at hand is whether indirect purchasers may be allowed to have the standing of a plaintiff in antitrust damages cases. Damage for indirect purchasers arises when the direct purchaser passes-on the damage which was inflicted upon it by the seller (who committed the infringement). The indirect purchaser *de facto* suffers damage because of the seller’s conduct which is in breach of competition rules despite the fact that there is no direct contact between the seller (tortfeasor) and the indirect purchaser.

EU law recognises the principle that every person has the right to be compensated for damages that arose as a consequence of an infringement of competition law. This is also a principle valid under general Croatian tort rules. The Commission noted in its White Paper that this principle applies to indirect purchasers also. However, since there is no direct link between the infringer and the indirect buyer, it might be very hard for the latter to prove the passing-on of damage as well as the actual amount of damage. Indirect purchaser will thus remain uncompensated while the infringer, which has invoked the passing-on defence in the proceedings opened against him by the direct buyer, will not be found liable for damages. As a result, it will be able to keep the illegally obtained gains despite the general prohibition of unjust enrichment. To help solving this issue, the Commission proposes a measure to alleviate the burden of proof on the side of indirect purchasers: the introduction of a rebuttable presumption that the illegal overcharge was passed on to indirect purchasers in its entirety.

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128 See Manfredi, para. 61.
129 White Paper, p. 4.
130 White Paper, p. 8. Some authors suggest that this solution should be accepted in Croatian law *de lege ferenda*. See V. Butorac Malnar, S. Petrović, ‘Novo pravno uređenje tržišnog natjecanja’, p. 137.
2.3. Passing-on defence and exculpation from liability

It is an open issue whether to allow the passing-on defence whereby the defendant in damages action (antitrust infringer) should be allowed to claim that the plaintiff passed-on the illegal overcharge to its own customers and thus suffered no harm. The Commission rightly argues that to deny this defence could result in an unjust enrichment of those who passed-on the overcharge (direct purchasers) and in the defendant being burdened in undue (multiple) compensation for its illegal actions (to the direct as well as indirect purchasers). The Commission proposed therefore that the plaintiff must have the right to invoke the passing-on defence. This is the position most legal scholars agree with.

To prohibit the passing-on defence would be contrary to European continental legal systems because damages would then be in their entirety compensated to direct purchasers, regardless of whether or not they have passed on the illegal overcharge. That would be contrary to basic principles of tort law applicable in most countries of continental Europe, including Croatia and in particular, contrary to the principle of unjust enrichment. As a result, the passing-on defence is often spoken of as the unjust enrichment defence.

If the use of the passing-on defence was precluded, compensation of damages would take on a preventive and punitive function as regards the tortfeasor. That approach is not recognised by tort law of continental Europe which sees the primary goal of damages claims as compensation and restitution based on the basic rule that every person that suffered damages, including indirect purchasers, must have the right to be compensated.

2.4. Collective legal protection

Collective protection of consumers encompasses: protection of collective interests of consumers and collective protection of individual interests of consumers. Various modalities of the collective exercise of individual interests of consumers are currently being developed, despite the fact that the system

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131 Confirmed in Manfredi, para. 99: EU law does not prevent national courts from acting to ensure that the protection of the rights guaranteed by EU law does not entail unjust enrichment of those who enjoy them.
133 M. Bukovac Puvača, V. Butorac Malnar, ‘Izvanugovorna odgovornost…’, p. 35.
136 Green paper – Access of consumers to justice and the settlement of consumer disputes in the single market, COM(93) 576 final, p. 15.

Croatian consumer protection law is still in an early stage of development covering solely the protection of collective interests of consumers. There is currently no possibility of collective protection of individual interests (in particular, by way of group actions), which is not recognised as such in Croatian civil procedural law.\footnote{Ibidem, p. 255.} In 2003, the institution of ‘representative actions’ (udružna tužba) was introduced by the Consumer Protection Act while the Obligations Act regulates ‘popular actions’ (popularna tužba; claim to eliminate danger of damage). Pursuant to the Civil Procedure Act, consumers can in principle use ‘collective actions’ (skupna tužba) on the basis of provisions regulating the institution of co-litigation (suparničarstvo).\footnote{Co-litigation means that only those consumers which were injured may act as plaintiffs, they must all be included in the plea as plaintiffs, hence consumer association cannot start the action in their name, and each plaintiff has to prove the damage it suffered in order to be compensated. Ibid, p. 277.}

Competition law infringements, especially cartels, are often characterised by the fact that they affect a large number of victims. As a rule, those include individual natural persons who act as purchasers of goods or services in relation to which the breach of competition law occurred. Due to the low-value damage received by each individual, such victims have no interest to individually start damages actions against the tortfeasor. The question arises therefore whether collective protection is available under Croatian law. Indeed, provisions of the Civil Procedure Act, acting as lex generalis in this context, provide an action for the protection of collective interests and rights (tužba za zaštitu kolektivnih interesa i prava). Incidentally, these provisions will not come into force until Croatia joins the EU.\footnote{Art. 502a–502h Civil Procedure Act [consolidated text: Narodne novine 148/11 (provisions inserted by Narodne novine 57/11)].} However, only those organisations engaged in the protection of collective interests and rights of citizens which have been explicitly authorised by the law can file a lawsuit of that type and only if serious harm or serious distortion of collective interests and rights occurred.\footnote{Art. 502a(1) Civil Procedure Act. Interests that can be protected in such an action are of inter alia environmental, moral, ethical, ethnic, consumer, anti-discrimination nature. Art. 502a(2) Civil Procedure Act.} Special rules must therefore be adopted in order to regulate which institutions can...
file a lawsuit for the protection of collective interests and rights related to antitrust infringements.

Actions for collective protection of interests and rights under the Civil Procedure Act only allows the plaintiff to request for the court: (a) to find that legally protected collective interests and rights of persons, whose interests the plaintiff was authorised to protect, were harmed or endangered by certain actions of the defendant; (b) prohibit such actions; (c) order the defendant to eliminate the illegal conduct’s harmful consequences and; (d) publish the ruling in the media at the defendant’s cost. The plaintiff is not allowed to request compensation however. The natural and legal persons who were actually injured can invoke, in a separate action for damages, the judgment which accepted an action for collective protection of interests and rights. In such cases, the civil court deciding on damages is bound by such earlier judgement.

In other words, the Civil Procedure Act does not, in fact, allow actions for collective compensation of damage but only actions where a breach of collective interests and rights is established, harmful conduct declared as prohibited and harmful consequences ordered to be eliminated (abstract consumer protection). In terms of antitrust damages, a collective action under the Civil Procedure Act for a breach of competition law can be filed only if special rules on the protection of collective interests and rights are adopted explicitly authorising certain organisations to file such claims. However, actions for the protection of collective interests and rights under to the Civil Procedure Act do not allow collective damage claims, since a separate action for compensation must be subsequently initiated.

143 Art. 502b(1) Civil Procedure Act.
144 Art. 502c Civil Procedure Act.
146 Collective protection of consumers under Croatian law is possible under some other laws adopted before the Civil Procedure Act gained its rules on collective protection of interests and rights including: the Consumer Protection Act (Article 131-138a, Narodne novine 79/07, 125/07, 79/09, 89/09), Illicit Advertising Act (Narodne novine 43/09), and Prohibition of Discrimination Act (Narodne novine 85/2008, in force as of 1 January 2009). After the relevant provisions of the Civil Procedure Act come in force, rules based on other pieces of legislation will be applied as lex specialis in relation to Civil Procedure Act, as lex generalis.

Under Consumer Protection Act only persons authorised under special legislation may initiate actions for finding a breach of consumer rights before commercial courts. However, no decision on damages is possible within this action. A separate action for damages must be initiated by individual consumers and the ruling finding a breach of consumer rights has binding effect on the court deciding on damages (Art. 138.a Consumer Protection Act).

Collective protection of merchants from misleading and illicit comparative advertising is provided by the Illicit Advertising Act and only persons authorised by special legislation can file
It has been argued that the system of consumer protection in Croatia has to be upgraded both in the area of individual protection and in the area of collective protection of consumer rights, and that a discussion is needed on whether the introduction of some type of group action would be advisable, taking into account possible deviations known from the US. In this regard it is helpful to look at the views of the Commission. The introduction of two complementary mechanisms of collective redress are proposed in order to deal with the weak position of individual victims of antitrust infringements (scattered and relatively low-value damage, procedural inefficiencies if a multitude of individual actions are brought in relation to the same infringement): representative actions, which are brought by qualified entities, and opt-in collective actions, where victims can expressly decide to combine their individual claims into one single action. Introducing such solutions in Croatia would require major modifications of its procedural law, which may encounter some resistance.

It is clear that Croatian procedural law must be modified in order to permit actions for collective compensation of damages, its current rules do not allow for effective protection in antitrust cases. A more elaborate discussion on how these rules would have to be set up goes however outside of the scope of this paper.

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a lawsuit to this effect. No decision on damages can be made by the court deciding to prohibit illegal advertising, and there is provision on the binding effect of the decision of the court finding a breach of the Illicit Advertising Act for the court deciding on damages.

Under the Prohibition of Discrimination Act, a very wide circle of persons may file a ‘representative action’ (udružna tužba) for the protection from discrimination. It seems that this piece of legislation does not allow for a collective damages action, since it explicitly provides that only a victim of discrimination may request damages.

147 M. Baretić, ‘Individualna and kolektivna zaštit...’, p. 277, 284. A group (class) action is designed for compensating damage suffered by a large group and gives concrete and direct protection. Its aim is predominantly compensatory; it is brought by one or more persons in the interest of a putative group (class) which encompasses persons who suffered the same type of harm, and the plaintiff must not necessarily be part of the group in whose interest the action is brought. See Baretić, ‘Individualna and kolektivna zaštit...’, p. 251-252.

148 White Paper, p. 4. The Commission states that both mechanisms of collective redress should be available since they complement each other. Authorised entities might not always be interested in bringing representative actions, so victims must have an alternative mechanism at their disposal in order to get compensation.

149 M. Bukovac Puvača, V. Butorac Malnar, ‘Izvanugovorna odgovornost...’, p. 36. However, the choice is not between individual and collective compensation but between collective compensation and no compensation at all. See S. W. Waller, ‘Towards a constructive public-private partnership to enforce competition law’ (2006) 29(3) World Competition 379.
3. Breach of competition law as harmful act

Two forms of breaches of the Competition Act – prohibited agreements and abuse – are recognised as harmful acts, in other words, one of the elements in proving a tort relevant for damages actions. A harmful act (štetna radnja) is defined as any positive or negative action of the tortfeasor which causes damage for the victim. The object of a harmful act is not the same as the damage: while harmful acts may be exercised on persons, objects, and objects of an obligation (činidba), damage is reflected on rights and interests of the person injured by the tortfeasor.

It has been argued that the object of a harmful act in the context of competition law is the process of competition itself since a competitive market is a state protected by competition law. After the tortfeasor caused a distortion in the competitive market structure by its illegal behaviour, damage caused by this distortion affects the rights and interests of others. The obligation to prove that the harmful act was committed is on the plaintiff. In this context, the binding effect of antitrust decisions is highly relevant, as discussed supra.

4. Fault requirement

A distinction must be made between fault as a requirement to find a breach of competition law, and fault as a requirement to find liability for damages caused by that infringement. In the former case, no fault is required in order to find a prohibited agreement or abuse of a dominant position, neither in EU nor in Croatian law. In the latter case, national tort law applies. The general rule of Croatian tort law states liability for damages on the basis of presumed fault: a person who has caused damage to another shall compensate it unless he has proven that the damage has not occurred as a result of his fault, lack of duty of care shall be presumed. Taking into account the nature of harmful acts committed as competition law infringements and the characteristics of the tortfeasor as an undertaking, the highest possible level of care should be required. Since

151 Ibidem, p. 588.
153 Abuse is an objective concept; see case 85/76 Hoffman-LaRoche ECR [1979] 461. It is visible from the text of Article 101 TFEU that agreements need to have as their aim or effect a restriction of competition, which is confirmed by EU jurisprudence. See Commission Staff Working Paper-Annex to the Green Paper accompanying the Green Paper Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, 19.12.2005, p. 31.
154 Art. 1045(1) and (2) Obligations Act.
the burden of proof that the tortfeasor is not liable lies on that undertaking itself, and taking into account that it operates on the market in a professional capacity, it seems highly improbable for the offending undertakings to be able to rebut the presumption of its fault\textsuperscript{156}.

The Commission proposes that any national fault requirements would have to be limited and, for Member States that require fault to be proven, that the infringer should be liable for damages unless it demonstrates that the violation was the result of a genuinely excusable error once the victim has shown a breach of Article 101 or 102 TFEU\textsuperscript{157}. According to the Commission, the error would be excusable if a reasonable person applying a high standard of care could not have been aware of the fact that the contested conduct restricted competition\textsuperscript{158}. Applying this standard of fault leaves the possibility for the infringer to be exculpated by proving that the undertaking applied a high standard of care. This would be liability on the basis of a presumed fault in which case Croatian tort law seems to be in harmony with the proposal of the Commission. Still, the standard of an excusable error would have to be interpreted in more detail and a special provision would have to be inserted into the Obligations Act to this effect\textsuperscript{159}.

5. Causal link between the infringement of competition law and the damage

Causal link between the harmful act and the damage that was suffered by a victim is one of the requirements to finding liability for damages. The victim must prove the causal link but as a rule, there is no presumption of causality. In the context of competition law infringements, the victim/plaintiff must prove that the damage suffered was caused by the breach of competition rules committed by the defendant.

Since damage has rarely one cause, it will be necessary to find from among them the one cause which will be deemed as the relevant cause of the given damage. It is generally accepted in Croatian law that the cause must be a ‘typical’ cause – one which regularly causes certain harmful consequences (adequation theory)\textsuperscript{160}.

It can be very difficult for the plaintiff in an antitrust damages action to prove such connection since an unbroken causal link between the harmful act and the damage has to be shown. It is well-known at the same time that harmful effects of an anticompetitive act can spill over various markets (even

\textsuperscript{156} Ibidem
\textsuperscript{157} White Paper, p. 6–7.
\textsuperscript{158} White Paper, p. 7.
\textsuperscript{159} M. Bukovac Puvaća, V. Butorac Malnar, ‘Izvanugovorna odgovornost…’, p. 41, 46–47.
\textsuperscript{160} Ibidem, p. 41.
outside the relevant market) and over various persons (competitors, direct purchasers, indirect purchasers)\textsuperscript{161}.

It has been argued that courts must insist on finding a direct causal link between the harmful act and the market distortion as well as a link between the distortion and the damage suffered by a concrete victim. A causal link must connect all three elements: the harmful act, the distortion and the harm to the given victim. It is for the court to assess in each concrete case where it will draw the causality line\textsuperscript{162}.

The ECJ touched upon the causality requirement only briefly in its \textit{Manfredi} judgment. It noted therein that damages can certainly be claimed if there is a causal link between the damage and the agreement or practice prohibited under Article 101\textsuperscript{163}. Since no supranational rules exist in this respect, it is up to the Member States to regulate this issue in accordance with the equality and effectiveness principle\textsuperscript{164}.

6. Harm as consequence of a competition law infringement –
   types of harm and scope of damages

The ECJ ruled in \textit{Manfredi} that injured entities must be able to seek full damages including compensation for actual loss (\textit{damnum emergens}) as well as loss of profit (\textit{lucrum cessans}) plus interest. Such approach is said to follow from the principle of effectiveness and the right of individuals to seek compensation for loss caused by anticompetitive conduct.\textsuperscript{165} Croatian tort law covers the following types of harm: actual loss (\textit{obična šteta}), loss of profit (\textit{izmakla korist}) and non-material harm, i.e. violation of privacy rights (\textit{povreda prava osobnosti})\textsuperscript{166}.

Unlike most comparative legal systems, the Croatian Obligations Act explicitly provides to a legal person a fair monetary compensation for non-material damages\textsuperscript{167}. It has been argued that prohibited conduct on the market, as

\textsuperscript{161} Establishing causality should be left to courts to deal with on a case to case basis. M. Bukovac Puvača, V. Butorac Malnar, ‘Izvanugovorna odgovornost…’, p. 42, 46–47.
\textsuperscript{162} Ibidem, p. 42.
\textsuperscript{163} \textit{Manfredi}, para. 61.
\textsuperscript{164} \textit{Manfredi}, para. 64. Neither the Green Paper, nor the White Paper deal in more detail with the issue of causality.
\textsuperscript{165} \textit{Manfredi}, para. 95, 100. In the absence of EU rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused provided that the principles of equivalence and effectiveness are observed. In accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions, it must also be possible to award such damages in actions founded on EU rules. \textit{Manfredi}, para. 98, 99.
\textsuperscript{166} Art. 1046 Obligations Act.
\textsuperscript{167} See Art. 1100 Obligations Act.
a harmful act, may infringe upon personal rights of legal persons, in particular enterpreneurial freedom which is protected by the Croatian Constitution [Article 49(1)]. Injured natural persons also have the right to be compensated for non-material damages suffered pursuant to Art. 19(2) Obligations Act. Hence, it has been argued that the Croatian Obligation Act offers even more avenues to compensation than mentioned in Manfredi (injury to personal rights as a type of harm, e.g. reputation)168.

The injured party has the right to be compensated both for the actual loss incurred as well as for the loss of profit169. In assessing the amount of the latter, considered should be the profit which could have reasonably been expected under normal or special circumstances, the realisation of which has been prevented by the actions or failure to act on the part of the defendant170. It has been argued that, as regards more serious breaches of competition law such as cartels, it can be expected that fair monetary compensation could also be given for the violation of privacy rights171.

As regards the scope of damages, Croatian tort law recognises the principle of full compensation: taking into account the circumstances that have occurred following the occurrence of the damage, the court shall determine the amount required in order to reverse the injured party’s financial position to the state in which it would have been had the wrongful act or failure to act not occurred172.

VIII. Limitation periods and the right to claim damages for infringements of competition law

Limitation periods for compensation of damage claims are covered by the Obligations Act; there are no special rules on antitrust infringements173.

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169 Art. 1089(1) Obligations Act.
170 Art. 1089(3) Obligations Act.
172 Art. 1090 Obligations Act. Proportionate reduction of compensation will ensue if the injured party contributed to the occurrence of the damage or to its increase. Art. 1092(1) Obligations Act.
173 In Manfredi, the ECJ only briefly touched upon the issue of limitation periods as regards damages actions for infringements of Article 101 and 102 TFEU, and noted that in the absence of EU rules, it is on Member States to regulate this issue taking into account the principle of equality and the principle of effectiveness. Manfredi, para. 81. It held also that a national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused, particularly if that national rule imposes a short limitation period which cannot be suspended. Manfredi, para. 78.
Hence, general rules on limitation periods for damage claims apply. The subjective limitation period is set to three years from the time the injured party became aware of the damage or of the person causing the damage. The objective limitation period is set to five years from the moment the damage occurred\textsuperscript{174}.

These general limitation periods do not seem suitable for antitrust damages actions. Special rules should be introduced in order to facilitate antitrust damage claims. In case of continuous or repeated infringements in particular, the aforementioned limitation periods may lapse before the illegal conduct ceases to exist\textsuperscript{175}. The ECJ ruled in \textit{Manfredi} that, as regards continuous or repeated infringements, it can indeed happen that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for an entity that suffered harm after the expiry of the limitation period to bring a damages action\textsuperscript{176}. In the case of continuous or repeated infringements, the limitation period should thus not start to be counted before the day on which the infringement cases. Moreover, the limitation period should not start to run before the victim can reasonably be expected to have knowledge of the infringement and of the harm it caused him\textsuperscript{177}.

The objective limitation period set in the Croatian Obligations Act does not seem suitable for continuous or repeated infringements, since the plaintiff would be barred from claiming damages five years from the moment the damage was caused. The more appropriate solution would seem to be for the limitation period not to start to run before the day on which the infringement cases, as suggested by the European Commission.

As regards follow-on actions, limitation periods provided by the Obligations Act can prove to be too short. It is highly probable that the limitation period for initiating a damages action will lapse before the decision of the Agency or the judgement of the adjudicating administrative court becomes final (\textit{res iudicata}), despite the fact that pursuant to the Competition Act court proceedings in antitrust cases are treated as urgent\textsuperscript{178}. It was suggested that the most appropriate course of action for a plaintiff would be to initiate proceedings before the commercial court immediately after the antitrust

\textsuperscript{174} Art. 230(1) and (2) Obligations Act.
\textsuperscript{175} This is precisely why it was regulated in the Competition Act that the limitation period for initiating proceedings before the Agency is counted from the day when the infringement stopped. Art.71(2) Competition Act 2009. However, this provision does not deal with the issue of lapsing of limitation periods in antitrust damages actions when it comes to continuous or repeated infringements.
\textsuperscript{176} \textit{Manfredi}, para. 79.
\textsuperscript{177} White Paper, p. 8.
\textsuperscript{178} See more in: V. Butorac Malnar, S. Petrović, ‘Novo pravno uređenje tržišnog natjecanja’, p. 139–141.
proceedings have started since the court would be likely to stay its proceedings until the Agency adopts its decision\textsuperscript{179}. The Commission proposed also that a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final (\textit{res iudicata}), since there is a risk that a limitation period for claiming damages might expire while public enforcement is underway\textsuperscript{180}.

\section*{IX. Conclusion}

Becoming the 28th member of the European Union, as envisaged as of 1 July 2013, will bring some significant changes to Croatia in the context of private enforcement of competition law. Still, they could have been much further reaching if the first announced but later revoked EU directive on damages claims have actually had been adopted\textsuperscript{181}.

Before Croatia becomes an EU Member State, its courts must apply national legislation in the area of competition law but pursuant to Article 70 of the Stabilisation and Association Agreement criteria arising from the application of EU competition law to restrictive practices must also be applied, provided an inter-state effect exists\textsuperscript{182}. After Croatia joins the EU, the acquis will become applicable in its entirety. Pursuant to Regulation 1/2003, Croatian courts and Competition Agency will both be able to apply Articles 101 and 102 TFEU\textsuperscript{183}. In addition, pursuant to Article 267 TFEU, Croatian courts will be able to use the preliminary reference mechanism.

Before accession, follow-on damages actions for breaches of Article 101 and 102 TFEU on the basis of a decision adopted by the Commission or another NCA will not be possible. Pursuant to Regulation 1/2003, decisions

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{179} V. Butorac Malnar, S. Petrović, ‘Novo pravno uređenje tržišnog natjecanja’, p. 140.
\item \textsuperscript{180} White Paper, p. 9. The Commission mentions also the possibility to stop the limitation period until a competent authority adopts a decision, but it prefers a new limitation period. Croatian commentators are of the opinion that the Commission’s proposal should be included in Croatian law \textit{de lege ferenda}. See V. Butorac Malnar, S. Petrović, ‘Novo pravno uređenje tržišnog natjecanja’, p. 140.
\item \textsuperscript{181} Some authors welcomed the fact that the directive was revoked because of a number of unresolved issues. See J. Alfaro, T. Reher, ‘The European Commission’s Journey to a Directive on Damages Actions: One Step Forward – Two Steps Back!’ (2011) \textit{European Antitrust Review} 53–57.
\item \textsuperscript{182} See Art. 70(1)(1-3) (restrictive agreements, abuse of dominant position, state aids). The Constitutional Court interpreted this provision in such way that EU law is applied as an auxiliary source of law. Decision of the Constitutional Court in case PZ Auto of 13 February 2008 (Narodne novine 25/08).
\item \textsuperscript{183} See Art. 5 and 6 Regulation 1/2003.
\end{itemize}
\end{footnotesize}
adopted by the Commission will have binding effect in follow-on actions for Croatian courts after EU accession, but not decisions of other NCAs.\textsuperscript{184}

Croatian procedural and substantive law was not designed so as to facilitate antitrust damages claims. Now that the legislative framework for public enforcement has been perfected by the adoption of the Competition Act 2009, it is time to start discussing changes to its overall legislative framework in order to make antitrust damages actions more attractive for plaintiffs. The conflict between public and private enforcement as regards the right to access leniency documents will have to be resolved. This is not an open issue at the moment because current legislation does not seem to provide the possibility for an injured entity to get access to corporate statements or confidential business information. It is very likely that this would remain as such in the future.

Current jurisprudence of Croatian commercial courts regarding antitrust damages actions is completely underdeveloped. However, it can be expected that the rising level of public awareness of competition rules and their enforcement will soon be accompanied by an increase in the number of antitrust damages actions. Indeed, some amount of caution is required here to put things into context: large backlogs of existing cases, long duration of court proceedings, and a need for more education for judges in the area of competition law will not contribute to an immediate attractiveness of antitrust damages claims. On the other hand, the leniency programme has yet to be tested in practice, and it is assumed that the establishment of a stable public enforcement activity is a precondition for successful private enforcement of competition law.

Taking into account the discussions in the EU incited by the Commission’s proposals to facilitate private enforcement in Member States, in particular the fears that its suggestions for legislative changes might negatively influence the coherence of national substantive and procedural legal systems,\textsuperscript{185} one has to be cautious not to rush into novelties while the system as it is can be optimised. Current Croatian tort law is sufficiently flexible to be used in practice to accomplish the goals of competition law. The opinion has thus been expressed that no intrusive amendments will be needed here in order to facilitate antitrust damages actions.\textsuperscript{186} However, especially when it comes

\textsuperscript{184} Art. 16 Regulation 1/2003.
\textsuperscript{186} M. Bukovac Puvača, V. Butorac Malnar, ‘Izvanugovorna odgovornost...’, p. 46–47.
to collective redress, current rules of Croatian legislation seem insufficient to provide effective protection of consumers harmed by antitrust infringements.

**Literature**


Canenbley C., Steinworth T., ‘Effective enforcement of competition law: is there a solution to the conflict between leniency programmes and private damages actions?’ (2011) 2(4) *Journal of European Competition Law & Practice*.


Gorenc V., *Zakon o obveznim odnosima s komentarom* [Obligations Act with Commentary], RRiF 1998.


Klarić P., Vedriš M., Gradansko pravo [Civil Law], Narodne novine 2006.


Still-unpopular Sanctions:
Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper

by

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Abstract

The European Commission published a White Paper on 2 April 2008 on damages actions for breach of EU antitrust rules. The content of the White Paper is since then being prepared to be converted into EU legislation on private antitrust enforcement. This paper presents the developments in private antitrust enforcement in Poland after 2 April 2008. It commences with an outline of EU actions in this field which act as an introduction to the more detailed analysis of recent jurisprudential and legislative developments in Poland. The latter part of the paper covers, in particular, the 2009 Act on the Pursuit of Claims in Group Proceedings and the 2011 Act Amending the Civil Procedure Code and Some Other Acts which abolishes all specific elements of commercial proceedings, including the statutory

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‘non-admission of evidence’ principle. These two legal acts are assessed in order
to establish whether their introduction is likely to help facilitate private antitrust
enforcement in Poland and to consider to what an extent are these developments
responding to the challenges outlined by the European Commission.

Résumé

Le 2 avril 2008 la Commission européenne a publié le Livre blanc sur les actions en
dommages et intérêts pour infraction aux règles communautaires sur les ententes
et les abus de position dominante. Le contenu du Livre blanc est dès lors en cours
de préparation pour être converti en législation de l’UE sur l’application des règles
de la concurrence par des particuliers. Cet article présente le développement de
l’application des règles de la concurrence par des particuliers en Pologne après le
2 avril 2008. Il commence par un aperçu des actions de l’UE dans ce domaine qui
agit comme une introduction à l’analyse plus détaillée de la jurisprudence récente et
les évolutions législatives en Pologne. Cette dernière partie du document porte, en
particulier, sur la Loi de 2009 sur la poursuite des revendications dans les procédures
collectives et la Loi 2011 modifiant le Code de procédure civile et certaines autres lois
qui abolissent tous les éléments spécifiques de la procédure commerciale, y compris
le principe de «non-admission de la preuve». Ces deux actes juridiques sont évaluées
afin de déterminer si leur mise en place pourrait faciliter l’application des règles
de la concurrence par des particuliers en Pologne et d’examiner à quel point ces
développements répondent aux défis formulés par la Commission européenne.

Classifications and key words: private enforcement; bipolar system of enforcement;
quantification of harm; follow-on actions; collective redress; non-admission of
evidence; consultation document

I. Introduction

The European Union shares with its Member States the tradition of
regulating competition in the public interest. Competition restraints within
the internal market of the European Union that may affect trade between
Member States fall within the ambit of EU antitrust law¹. Those with no effect

¹ For the purposes of this paper antitrust law is seen as area of public laws protecting com-
petition, other than merger control and state aid regulation (an American-style convention). The
European Commission has in the last years started using the term ‘antitrust’ alongside the tradi-
tional term ‘competition law’ – the two terms are used interchangeably in this paper; W.P.J. Wils,
2007, p. 278.
on EU trade are covered by national competition rules. Core antitrust values have clearly been identified as related to the public interest\(^2\).

Victims of competition restraints should be fully compensated for the injuries they suffered, irrespective of the fact whether such restraint affects trade between Member States or not. But public antitrust enforcement is not a direct way to compensate those who suffered from competition law infringements. At the same time, antitrust enforcement in the private interest of individual market players always seemed to be in eclipse in Europe.

The European Commission made it clear in its Green Paper of 2005 – Damages actions for breach of the EC antitrust rules (hereafter, the 2005 Green Paper)\(^3\) as well as White Paper on damages actions for breach of the EC antitrust rules issued on 2 April 2008 (hereafter, the 2008 White Paper)\(^4\) that some kind of ‘revaluation of values’ is needed. Demand for a more modern victim-oriented form of antitrust enforcement exists alongside the growing feeling that the period of ‘autocracy’ of public antitrust enforcement should come to an end. The European Commission worked out its own theory on how to balance the public interest with the private interests of those injured by competition restraints. It presented its approach in the two aforementioned Papers stating ‘(…) the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement’. These lines are quoted from the opening chapter of the 2008 White Paper. The most important measures proposed therein relate to nine factors said to influence effective private antitrust enforcement: 1) standing (indirect purchasers and collective redress); 2) access to evidence (disclosure \textit{inter partes}); 3) binding effect of decisions by national competition authorities; 4) fault requirement; 5) calculation of damages; 6) passing-on of overcharges; 7) limitation periods; 8) costs of damages actions and; last but not least, 9) interaction between leniency programmes and actions for damages.

This paper focuses on the Polish approach to private enforcement of competition law (both EU and Polish antitrust rules) attempting, at the same time, to relate them to the scheme proposed by the European Commission. In this context, the question can be justifiably asked whether any attempts were made after the 2008 White Paper to fill existing gaps in Polish legislation regarding antitrust enforcement. Another question that arises here is whether it is possible to balance the public interest with the private interests of those who suffered from competition restraints or, in other words, whether it is possible

\(^3\) COM(2005)672.
to balance public enforcement with private enforcement in Poland. Would it be possible to replicate, even only partially, the success of private enforcement in the United States?\(^5\) While the ineffectiveness of private antitrust enforcement in Poland has been known for at least a decade\(^6\), have the authorities done anything to identify how to best address this problem? Have they learnt necessary lessons from other jurisdictions and taken any legislative actions in this area? Although a good deal of academic research has been devoted to this issue in recent years\(^7\), its results are yet to be used for legislative purposes.

II. EU developments after the 2008 White Paper

The need for a mechanism enabling the aggregation of individual claims of antitrust victims has been identified as a problem to be solved in the 2008 White Paper. At the end of 2008, the Commission published a Green Paper on consumer collective redress\(^8\) as part of its wider initiative in this field (managed by the Directorate-General for Health and Consumers).

\(^5\) Private plaintiffs brought 96.76% of the 555 civil antitrust lawsuits filed in US federal courts in the 12 months ending 31 March 2011 (97.00% of the 666 lawsuits in the 12 months ending 31 March 2010; 97.79% of the 1086 lawsuits in the 12 months ending 31 March 2009; 96.80% of the 1063 lawsuits in the 12 months ending 31 March 2008; 98.71% of the 1165 lawsuits in the 12 months ending 31 March 2007). See Federal Judicial Caseload Statistics, available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx. A decline in the number of antitrust lawsuits since 2009 is thus visible. On the face of it, there seems to be a continuing judicial trend of limiting the ability of private plaintiffs to seek relief under antitrust rules. See also The Handbook of Competition Enforcement Agencies 2008. A Global Competition Review Special Report, London 2008, p. 304.

\(^6\) P. Podrecki wrote in 2000 about difficulties in antitrust damages actions; P. Podrecki, Porozumienia monopolistyczne i ich cywilnoprawne skutki, Kraków 2000, p. 282.


Also announced in the 2008 White Paper was the fact that the Commission intended to draw-up non-binding guidelines on quantifying harm caused by antitrust violations. During the drafting process, the Commission commissioned a study on the quantification of harm suffered by victims of competition law infringements (prepared in 2009 by a group of lawyers and economists). Following the publication of the study, the Commission organised also a workshop with external economists on 26 January 2010 regarding this very issue.

Contrary to its initial intentions, the Commission soon engaged in the preparation of a draft directive on the rules governing damages actions for breach of EU antitrust rules. It seemed by 2009 that the 2008 White Paper would end up as the basis for the preparation of an act of EU hard law (directive) rather than the originally envisaged act of soft law (guidelines). EU Member States could expect, therefore, to be put under more pressure in this context than ever before.

The beginning of 2010 brought about another shift when Joaquín Almunia took over the role of the European Commissioner for competition from Neelie Kroes (who seems to have done more than any other Commissioner to bring private antitrust enforcement out of its ‘ivory tower’ of ineffectiveness and isolation). The draft directive was withdrawn as a result and the new Commissioner got involved in questions of collective redress and the quantification of harm in antitrust damages actions. In his speech entitled ‘Common standards for group claims across the EU’, delivered on 15 October 2010, the new Commissioner has shown a particularly urgent and practical concern for collective redress.

The issue that seems to have been abandoned by the Commission in that period of time was the requirement of ‘fault’. The Commission came to the conclusion in the 2008 White Paper that once the victim had shown a breach of EU antitrust law, the infringer should be liable for damages caused, unless it demonstrated that the infringement was the result of a genuinely excusable error. The Commission proposed at that time that an error would be considered excusable if a reasonable person applying high standards of care could not have been aware of the fact that the conduct in question restricted competition. It is worth noting that the European Parliament eventually opposed this concept in a 2009 Resolution concerning the 2008 White Paper on damages actions for breach of the EC antitrust rules. The European Parliament stressed therein ‘that a culpable act must always be a prerequisite for an action for

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damages, and that a breach of the EC competition rules must, at the least, be negligent unless national law provides that there is an automatic implication or rebuttable presumption of fault in the case of a breach of the EC competition rules, ensuring the consistent and coherent enforcement of competition law.\(^{11}\)

It seems that the Commission has chosen since then to pursue further merely two out of the nine factors listed in the 2008 White Paper as affecting private antitrust enforcement. This realisation is supported by the 2011 Commission Work Programme with its scheduled adoption in 2011 of only communications affecting private antitrust enforcement:

- a communication presenting a set of common principles that shall guide any future legislative proposals concerning collective redress, including in the antitrust field,
- a communication on quantification of harm in antitrust damages actions\(^{12}\).

In the first half of 2011, the Commission released a Staff Working Document – Public Consultation: Towards a Coherent European Approach to Collective Redress\(^{13}\). The act was preceded by a Joint Information Note of the Commissioners for Justice, Competition and Consumer Policy on the need for a coherent European approach to Collective Redress. From 17 June 2011 to 30 September 2011, the Commission held a public consultation on its draft Guidance Paper on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU\(^{14}\). The draft Paper presented the main methods and techniques used to quantify antitrust harm. The consultation was accompanied by a workshop with economists held on 27 September 2011.

The Commission has not advanced the issue further since then. An EU framework for collective redress has been entered into the 2012 Commission Work Programme as one of its initiatives\(^{15}\) alongside actions for damages for antitrust violations (legislative initiatives). One of the objectives of the latter is to clarify the interrelation of damages actions with public enforcement of EU antitrust law by the Commission and National Competition Authorities (hereafter, NCAs), notably as regards the protection of leniency programmes, in order to preserve the central role of public antitrust enforcement in the

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\(^{12}\) Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2011, COM(2010)623.

\(^{13}\) SEC(2011)173.


\(^{15}\) Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Commission Work Programme 2012, COM(2011) 777.
EU. Protection of leniency material in the context of civil damages actions is also the subject of a Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012\textsuperscript{16}.

Attempts to provide quick solutions to the lack of effective private antitrust enforcement in Europe have proven beyond the powers of the Commission. However, it may be better to avoid ‘quick fix’ measures here and aim instead to formulate a long-term strategy for a continuous increase in the level of ‘just’ compensation and ordered progress in ‘sustainable antitrust enforcement’. The next sections of this paper will present in detail the developments in private antitrust enforcement in Poland after 2008\textsuperscript{17}. Are there reasons to believe that Polish initiatives were inspired by the actions of the European Commission? To avoid misunderstandings, it is not the intention of this paper to compare the range and scale of Polish solutions to that of the EU because even at first glance, Polish initiatives seem so small that a comparison would be difficult.

III. The private antitrust enforcement developments in Poland

1. Prologue

The publication of the 2008 White Paper coincided almost exactly with the first anniversary of the Polish Act of 16 February 2007 on Competition and Consumer Protection (hereafter, Competition Act)\textsuperscript{18}. Although its authors could not draw an inspiration from the 2008 White Paper, they were surely familiar with the earlier Green Paper of 2005. One of the most important innovations introduced by the current Competition Act was the elimination of the possibility to commence administrative proceedings in antitrust matters (called ‘antimonopoly’ proceedings in the Competition Act) on the basis of a complaint. Since 21 April 2007, all antitrust proceedings in Poland are therefore initiated \textit{ex officio}. In the modernisation process of Polish competition law, the initiation of proceedings by way of a complaint was thus made impossible. This change was, in the opinion of some commentators, unwarranted and thus incurred a great deal of criticism\textsuperscript{19}. However, the

\textsuperscript{16} Available at http://ec.europa.eu/competition/ecn/lhciency_material_protection_en.pdf.
\textsuperscript{17} Information contained herein was last updated on 26/07/12.
\textsuperscript{18} Journal of Laws 2007 No. 50, item 331, as amended.
explanatory notes to the draft bill\textsuperscript{20} state that the said amendment was in fact inspired by EU’s aim to promote private antitrust enforcement, which the 2005 Green Paper is related to. The explanatory notes stress that public antitrust enforcement is not meant to protect individual interests. In this light, the authors of the Competition Act 2007 stressed the existence of a bipolar system of public and private enforcement of antitrust rules.

The above postulate seems to have little in common with the approach of the Commission. Neither the 2005 Green Paper nor the 2008 White Paper encourage the elimination of antitrust proceedings initiated by way of a complaint. Neither do they postulate any other such ‘bipolarisation’ of competition law enforcement. In this sense, the European Commission saw information contained in its own documents used for purposes it might have not approved of. Whatever the views might be on commencing antitrust proceedings on a complaint, EU competition law is being enforced by the Commission according to a ‘tandem model’ whereby it may, pursuant to Article 7(1) of Regulation 1/2003, initiate proceedings either on a complaint or on its own initiative\textsuperscript{21}.

2. Binding effect of administrative decisions (jurisprudential developments)

The explanatory notes to the draft Competition Act state also that abolishing administrative proceedings initiated by way of a complaint is beneficial for competition as such (‘institutional phenomenon’) as well as for those injured by competition restraints. This benefit is associated with the shortening of overly long administrative proceedings. Their excessive length is supposed to imply that the final decisions issued by the UOKiK President may be primarily of ‘historical interest’ for those injured by competition restraints.

Public antitrust enforcement is not a direct way to compensate victims of competition restraints. It may, however, facilitate access to redress when damages claims are brought forward on the basis of infringement decisions taken by the European Commission or an NCA, provided that the possibility of so called ‘follow-on actions’ is preserved. Follow-on actions are considerably simpler to pursue than stand-alone actions, where there is a need to prove an antitrust infringement. Therefore, final antitrust decisions are usually of more than just ‘historical interest’ for those injured by restraints of competition.

The Polish jurisprudence concerning private antitrust enforcement surrounds this very issue. Not later than a few months after the publication of the 2008

\textsuperscript{20} Available at http://orka.sejm.gov.pl/proc5.nsf/opisy/1110.htm.

\textsuperscript{21} Council Regulation No. 1/2003 of 16/12/02 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.
White Paper, the Polish Supreme Court stated in a resolution\textsuperscript{22} that ordinary courts are competent to decide whether or not an abuse of a dominant position had occurred if such an assessment is necessary to declare an agreement lawful or illegal and thus void (unlike the EU, legal actions constituting an abuse are null and void \textit{ex lege} in Poland). The Supreme Court declared also that courts do not have such competences if the UOKiK President has already issued a final decision concluding that an infringement had indeed taken place. In such cases, a final decision of the UOKiK President was binding on the courts. The Supreme Court stressed furthermore that courts should always assess whether it is necessary to suspend proceedings, pursuant to Article 177(1)(3) of the Civil Procedure Code\textsuperscript{23}, awaiting the conclusion of administrative proceedings already underway before the UOKiK President. Article 177(1)(3) provides that the court may (but is not obliged to) stay its proceedings, \textit{ex officio}, where resolution of the case is dependent upon a prior decision of an administrative authority (such as the UOKiK President). Although the 2008 Resolution explicitly concerns a specific group of competition-restricting practices only (dominant position abuses) it can be applied to a wider range of restrictive practices including anti-competitive agreements.

The ‘prejudicial’ (in Polish: \textit{prejudycjalność}) nature of administrative decisions in antitrust cases, in other words, the fact that they are binding on courts assessing related civil law claims, has been highly disputed in Poland for the last two decades. Although a rich body of jurisprudence has developed on this subject, the judiciary has shown divergent views of this key concept. On one hand, the Supreme Court concluded in a series of judgments\textsuperscript{24} that where the declaration of the invalidity of an agreement is at stake, the concept of the prejudicial character of UOKiK decisions demanded that the competition authority must rule first that an antitrust infringement had indeed occurred. This approach has undoubtedly the general effect of erecting barriers to the development of private antitrust enforcement.

On the other hand, however, examples exist of more effective judicial interpretation which suggests that the weakness of Polish private antitrust enforcement might not only derive from the content of existing legislation but also from its interpretation. Just after Poland’s accession to the European Union in 2004\textsuperscript{25}, the Supreme Court stated, in accordance with its earlier


\textsuperscript{23} Journal of Laws 1964 No. 43, item 296, as amended.


\textsuperscript{25} See judgments of: 2 March 2006, I CSK 83/05, LEX No. 369165; 5 January 2007, III SK 17/06, LEX No. 489018; 4 March 2008, IV CSK 441/07, LEX No. 376385.
judgment of 22 February 1994\textsuperscript{26}, that an assessment whether an agreement has infringed the prohibition of anti-competitive agreements may be carried out in civil litigations between private parties.

Since then, the process of increasing homogeneity of Polish jurisprudence has been remarkably smooth. It is possible to say, in light of the 2008 Resolution of the Supreme Court, that Polish jurisprudence on the prejudicial nature of antitrust decisions is well-established. What it did lack was the analysis of the consequences of an antitrust decision accepting binding commitments. The Supreme Court emphasised therefore in its Resolution that a ‘commitments’ decision did not determine the existence of an antitrust infringement. The plausibility of the existence of a competition law violation is a necessary (\textit{sine qua non}) and sufficient requirement for a commitments decision, in other words, it is not necessary to prove and firmly determine therein whether an infringement of antitrust provisions had actually taken place. Commitment decisions refer thus to ‘potential’ violations only. As such, a commitments decision is not in any way prejudicial for ordinary courts.

There was a deeper reason for the discussed development in Polish jurisprudence. The Supreme Court analysed solutions offered by EU legislation and jurisprudence (however, it did not refer to soft law documents such as Papers) and concluded that its own views were additionally supported by the results of this analysis.

Is it possible to see in the 2008 Resolution nothing more than the end of the discussion in Polish jurisprudence on the prejudicial standing of antitrust decisions? The answer is, in fact, no. The Resolution has already been followed by the judgment of the Court of Appeals in Warsaw of 25 November 2009 (VI ACa 422/09)\textsuperscript{27}. The Appeals Court, referring to the 2008 Resolution, determined that an ordinary court in a particular case could determine for itself whether or not it should examine the anti-competitiveness (illegality) of a given conduct, that is, unless administrative proceedings were underway before the UOKiK President in this regard. It is unclear whether this Appeals Court spoke in line with the 2008 Resolution. The Supreme Court allowed courts to independently assess the need to stall their own proceedings awaiting a decision from the UOKiK President. According to the Supreme Court, the discretion of the courts is precluded in this respect only by the existence of a final infringement decision issued by the UOKiK President (seeing as such a decision is binding on the court). The Appeals Court seems to have gone further than the Supreme Court – its ruling suggests, \textit{a contrario}, that the very commencement of antitrust proceedings precludes courts from independently examining the anti-competitiveness of a given market conduct. As a result,

\begin{itemize}
\item \textsuperscript{26} I CRN 238/93, LEX No. 4060.
\item \textsuperscript{27} LEX No. 1120262.
\end{itemize}
courts should wait for the outcome of the proceedings before the UOKiK President.

It is worth investigating here the accessibility of Polish jurisprudence regarding private antitrust enforcement. Unfortunately, access to information on this subject is greatly lacking. Courts keep cases registers, including civil law cases, and case information is given in the form of code numbers according to a classification system\(^{28}\). Private antitrust actions included in index ‘GC’ have not been given a specific code; actions in unfair competition cases are classified as 652; tort actions are labelled 667. To make matters worse, also index ‘C’ lacks a specific code for private antitrust actions. Worse yet, ordinary courts seem frequently unable to distinguish between unfair competition actions and private antitrust actions\(^{29}\). As a result, it is by no means surprising that it is practically impossible to research Polish private antitrust actions in a coherent manner\(^{30}\). Oddly enough for the Polish history of private antitrust enforcement, the authorities seem to support the status quo which sees private antitrust enforcement remaining weak and unpopular. Unlike other NCAs\(^{31}\), the UOKiK President has not been given any measures to ensure data collection on antitrust actions. How can Poland be ready for a reform of private antitrust enforcement if the scale of the phenomenon is not even known? Why should special departments be created within existing court structures in order to rule on antitrust cases if it might emerge that there is little need for such change because of their rarity on court dockets?

Legislative changes must therefore be advocated. First, a separate code for private antitrust actions should be introduced\(^{32}\). Second, courts should inform the Justice Minister, who should in turn inform the UOKiK President, about

\(^{28}\) Explained in the Appendix to the Decree of the Minister of Justice of 12 December 2003 on the organisation and scope of work of the court secretariats and other departments of the court service; Official Journal of the Minister of Justice No. 5, item 22, as amended.

\(^{29}\) Mistakes in this respect can be found even in the above mentioned resolution of 23 July 2008, III CZP 52/08, and judgment of the Appeals Court in Warsaw of 25 November 2009 (VI ACa 422/09).

\(^{30}\) The Author has been involved since 2011 in project No. 524/BMN intended to prepare a statistical analysis of unfair competition actions. For example, between 2009-2011, only 8 such claims were filed in the Commercial Regional Court in Bialystok and it is unknown how many, if any, of them are cases alleging antitrust violations. It would be surely beneficial to consider antitrust actions only.

\(^{31}\) E.g. the German NCA (Bundeskartellamt) has to be informed about all civil litigations concerning antitrust infringements including Articles 101 & 102 TFEU, and may decide to participate therein. It thus has at its disposal full data on private antitrust enforcement in Germany; see S.E. Keske, *Group Litigation in European Competition Law*, Antwerp – Oxford – Portland 2010, p. 231.

\(^{32}\) Into the Appendix to the Decree; see footnote 28.
all private antitrust actions (alternatively, courts should send such information directly to the UOKiK President).

Regarding actions for the breach of EU antitrust rules, it is worth drawing particular attention to Article 16(1) of Regulation 1/2003. When national courts rule on agreements, decisions or concerted practices under Article 101 and 102 TFEU that are already the subject of a Commission decision, they cannot deliver judgments running counter to an earlier EU decision. National courts must also avoid delivering rulings which would conflict with a decision contemplated by the Commission during existing proceedings. To that effect, national courts may assess whether it is necessary to suspend their proceedings awaiting a decision from the Commission.

All civil courts (courts for civil litigation), including commercial ones, need to be able to address certain problems unique to competition law, be it EU or national provisions. That is true even for inexperienced courts and it is in fact rare for judges involved in private enforcement of competition law to have frequent contact with antitrust issues. It cannot be common practice for courts to depend solely on Article 15(1) of Regulation 1/2003 which makes it possible for them to ask the Commission for information or its opinions on questions concerning the application of the EU competition rules in proceedings based on Article 101 and 102 TFEU. Although the Commission does not seem obliged to respond to such request, it is likely that it will do whatever it can to help a national court (pursuant to the spirit of the TFUE, rather than to the letter of EU law). Asking a rhetorical question, who can national courts ask for help in the application of domestic competition law? That is why the importance of training national judges in both EU and national antitrust provisions cannot be stressed enough.

It is worth noting in the closing lines of this section that jurisprudential developments concerning the prejudicial character of antitrust decisions in Poland should be reflected in legislation in a similar way to that of Regulation 1/2003. Plaintiffs in follow-on actions are not required to prove an antitrust infringement. The absence of such legal provision is somewhat compensated by the 2008 Resolution of the Supreme Court. However, there is no \textit{stare decisis} rule in the Polish legal system whereby lower courts may deviate in a given case from the views of the Supreme Court expressed elsewhere. The outcomes of the 2008 Resolution should, therefore, be codified into positive laws in order to reduce legal uncertainty on the side of the plaintiffs. Such an amendment might increase the number of civil antitrust lawsuits in Poland and, thus, act as an effective deterrent for antitrust violations. However, Polish legislation remains unclear on issues surrounding private antitrust enforcement – a fact that seems to deter potential plaintiffs from taking this road of action.
3. Collective redress

Collective redress has been subject to much debate in Europe, and with reason. Private antitrust enforcement is expensive, time consuming, complex and inefficient. The concept of group proceedings emerged in Europe, modelled after American class actions, as a centrepiece for private enforcement of competition law. The Act of 2009 on the Pursuit of Claims in Group Proceedings came into force in Poland on 19 July 2010. An opt-in procedure was adopted therein (as opposed to the American-style opt-out system).

Accordingly, an action may be pursued in group proceedings in Poland if a group comprised of at least 10 persons (consumers, undertakings, natural persons, legal entities etc.) files claims of the same type and based on the same or identical factual basis. The Act can be applied only to such issues as consumer protection, product and tort liability (except personal rights’ protection) as well as competition protection albeit antitrust claims are included in ‘roundabout’ terms [Article 1(2)]. While it is regrettable that Article 1(2) of the Act is not detailed enough, when taken in the general context, it is clear that it must be understood as referring to private antitrust claims also. Competition law infringements can be thought of as a form of torts. This paper is not meant to provide a detailed answer to the question on what are the legal bases for private antitrust enforcement in Poland or, what are the categories of sanctions (claims) provided for them. Influential commentators stress nevertheless that competition restricting market practices are torts within the meaning of civil law provided that the requirements (prerequisites) for the tort are met. This realisation stands be it under the tort law provisions of the Civil Code (Article 415 et seq.) taken in isolation or in conjunction with other provisions such as Article 18(1)(4) of the Act of 1993 on Combating Unfair Competition or Article 12(1)(4) of the Act on Counteracting Unfair Market Practices.

In other words, private damages actions for torts, consisting of a breach of competition law (including EU antitrust rules), can be pursued in group...

34 Journal of Laws 2010 No. 7, item 44.
36 Journal of Laws 1964 No. 16, item 93, as amended.
proceedings in Poland. Importantly also, the Act does not reserve the benefit
of group proceedings exclusively to consumers and thus the said ‘group’ can
include undertakings\textsuperscript{39}.

Does the Polish Act on the Pursuit of Claims in Group Proceedings facilitate
private antitrust enforcement? Can it be considered a real development
thereof? It does not adopt any specific rules for measuring damages. It does
not introduce any presumptions nor does it introduce the concept of a ‘reverse
burden of proof’ or even introduce a less stringent standard of proof for
plaintiffs in such cases. Have group plaintiffs less responsibilities, less ‘burdens’
than individual ones? Existing legal provisions may suggest the opposite.

In group proceedings, legal representation by a barrister or legal advisor is
compulsory for the plaintiff unless the plaintiff is a barrister or legal advisor
himself/herself. Perhaps this provision originates from the positive intention
of the legislator – it might have been designed so as to reduce of anticipated
problems associated with proofs and evidence\textsuperscript{40}. Article 2(1) of the Act
puts another type of ‘pressure’ on group plaintiffs. It stipulates that in cases
concerning pecuniary claims the amount of individual claims, which make
up the overall group litigation, have to be standardised. If standardisation
is not approved by all members, group proceedings will not be allowed by
the court. These difficulties are eased under Article 2(2) which states that
standardisation can be made in subgroups of at least 2 participants.

Nevertheless, group proceedings do have some clear advantages over other
types of civil proceedings. First of all, court fees are lower. As a rule, court
registration fee for group proceedings in Poland amounts to 2\% of the claim,
not less than PLN 30 (approx. EUR 7) and not more than PLN 100,000.00
(approx. EUR 24,100). By contrast, 5\% of the claim is generally applicable
for individual proceedings. Second, Article 5 of the Act is advantageous for
barristers and legal advisors of group plaintiffs. If their fees are based on a
contingency fee agreement, the court shall award them not more than 20\% of
the amount awarded to the plaintiffs, with no further conditions. In individual
proceedings, the contribution of the losing party toward the fees for the
winning lawyers have, as a rule, the highest minimum value of PLN 7,200.00
(approx. EUR 1,735) where the claim is over PLN 200,000.00 (approx. EUR
48,200). The court can increase it by up to six fold (here, to PLN 43,200.00,
approx. EUR 10,410) but that is dependent on such factors as: the nature of
the case, lawyers’ effort, his or her contribution to clarifying and/or bringing

\textsuperscript{39} By contrast, the use of group proceedings is reserved exclusively to consumers, for
example, in Finland. See L. Ervo, Characteristics of Procedure [in:] L. Ervo (ed.), Civil Justice
in Finland, Tokyo 2009, p. 92.

\textsuperscript{40} See M. Sieradzka, Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz,
the case to a resolution. The same fee could be obtained from the losing party in group proceedings where the claim is PLN 216,000.00 (approx. EUR 52,057) irrespective of any of the above factors. The third benefit of group actions lies in the fact that they fall within the competence of district courts (in Polish: sądy okręgowe). As a result, they are judged by a panel of three professional judges. Their superior experience and expertise is likely to allow them to handle such complex cases better than a single professional judge at a regional court. Another advantage of group proceedings used to lie in the fact that legislation on commercial proceedings was not applicable to group proceedings. However, it is worth remembering that Poland no longer has separate commercial proceedings (see section below).

The statement of claim is submitted in group proceedings by a representative of the entire group, a position that can be held either by a member of the group or a regional (in Polish: powiat) consumer ombudsman. What can be said against the involvement of consumer ombudsmen in the pursuit of group actions is that they did not used to represent consumers in court proceedings. Figures published by the UOKiK President show only three cases where consumer ombudsmen took action in 2010 under the Act on the Pursuit of Claims in Group Proceedings41.

It might seem that group proceedings would occupy a growing place in Polish antitrust enforcement and policy. This ‘achievement’ should, therefore, not be over-emphasized because it says more about where the country was in 2010 than where it stands today. In Poland, a tendency to think that legal amendments should result in the removal of barriers to private enforcement (or at least lowering them) has been apparent42.

The empirical analysis of group actions of 2010–2011 has been conducted in all Polish district courts43 taking note, in particular, if unfair competition or private antitrust actions were among them. The feedback is positive from most of the examined courts, but certainly not from all. It can only be hoped that future research will present complete statistical data in this field. So far only one ‘class action’ is known to have been filed in Poland regarding competition protection since the Act on Pursuit of Claims in Group Proceedings came

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43 Statistical data has been gathered in projects No. 524/BMN (closed) and 538/BMN (in progress). Less than twenty courts (civil or commercial departments), excluding courts in Warsaw, have not yet responded.
into force. However, it is not an antitrust but an unfair competition action (concerning misleading advertising).

Data suggests that victims are unwilling to take legal actions and to make use of the available solutions. The Polish legislator provided victims with a legal tool in the forms of private antitrust enforcement, but they do not take advantage thereof. These inefficiencies are surprising when compared to the legislative and organisational effort that has been put into creating them. However, this is a problem that elicits a question of what challenges are faced by policy makers who attempt to facilitate private antitrust enforcement? What sort of resistance do they encounter? Potential plaintiffs are influenced by various motives that cannot be quantitatively measured. Most of all, however, opting-in requires efforts on the side of the individual who initiates the group action⁴⁴. He/she has to gather information and provide evidence. What hampers private antitrust enforcement in Poland is thus not only substantive law but the lack of incentives for such enforcement also.

Without speaking for or against the Polish Act on the Pursuit of Claims in Group Proceedings, this paper merely acknowledges the existence of a number of future problems associated with its provisions. Its adoption was motivated by clearly significant reasons such as: improving access to courts; increasing legal protection; improving the administration of justice and judicial economy; relieving courts of the obligation to hear multiple factually similar cases with different plaintiffs; reducing court costs; ensuring consistency of judgments in similar cases. The achievement of the aforementioned goals requires sophisticated tools, which the Act deals with. However, the explanatory notes to the draft bill⁴⁵ mention neither related EU documents nor the need for a reform of private antitrust enforcement in Poland as the underlying reasons for this legislative initiative.

4. Evidence

The 2008 White Paper concerns, among other things, the problem of asserting claims by entities positioned on different levels in the supply chain, including end-consumers (so called indirect purchasers). End-users may assert claims directly against the antitrust infringer in Poland. In practice, most indirect purchasers are individual consumers; no legal obstacle prevents them from initiating antitrust litigation to recover their damages. There are, however, factual obstacles in this respect namely significant difficulties in obtaining evidence necessary for proving the passing-on of supra-competitive

⁴⁴ See S.E. Keske, Group Litigation in…., p. 156.
prices and their extent. These problems result from the considerable distance that frequently exists between final consumers and the place in the supply chain where the antitrust violation occurs. Polish legislation lacks the American-style, wide-ranging form of discovery of admissible evidence. The principle of ‘non-self-incrimination’ protects the alleged infringer against helping the opponent.46

Regarding EU antitrust law, Article 2 of Regulation 1/2003 stipulates that in any national or EU proceedings for the application of Articles 101 and 102 TFEU, the burden of proving an infringement of Article 101(1) or Article 102 TFEU shall rest on the party or the authority alleging the violation. An undertaking or association of undertakings claiming the benefit of Article 101(3) TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled. It is worth noting that according to recital (5) of its preamble, Regulation 1/2003 affects neither national rules on the standard of proof nor obligations of NCAs and national courts to ascertain the facts of a case, provided that such rules and obligations are compatible with general principles of EU law.

Burden of proof principles are rigid for plaintiffs in Poland. Critics of commercial proceedings used to complain, in particular, about the rules on the burden of proof applicable to undertakings – the so-called ‘non-admission of evidence’ principle (in Polish: prekluzja dowodowa). Pursuant to this rule, evidence could be filed by the parties to commercial proceedings only within the dates specified by the provisions of Article 47912 § 1 and Article 47914 § 1–2 of the Civil Procedure Code (the so-called statutory non-admission of evidence). The plaintiff had to include all allegations in the statement of claim as well as indicate all evidence to support these allegations. The court would ignore late allegations and/or evidence not filed within the deadlines laid out by the Civil Procedure Code. They could be admitted only exceptionally if the plaintiff proved that it had been impossible to include them in the statement of claim or the need thereof had not occurred before (in such cases a two week deadline was given). On the other hand, defendants would be precluded from making allegations/presenting corresponding evidence if they failed to include them in the response to the statement of claim and failed to prove the applicability of one of aforementioned exceptions. The reason for the use of the statutory non-admission of evidence principle was to facilitate and shorten commercial proceedings. Incidentally, non-admission of evidence was the subject of almost every discussion concerning commercial proceedings – it was, so to speak, an issue ‘floating’ above the entire debate. Widely criticised

was particularly the fact that the prime task of a commercial trial was to speed up proceedings rather than find the material truth of the case (and achieve justice)\textsuperscript{47}.

The Polish legislature adopted on 16 September 2011 the Act amending the Civil Procedure Code and Some Other Acts\textsuperscript{48} abolishing, as of 3 May 2012, all specific provisions governing commercial proceedings, including the statutory non-admission of evidence principle. The amended Articles 207 and 217 of the Civil Procedure Code are now applicable instead with respect to evidence making no difference between submissions by undertakings and other parties to the proceedings. According to Article 207(2), the presiding judge may order the defendant to make a statement in response to the statement of claim within the period of at least two weeks. The presiding judge may also, before the first sitting of the court, require the parties to file further submissions, giving them directions on the order of submissions, deadlines and stress points that must be explained and clarified. Parties are not allowed to file any submissions other than a statement of claim, response to the statement of claim and those required by the court unless such submissions contain additional evidentiary motions only. The court shall ignore any late allegations and/or evidence unless the submitting parties presents plausible reasons in support of the conjecture that: 1) the delay is not caused by their fault or 2) investigating late allegations and evidence will not lead to a delay in the resolution of the case or 3) there are other exceptional circumstances. On the other hand, Article 217(1) seems to conflict Articles 207 seeing as it stipulates that any allegations and submissions of evidence to substantiate each fact and matter alleged and/or to refute and rebut any evidence and arguments of the opponent must be made before the closing of the hearing. However, existing literature on the amendment suggests that Article 207 of the Civil Procedure Code takes precedence over Article 217\textsuperscript{49}. It seems that statutory non-admission of evidence, which used to apply to commercial proceedings, has now been replaced by judicial non-admission of evidence. In fact, not only has the old principle been retained merely in a different form (statutory vs. judicial), the scope of its applicability has increased. While it used to apply to undertakings only (parties to commercial proceedings only), it now covers parties to all types of civil law proceedings, including consumers. The previous

\textsuperscript{47} More T. Szanciło, ‘Pozycja procesowa przedsiębiorcy po zmianach Kodeksu postępowania cywilnego’ (2012) 125 \textit{Radca Prawny} 10D.

\textsuperscript{48} Journal of Laws 2011 No. 233, item 1381.

\textsuperscript{49} J. Mucha, ‘Ciężar wspierania postępowania i granice dyskrecjonalnej władzy sędziego w świetle znówelizowanych przepisów Kodeksu postępowania cywilnego’ (2012) 126 \textit{Radca Prawny} 3D.
solution was considered inflexible, but at the same time transparent\textsuperscript{50} – the new approach seems to considerably reduce legal certainty for all parties. Under the new approach it is possible that the presiding judge will not permit the parties to file any submissions other than the statement of claim and a response by the defendant\textsuperscript{51}.

There is no reason to think that the aforementioned developments have been inspired by EU initiatives concerning private antitrust enforcement primarily because the amendment is not limited to antitrust actions. Even final consumers not represented by a lawyer are now bound not only by ordinary rules on the burden of proof but also by the principle of judicial non-admission of evidence. And these principles are strict for plaintiffs. Is there any chance that the said amendment will contribute to the facilitation of private antitrust enforcement in Poland?

The non-admission of evidence principle remains part of the Civil Procedure Code albeit it has taken on a different form. If Article 207, as speculated, is today’s version of the statutory non-admission of evidence principle that used to apply to commercial proceedings, then in truth not much has changed for undertakings as antitrust plaintiffs. As in the past, they must still find their way in a restrictive model of court proceedings, perhaps slightly more irregular than before because its schedule is now dictated not only by statutory means (the Civil Procedure Code) but also by the judiciary. For consumers, however, the situation has notably worsened since the risks connected with litigation have multiplied. If a consumer-plaintiff is not sufficiently familiar with procedures and there is a higher risk that evidence requirements are not met, his/her claim is more likely to fail. Thus, the new rules may act as a very significant disincentive for individual consumers to file antitrust lawsuits.

If only victims made use of existing possibilities, there could be a demand for a jurisprudential development in the area of access to evidence – an issue recently considered by the Court of Justice of the EU. On 14 June 2011, the Court reached its long-awaited verdict in \textit{Pfleiderer AG v Bundeskartellamt}\textsuperscript{52}. The judgment focuses on access of antitrust victims to documents and information provided under a national leniency programme. The Court declared therein that the ‘provisions of European Union law on cartels, (…), must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement’. According to the Court, it is for the courts and tribunals of the Member States, on the basis

\textsuperscript{50} J. Mucha, ‘Ciężar wspierania…’, p. 6D.
\textsuperscript{52} Case C-360/09.
of their national laws, to determine the conditions under which such access must be permitted or denied by weighing the different interests protected by EU law. Polish jurisprudence presents the opinion that national law enforcers should use purposive interpretation in order to achieve an outcome consistent with the objectives pursued by EU law. The Polish Supreme Court emphasised that such consistency could be obtained by referring not only to the letter of the law (legislation) but also to EU case law. In the aforementioned 2008 Resolution, the Supreme Court spoke in favour of interpreting national laws so as to eliminate basic procedural discrepancies between the application of EU legislation and national law. Therefore, the Pfleiderer judgment is likely to help believe in the possibility of an improvement in the way injured parties regard seeking compensation for national antitrust infringements.

5. Remaining factors influencing private antitrust enforcement (instead of an epilogue)

There have been no developments likely to impact private antitrust enforcement in Poland with respect to other contagious issues such as: disclosure inter partes; calculation of damages; passing-on of overcharges; limitation periods; or costs of damages actions (apart from special rules for group litigation). The ‘fault requirement’, acting as a prerequisite for compensation, has not been eliminated either. Indeed, it should be expected that changes in this field are likely to occur only if EU Member States are made to do so.

The UOKiK President published for public consultation in May 2012 (amended in July 2012) a proposal for assumptions underlying an Amendment Act of the Competition Act of 2007. Despite the fact that the draft covers the topic of leniency and ‘fashionable’ leniency plus, it does not take into consideration the wide spectrum of issues surrounding the interaction between leniency and actions for damages. The proposal does not even refer to the aforementioned Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 on protection of leniency material in the context of civil damages actions.

It is, nevertheless, possible to identify a step forward in addressing the issue of private antitrust enforcement in the draft’s newest version of July 2012. The UOKiK President agreed to include a proposal by the Polish Competition Law Association submitted during the public consultation. The Association recommended for the Competition Act to cover provisions which would allow

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the UOKiK President to submit an opinion relevant to a case subject to court proceedings (other than those referred to in Part I Book I Title VII Section IVa of the Code of Civil Procedure), such as proceedings relating to private claims arising from an antitrust violation\(^{55}\). The future challenge lies now in an effective incorporation of this proposal into the Competition Act and, then, its practical implementation.

### IV. Summary

Public antitrust enforcement is considerably stronger in Poland than its private counterpart. In fact, they are hardly partners at all since private enforcement remains poorly developed and its popularization is being disfavoured by national legislation regarding the procedural situation of plaintiffs.

The aim of this paper was to assess if there is a chance that recent jurisprudential and legislative developments will help facilitate private antitrust enforcement in Poland. If a quantitative comparison is made between Polish initiatives and those in the European Union, Polish advancements might seem to stand up to the comparison quite well. The paper identified two pieces of national legislation (hard law), adopted in the last two years that may have an effect on private antitrust enforcement. Asking, however, how much were they inspired by the needs of victims of competition restraints, the conclusion might emerge that their authors did not even think of private antitrust enforcement during the legislative process. Moreover, neither the 2008 White Paper nor subsequent actions of the European Commission have managed to provide a key stimulus in the development of private antitrust enforcement in Poland.

National authorities proved to be neither constructive reformers nor revolutionaries. Unfortunately, with two steps forward (jurisprudence on the prejudicial effect of antitrust decisions, legislation on group proceedings), two steps back were taken (non-admission of evidence in proceedings with consumers as parties). Potential plaintiffs will react accordingly.

It has been more than four years since the 2008 White Paper and yet Polish legislature continues to lack an overall idea on how to re-design

\(^{55}\) It is worth noting that Article 479\(^{29a}\) (1)(1) of the Code of Civil Procedure stipulates that if the provisions of a separate act grant an entity that does not participate in the case the right to submit an opinion relevant to the case, Article 63 shall be applied respectively thereto. Article 479\(^{29a}\) was added as of 03/05/12 and replaced the now-repealed Article 479\(^{6a}\) using identical wording. The latter was introduced in 2004 by the Polish legislature inspired by Article 15 of Regulation 1/2003.
the still vastly unpopular private antitrust sanctions and their enforcement. The impression emerges at present that the authorities are waiting for the European Commission to take definite actions. The pace of the evolutionary processes of Member States’ competition laws has historically seldom been quickened by anything other than EU initiative. One can thus expect such an initiative in the field of private antitrust enforcement to follow.

It does not seem appropriate to take such a long path to ‘sustainable antitrust enforcement’ and achieving a balance between public (administrative) and private (civil law) antitrust enforcement. However, increasing the scale of private actions should not be an aim in and of itself since increasing the workload of courts cannot be advocated. The aim of the reform of the antitrust enforcement system should be, first of all, to decrease the percentage of victims who have not been compensated. Therefore, infringers should be first and foremost persuaded to compensate their victims voluntarily. Encouraging victims to file damages claims in courts should be a secondary aim. But this is a vast subject beyond the scope of this paper.

**Literature**


Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [Procedural justice in proceedings before a competition authority], Warszawa 2011.


Kolasiński M., ‘Odpowiedzialność cywilna za szkody powstałe w wyniku naruszenia wspólnotowych zakazów stosowania praktyk ograniczających konkurencję i nadużywania pozycji dominującej’ ['Civil liability for damage arising from infringement of EC pro-
hition of applying competition-restricting practices and abusing a dominant position’]
Kopiczko O., ‘Prywatnoprawne stosowanie wspólnotowego prawa konkurencji’ [‘Private
Kosikowski C., Publiczne prawo gospodarcze Polski i Unii Europejskiej [Public economic law
of Poland and the European Union], Warszawa 2010.
Krasnodębska-Tomkiewicz M., Szafrański D., ‘Skuteczność prawa antymonopolowego’
[‘Effectiveness of antitrust law’] [in:] T. Giaro (ed.), Skuteczność prawa [Effectiveness
of law], Warszawa 2010.
Mucha J., ‘Ciężar wspierania postępowania i granice dyskrecjonalnej władzy sędziego
w świetle znowelizowanych przepisów Kodeksu postępowania cywilnego’ [‘Burden of
support for proceedings and limits of discretionary power of the judge in the light of
Nowak-Chrząszczyk B., ‘Roszczenie odszkodowawcze w postępowaniu w sprawie
o naruszenie wspólnotowego prawa konkurencji’ [‘Damage claim in proceedings
regarding infringement of EC competition law’], [in:] E. Piontek (ed.), Nowe tendencje
w prawie konkurencji UE [New tendencies in EU competition law], Warszawa 2008
Piszcz A., Wybrane problemy związane ze stosowaniem prawa antymonopolowego Unii
Europejskiej przez sądy krajowe [Selected problem concerning the application of EU
antitrust law by national courts] [in:] N. Szczepaniak (ed.), Księga Jubileuszowa z okazji 5-lecia Wydziału Prawa Wyższej Szkoły Menedżerskiej w Legnicy „Ius est boni et aequi” [The jubilee book to celebrate the 5th anniversary of the Law Faculty of the High Management School in Legnica „Ius est boni et aequi”], Legnica 2010.
Podrecki P., ‘Civil Law Actions in the Context of Competition Restricting Practices under
Polish Law’ (2009) 2(2) YARS.
Podrecki P., Porozumienia monopolistyczne i ich cywilnoprawne skutki [Monopolistic
agreements and their civil effects], Kraków 2000.
Sieradzka M., Pozew grupowy jako instrument prywatnoprawnej ochrony interesów
konsumentów z tytułu naruszenia regul konkurencji [Group action as an instrument of
the private protection of consumers against a breach of competition rules], Warszawa 2012.
Sieradzka M., Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz [Act
Szancioł T., ‘Posyłka procesowa przedsiębiorcy po zmianach Kodeksu postępowania
cywilnego’ [‘Procedural position of the undertaking after the amendment of the Code
The Handbook of Competition Enforcement Agencies 2008. A Global Competition Review
Funkcjonowanie powiatowych (miejskich) rzeczników konsumentów w roku 2010 [Functioning
of poviat (municipal) consumer ombudsman in 2010], UOKiK, Warszawa 2011.
Wagner G., ‘Should Private Enforcement of Competition Law Be Strengthened?’, [in:] D.
Schmidtchen, M. Albert, S. Voigt (eds), The More Economic Approach to European
Wils W.P.J., ‘Is Criminalization of EU Competition Law the Answer?’, [in:] C.D. Ehlermann,
I. Atanasiu (eds), European Competition Law Annual 2006: Enforcement of Prohibition
What Do Limitation Periods for Sanctions in Antitrust Matters Really Limit?

by

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Abstract

Limitation periods represent a legal safeguard for a person who has once broken the law in order not to be put at risk of sanctions and other legal liabilities for an indefinite amount of time. By contrast, public interest can sometimes require that a person who has committed a serious breach of law cannot benefit from limitation periods and that it is necessary to declare that the law had indeed been infringed and that legal liability shall be expected irrespective of the passage of time.

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This article aims to answer the question whether limitation periods for sanctions attached to competition restricting practices by Slovak competition law also limit the powers of its competition authority to declare the illegality of illicit behaviour or to prohibit it. Although this question can arise, and has done so already, as a defence in antitrust proceedings, as well as the fact that an answer to this question can potentially, as well as actually, affect rights of undertakings which have broken competition rules, Slovak jurisprudence cannot be seen as explicit in answering this question.

Résumé

Les délais de prescription représentent une garantie juridique pour éviter que celui qui a violé la loi soit pour toujours exposé à la contrainte d’une sanction ou d’un autre type de responsabilité juridique. Toutefois, dans certains cas, il est dans l’intérêt public que la personne qui a gravement enfreint la loi ne puisse pas bénéficier du délai de prescription et qu’il soit possible de constater la violation du droit et d’engager la responsabilité juridique.

Le présent article essaie de répondre à la question fondamentale, celle de savoir si les délais de prescription prévus, dans le droit slovaque actuel, pour infliger des sanctions pour accords limitant la concurrence ou pour abus de position dominante sont, également, en situation de limiter la compétence de l’autorité slovaque de la concurrence de constater l’illégalité d’une démarche d’une entreprise ou sa compétence d’interdire une telle démarche.

Même si cette question peut être posée, ou a déjà été posée, en défense contre les démarches anti-cartel et la réponse à la question peut, potentiellement mais aussi réellement, avoir une influence sur les droits de l’entreprise qui a violé les règles de concurrence, la jurisprudence slovaque donne une réponse claire à cette question.

Classifications and key words: competition law; antitrust procedure; sanctions; administrative responsibility; Slovakia; EU law; limitation period; criminal law; private enforcement; legal certainty; safeguards; powers of competition authority; European Commission.

I. Introduction

Limitation periods represent a legal safeguard for a person who has once broken the law in order not to be endangered by sanctions and other legal liabilities for an indefinite amount of time after there is no longer ‘the need of response in terms of both general and individual prevention’. On the other

hand, public interest can sometimes require that a person who has committed a serious legal infringement cannot benefit from limitation periods and that it is necessary to declare that the law has been broken and legal liability shall be expected irrespective of the timeframe of the infringement.

This article aims to answer the basic question whether limitation periods set by Slovak competition law for sanctions associated with the participation in competition restricting agreements and abuse of dominance also limit the powers of the Slovak competition authority to declare the illegality of illicit behaviour of undertakings or to prohibit such behaviour. Although this question can arise, and has in fact done so already, as a defence in antitrust proceedings and an answer to this question can potentially, as well as actually, affect rights of undertakings that have broken competition rules, Slovak jurisprudence cannot be considered explicit in answering this question.

In order to find an answer to this question, this article compares the regulation of administrative offences sanctioned by Slovak competition law with the regulation of other offences in the Slovak legal regime, especially other administrative offences and crimes. Considered will also be the impact of limitation periods on the power to commence sanction proceedings, to continue such proceeding, to declare the illegality of certain behaviours or to impose sanctions.

The article compares also the powers of certain bodies acting within the Slovak institutional framework with the powers of its competition authority with respect to the declaration of the illegality of illicit behaviour and the imposition of sanctions. This analysis takes note of several judgements delivered in cases dealing with administrative sanctions and responsibility for administrative offences (e.g. in competition or customs matters).

On this basis, two fundamental yet contradicting positions (hypothesis) will be presented and tested in conditions of competition law vis-à-vis the purpose of competition, its special features and also the relation to private enforcement.

Assessed further on will be the similarities and differences between Slovak competition law and that of the EU and of the Czech Republic. These two jurisdictions provide instructive jurisprudence in this context including, inter alia, ECL judgments in the GVL case (case 7/82), the Sumitomo Chemicals, Sumika Fine Chemicals case (joined cases T-22/02 and T-23/02), and in the Pergan case (T-474/04).

This article is meant to find a way out of the maze of arguments concerning the issue at stake and give a firm answer to the given question – an answer fully supported by theoretical analyses and jurisprudential argumentation.
Incidentally, the relevance of this issue has recently surfaced one again because the Slovak competition authority is currently dealing with the CRT Cartel\(^2\) which is similar to the Cathode Tubes Cartel case dealt with by the Czech authority.

II. Consequences of anti-competitive behaviour in Slovak jurisdiction and competences of the Antimonopoly Office of the Slovak Republic

The Slovak legal order attaches both private law and public law consequences with anti-competitive behaviour. The main private law consequences of restrictive practices are the legal nullity of any act that violates competition rules and damages liability. Damages for harm caused by competition law infringements can be claimed in Slovakia under the rules of the Commercial Code\(^3\) because such violations constitute an infringement of the general rule laid down therein: the obligation to observe legally binding provisions on economic competition and the obligation not to abuse participation in such economic competition\(^4\),\(^5\). Although several actions for damages were filed in Slovakian courts already, not one final judgment on claims for damages in competition matters has yet been delivered\(^6\). For that reason, the duty to pay damages cannot be considered an immediate threat deterring from competition violations in the Slovak competition framework.

The most serious public-law consequence of competition law infringements derives from the Slovak Penal Code\(^7\) that condemns the crime of abuse of\(^2\)

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\(^3\) Act No. 513/1991 Coll. as amended.

\(^4\) § 41 of the Commercial Code.

\(^5\) The notion ‘abuse of participation in economic competition’ can sound strange but it might be a heritage of transitional period after the fall of Communist regime when certain fear of free market economy and deregulation appeared. It is clear that participation in economic rivalry can be considered abusive. Albeit this notion is illogical and wrong, even in Slovak, I will use it within the presented paper since there is no equivalent to use in Slovak legal order and no corresponding notion in English-speaking countries. The notion “abuse of participation in economic competition” covers unfair competition practices and also practices contrary to competition (antitrust) rules.


participation in economic competition under penal sanctions. However, it is impossible to find even one case in Slovakia where a natural person has actually been imprisoned because of a competition law infringement. For this reason, criminal sanctions for competition law offences are not seen as an effective deterrent in Slovakia. Liability for administrative offences and the imposition of administrative sanctions remains, therefore, the most frequent public-law consequence of competition law violations.

The majority of the responsibility for the enforcement of Slovak competition policy is placed on its competition authority. The Antimonopoly Office of the Slovak Republic (hereafter, AMO) was established as a central administrative body responsible for the protection and promotion of economic competition. Under § 22(1) of the Act on the Protection of Competition⁸ (hereafter, APC), the authority is empowered to issue decisions stating that: an undertaking’s conduct or activity is prohibited pursuant to the APC or other special legislation (e.g. EU competition rules); to decide on the imposition of an obligation to refrain from such conduct and the obligation to remedy the unlawful state of affairs [subpar. b]); and to proceed and decide on all matters regarding the protection of competition ensuing from the provisions of the APC or other special legislation [subpar. d]).

The provisions of § 4(1) APC prohibit agreements restricting competition (unless they are exempted under competition rules) while § 8(6) APC prohibits the abuse of a dominant position. The Act does not include any rules similar to those of Article 1(1) and 1(3) of Council Regulation (EC) No. 1/2003⁹ whereby any practice of an undertaking caught by Article 101 or 102 of the Treaty on Functioning of the European Union (hereafter, TFEU) shall be prohibited, no prior decision to that effect being required. The absence of such provisions in the Act does not mean, however, that prior administrative decision is necessary for considering restrictive practices as illegal in Slovakia. A decision adopted pursuant to § 22(1)b) APC declaring a given conduct or activity as prohibited pursuant to Slovak competition rules is, therefore, merely of declaratory nature. In other words, the AMO can declare the prohibition of given conduct provided it is prohibited ex lege.

The Act itself does not contain a definition of what constitutes an administrative offence against competition (unlike some more modern Slovak laws, which do contain definitions of their respective administrative enforcement agencies).

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⁸ Act No. 136/2001 Coll. on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic, as amended.

offences\textsuperscript{10}) and the term itself is only used in its sixth part which is entitled ‘Liability for administrative offences’ and includes the provisions of § 38 which regulate fines. Pursuant to § 38(1) APC, the AMO shall impose fines, \textit{inter alia}, for violations of § 4(1) and § 8(6)\textsuperscript{11} APC, of up to 10\% of the scrutinised undertaking’s annual turnover. Despite the lack of a definition of a competition offence in the APC, such definition can easily be derived from the wording of the powers of the competition authority with respect to the imposition of fines. Accordingly, an undertaking that violates § 4(1) APC and/or 101 TFEU (takes part in a prohibited competition restricting agreement) or § 8(6) and/or 102 TFEU (abuse of dominance) commits an administrative offence. The power of the AMO to impose fines is not explicitly listed in the recitals of § 22 APC, which contains powers and duties of the AMO, but is included in the general provision of subparagraph d). For that reason, it is necessary to distinguish the power to adopt a decision declaring that a given conduct is prohibited [subpar. b)] and the power to impose a fine [subpar. d)] despite the fact that these two powers are closely related and usually executed together.

The AMO’s power to impose an administrative fine is statute-barred by the APC as follows: ‘The Office may impose fines pursuant to paragraphs 1 to 3 and 5 within four years from the commencement of the proceedings. However, the Office may impose these fines within eight years from the day of the violation of the provisions of this Act and/or the provisions of special legislation, the failure to fulfil a condition or the violation of an obligation or commitment imposed by a decision of the Office; in the event of a continuing administrative offence or lasting administrative offence, the time limit shall begin on the date on which the violation last occurred\textsuperscript{12}.

However, the APC does not contain any other provisions on limitation periods concerning the AMO’s other powers. The question arises, therefore, whether limitation periods set out for the imposition of administrative fines also limit the powers of the Slovak competition authority to declare the illegality of a given illicit behaviour or to prohibit such behaviour. In other words, it is not clear how does the provision of § 38(8) APC affect the powers of the AMO under § 22((1)b) APC.

An overview of limitation periods applicable to other consequences of restrictive behaviours is not helpful in answering this question since there is no cross-reference between the APC and Slovak legislation on private or criminal law liability.

\begin{itemize}
\item \textsuperscript{10} See e.g. Act No. 563/2009 Coll. Tax Rules of Procedure, § 154 and 155.
\item \textsuperscript{11} This provision also empowers the AMO to impose fines for violations of procedural and merger rules.
\item \textsuperscript{12} § 38(8) APC.
\end{itemize}
Anti-competitive practices are prohibited by competition rules – there is no limitation period after which such behaviour is not considered to be prohibited. The nullity of proscribed acts can clearly not be legalized by the mere passage of time – competition rules provide no exemption to this rule. However, the civil law right to claim damages falls under the limitations of the Commercial Code and is statute-barred upon the expiry of a four-year limitation period that begins on the day when the aggrieved (injured) party learned, or could have learned, of the damage and of the identity of the party liable for compensation; however, it shall expire no later than ten years from the day when such an infringement occurred\textsuperscript{13}.

The limitation period for prosecuting the crime of abuse of participation in economic competition is statute-barred after three years for misdemeanours and five years for felonies\textsuperscript{14}. There is no interdependence between limitation periods designed for different kinds of public law consequences of competition law infringements. Moreover, the limitation period in criminal cases is shorter than it is in cases tried by administrative bodies while administrative law does not include provisions similar to penal rules pursuant to which an offender is regarded as having never committed a crime after the lapse of the specified limitation period.

Limitation periods for the consequences of restrictive behaviour can be both longer (right to claim damages) and shorter (criminal responsibility) than limitation periods designed for administrative offences. Their comparison clearly shows that the AMO’s ‘declaratory’ decisions (issued after the lapse of the period for imposing administrative fines) can be helpful to private-law claims only.

It is useful to outline here the Slovak administrative sanction system overall and to compare the definitions of the powers of administrative bodies other than the AMO as well as the consequences of the lapse of limitation periods for the responsibility for administrative offences other than those related to competition matters. It is also worth testing the non-existence of an explicit limitation period for the issue of ‘declaratory’ decisions by administrative bodies \textit{vis-à-vis} constitutional safeguards of legal certainty, on the one hand, and the requirement to protect and promote economic competition, on the other hand.

\textsuperscript{13} § 397 and 398 Commercial Code.
\textsuperscript{14} § 87 Penal Code.
III. Public-law sanction system in the Slovak Republic and position of the sanctions imposed by the AMO therein

Types of public-law liability for wrongful acts can be divided into two groups:
1. liability for criminal offences – offences prosecuted and punished by an independent judiciary;
2. liability for administrative offences – offences ‘prosecuted’ and ‘punished’ by administrative bodies\textsuperscript{15}.

All types of offences (all offences, notwithstanding how they are labelled or what body or institution deals with them), as well as all corresponding investigations and enforcement procedures, can, nevertheless, be subject to the rules provided by the Convention for the Protection of Human Rights and Basic Freedoms (ECHR), particularly Articles 6 and 7 thereof. That is so because the term ‘criminal charge’ used in the ECHR covers charges for any offence of a criminal nature (both crime and administrative offences\textsuperscript{16}) if it fulfils the criteria set out by the European Court of Human Rights\textsuperscript{17}. Even if certain sanctions are explicitly labelled as non-criminal by domestic legislation, they can still be subject to the broader definition of ‘criminal’ sanctions applicable under the ECHR\textsuperscript{18}. Deeming administrative offences as ‘criminal’ (broader sense) logically results in the need to apply certain criminal law (narrower sense) principles, definitions and institutes within the administrative sanction procedure, especially when administrative law does not provide such explicit provisions\textsuperscript{19}.

Criminal offences are codified in Slovakia in the Penal Code and represent a \textit{numerus clausus} category (the Penal Code covers all types of crimes – felonies and misdemeanours – and all subject-matters of crimes; crimes are tried by


\textsuperscript{16} See e.g. L. Madleňáková, ‘Probíhá v ČR řízení o uložení správních sankcí a jejich ukládání dle zásad Rady Evropy?’ (2010) XLIII(2) \textit{Správní právo} 65–89.

\textsuperscript{17} For definitions of a criminal charge for the purpose of ECHR application regarding administrative offences see e.g. ECHR cases \textit{Adolf} v. Austria, § 30; \textit{Öztürk} v. Germany, § 49; \textit{Engel and others} v. \textit{The Netherlands}, §§ 82–83; \textit{Jussila} v. Finland, § 38; \textit{Bendenoun} v. France, § 47; \textit{Benham} v. The United Kingdom, § 56.


\textsuperscript{19} See e.g. judgment of the Supreme Administrative Court of the Czech Republic of 22/02/05, No. 5A164/2002; judgement of the Supreme Court of the Slovak Republic of 03/05/11, case No. 3Sžh/3/2010.
uniform procedure pursuant to rules of the Penal Proceeding Code\(^{20}\). By contrast, the law on administrative offences is neither systematic nor codified:

1. there is more than just one category of administrative offences;
2. there is no common code of procedural rules;
3. definitions of subject-matters of administrative offences lie in a variety of acts.

Minor offences constitute the first and most homologous category of administrative offences in Slovakia since their general features, conditions of application and procedural rules\(^{21}\) are set out by the Act of the Slovak National Council No. 372/1990 Coll. on Minor Offences as amended (hereafter, Minor Offences Act). Despite the adoption of the Minor Offences Act, the law on minor offences remained ‘semi-codified’ since provisions on liability for minor offences can be found in other, more specific legal acts also (e.g. sectorial legislation). The common features of minor offences, either listed in the Minor Offences Act or enacted by special legal acts, include:

1. an illegal behaviour shall be explicitly designated as a minor offence by law;
2. only natural persons older than 15 years can be liable for minor offences;
3. guilt of an offender shall be proven – a minor offence must be committed at least by negligence (provided the subject-matter of the specific minor offence does not require the proof of the intent of the offender).

Disciplinary offences represent the second group of administrative offences that can be committed by natural persons. They are, however, of no relevance for the topic of this article.

The so-called ‘other administrative offences’ constitute the third and at the same time least homogenous group of administrative offences in Slovakia. They can be defined in a negative way as neither crimes, nor minor offences, nor disciplinary offences. ‘Other administrative offences’ are not subject to a specific procedural act and no binding list of their ‘common’ features has been legally formulated. The Act No. 71/1967 Coll. on Administrative Proceeding (Administrative Procedure Code), which provides specific procedural rules for particular offences\(^{22}\), is the only procedural act applicable to ‘other administrative offences’. In fact, many of the so-called ‘other administrative offences’ are not even defined by the law – they are merely subject to a sanction in the form of an

\(^{20}\) Act No. 301/2005 Coll., as amended.

\(^{21}\) General rules of administrative procedure shall be applied if there are no necessary rules in the Minor Offences Act (i.e. subsidiary application of general rules of administrative procedure).

\(^{22}\) E.g. special procedural rules for offences regarding tax or financial market regulation, or special provisions complementing the general rules of the Administrative Procedure Code.
administrative fine. Some common features of ‘other administrative offences’ can be deduced:

1. both natural and legal persons can be found liable for such offences;
2. *mens rea* is usually irrelevant – strict liability applies and exculpation is not possible, there are no liberation reasons (absolute strict liability);
3. sanctions for such offences are rather harsh.

Fines imposed by the AMO under § 38(1) APC represent a liability for an administrative offence that falls into the group of ‘other administrative offences’ since they do not match the features of criminal offences or that of minor or disciplinary offences (nor are they labelled in such way). Liability for administrative offences pursuant to the APC is strict (lack of intent or negligence is irrelevant) and all undertakings violating competition rules are subject to this liability – both natural and legal persons.

Incidentally, minor offences and administrative offences concerning competition share a number of common features:

1. from the procedural point of view, they are both dealt with under the rules of the Administrative Code, unless the Minor Offences Act or the APC provides otherwise;
2. from the point of view of constitutional safeguards, conditions associated by the ECHR with ‘criminal charges’ shall be followed in the case of both minor offences and competition related administrative offences.

A question remains, however. How useful can this systematization of competition offences be seeing as it can face two basic restrictions regarding the analysis of the effects of limitation periods? First, limitation periods for minor offences, as shown below, are laid down by special legislation – the Minor Offences Act. Second, ECHR’s general rules on ‘criminal charges’ are more concerned with questions such as fair trial, right of defence, right to be heard and protection against self-incriminating than with the question of limitation periods.

### IV. Slovak jurisprudence in administrative sanction cases and limitation periods

Slovak courts dealt with the question of limitation periods in competition matters only once in the *Východoslovenská vodárenská spoločnosť* case. The Supreme Court of the Slovak Republic (hereafter, SCSR) ruled therein that subjective and objective statutory limitation periods do not apply to behaviour that was considered illegal – it applies, however, to the limitation period.
for the imposition of fines. This approach could serve as a firm basis for Slovak competition enforcement practice, if it was not for that fact that it can be challenged by later jurisprudential developments in matters of other administrative offences.

As noted, Slovakia does not have a specific procedural regime for sanctioning competition infringements or a general code on administrative offences. The Minor Offences Act applies to minor offences committed by natural persons by negligence or intentionally only – such violations are declared as minor offences by law. It seems useful to outline the legal basis of the consequences of limitation periods in cases of minor offences before engaging in further jurisprudential analyses.

The operative part of a decision declaring that an infringement occurred and imposing a sanction (a ‘condemning’ decision) in a minor offences case must, inter alia, contain a description of the wrongful act, a declaration of guilt and the type and amount of the sanction. Under § 6(1)f) of the Minor Offences Act, the appropriate administrative body shall stop its proceedings if liability for a minor offence ceased to exist. The authority is not allowed to proceed against a minor offence if more than two years have passed since the violation occurred. It is clear that the relevant authority is thus neither allowed to continue proceedings where the limitation period expired nor to issue a ‘condemning’ decision thereafter. The administrative body responsible for the minor offence at hand shall therefore not declare liability or guilt if the limitation period passes. For this reason, the Minor Offences Act contains limitation periods for both the imposition of sanctions and the declaration that certain behaviour was illegal.

The SCSR has repeatedly dealt with the question whether the expiration of the right to impose a fine means also the expiration of the right to decide that a given act was illegal. The Court noted with respect to customs offences, that § 251 of the Customs Code applicable at the time of the judgment was similar to § 20 of the Minor Offences Act, despite the fact that it deals with a limitation period for imposing a fine (two-year subjective and six-year objective limitation period) and the fact that it was not named ‘Expiry of Punishability’. The SCSR ruled, therefore, that the expiration of the period for the imposition of a fine results in the elimination of the punishability of the offence from the material point of view. From the procedural point of view, it shall thus result in ceasing of the proceedings in such cases. This approach

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23 Judgement of the SCRS of 14/12/05, case No. 1 Sž 14/2004 (Východoslovenská vodárenská spolocnosť, a.s./Protimonopolný úrad Slovenskej republiky)
24 § 77 Minor Offences Act.
25 § 20 Minor Offences Act.
26 Judgment of the SCRS of 28/01/05, case No. 2 Sž-o-KS 63/04.
can be considered as established since it was later confirmed on a number of occasions with respect to diverse types of administrative offences such as transport matters\textsuperscript{27} or broadcasting\textsuperscript{28}.

The SCSR stressed also that administrative offences and crimes shall be subject to the same principles because they both fulfil the criteria of Article 6(1) ECHR. The Court found a parallel here for its reasoning in the Slovak Penal Code and the Penal Proceeding Code. Under § 96 of the Penal Code, ‘punishability of an act shall become statute-barred on the expiry of the limitation period’; at the same time, if punishability is statute-barred, criminal proceedings cannot be commenced or shall be stopped if already underway under § 9(1)a) of the Penal Proceeding Code. Any decision adopted after the expiration of the statutory limitation period (despite being set for the imposition of a fine), shall thus be declared null or a false-act because the administrative body at hand no longer has the right to adopt any type of decision. The SCSR noted therefore that the given authority is not empowered to merely declare the illegality of a given behaviour in terms of liability.

All this notwithstanding, a key question arises in this context of whether this conclusion is unconditionally applicable to competition offences also or whether it is not applicable because of the existence of a special exemption clause or some unique features that competition offences poses?

V. Common features and differences between powers of the AMO and other sanction bodies in Slovakia

Decision-making powers of courts in criminal cases and administrative bodies in minor offence matters are very similar. Pursuant to the Penal Proceeding Code and the Minor Offence Act, decision-making bodies have the power to adopt a single decision where they describe the action or conduct that represents an infringement, declare the offender’s guilt and impose a sanction. After the expiry of the limitation period laid down by the Penal Code, any criminal responsibility ceases to exist. It is thus not possible to start prosecution or trial after that date while all existing proceedings shall be stopped. If there is no legal responsibility for the wrongful act, it is impossible for an authority to assess such behaviour. By contrast, the Minor Offences Act is silent on the question of responsibility for minor offences but orders the discontinuation of existing proceedings regarding time-barred minor offences. This procedural provision avoids any further consideration of the scrutinised

\textsuperscript{27} Judgment of the SCRS of 12/03/09, case No. 8 Sžo 147/2008
\textsuperscript{28} Order of the SCSR of 08/06/10, case No. 2 Sžo/2009.
practice – no decision can be adopted later on (guilt can no longer be declared or prohibited conduct described).

When it comes to ‘other administrative offences’ specific legislation describes merely the features of their subject-matter and specifies the associated sanctions. Many of these acts are in fact limited to the setting of the sanction only. Imposing a sanction (of pecuniary and non-pecuniary nature) is, therefore, the only power conferred by such legislation on the appropriate administrative bodies. The authorities have in all these cases an implicit power to declare that an administrative offence was committed but this power is closely and inseparably joined with the power to impose a sanction. This realisation is true in all matters except for competition law infringement where the AMO has the additional right to declare a violation, to prohibit it and to order to remedy the unlawful state of affairs.

Once an authority loses its power to impose a sanction because the limitation period expired, it is left with no other power to act and is obliged to stop the procedures. With respect to administrative offences, the situation of the AMO is the same. After the expiry of the limitation period, the Slovak competition authority has no longer the power to impose a fine and it thus has no longer the power to declare the guilt. As a result, the responsibility for the administrative offence expires. The uniqueness of competition offences lies, therefore, in the existence of separate powers of the enforcing administrative body – the AMO – that are not directly connected with fines and limitation periods set for them [§ 22(1)b) APC].

VI. EU competition law and case-law developments

The Slovak legislator was broadly inspired by EU competition law when drafting domestic provisions. Similarly, European competition enforcement practice is followed not only in cases with EU dimension, where the need to ensure the uniform application of EU competition law is obligatory29, but also in domestic proceedings. Even in cases dealt purely under Slovak national law30, the decisions of the AMO are often inspired and their arguments supported by the case-law of the European Commission and the jurisprudence of European courts. It is thus useful to consider EU experiences with respect to limitation periods.


30 E.g. decision of the Council of the AMO of 01/07/05, No. 2005/KH/R/2/073
In order to enforce the prohibition laid down by Articles 101 and 102 TFEU, Regulation 1/2003 empowers the European Commission:

1. to require the undertakings and associations of undertakings concerned to bring such infringement to an end (Article 7);
2. to order interim measures (Article 8);
3. to make undertaking’s commitments binding on the undertakings (Article 9);
4. to impose fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU; or they contravene a decision ordering interim measures under Article 8; or they fail to comply with a commitment made binding by a decision pursuant to Article 9 (Article 23);
5. to impose on undertakings or associations of undertakings periodic penalty payments in order to compel them to put an end to an infringement of Article 101 or 102 TFEU, in accordance with a decision taken pursuant to Article 7; to comply with a decision ordering interim measures taken pursuant to Article 8; to comply with a commitment made binding by a decision pursuant to Article 9 (Article 24).

The powers conferred on the Commission by Articles 23 and 24 are subject to the limitation period specified in Article 25 of Regulation 1/2003.

The European Commission is not explicitly empowered by Regulation 1/2003 to adopt a decision purely declaring that a violation of EU competition rules has occurred; incidentally, it was not empowered to do so by earlier Regulation No. 17 either. However, L. Ritter, W. D. Braun and F. Rawlinson were quite clear in stating that the effect of limitation periods does ‘not apply to declaratory prohibition orders without fines’. In support of this thesis a number of declaratory decisions was listed, which formally declared that an already ceased conduct did in fact take the form of an infringement of EU competition rules.

The question of a separate power to declare that a conduct or action of an undertaking is prohibited under EU competition rules was first raised before the ECJ in 7/82 GVL. The scrutinised Commission decision declared that some of GVL’s behaviours constituted an abuse within the meaning of Article

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34 L. Ritter, W. D. Braun, F. Rawlinson, EEC Competition Law..., p. 691.
86 of the Treaty Establishing European Communities (currently, Article 102 TFEU). Unlike the view ultimately taken by the ECJ regarding the existence of a separate power to declare that a conduct is prohibited without imposing a fine or ordering to refrain from such action/conduct, Advocate General Reischl\textsuperscript{36} proposed to refuse all of the arguments presented by the Commission in favour of the existence of such competences. He rejected the claims made by the Commission claims on the grounds that:

1. there was no explicit provisions for such decision in the EEC Treaty or in the implementing Regulation 17/62\textsuperscript{37};
2. under Article 3(1) of Regulation 17/62, the Commission was not competent to adopt a decision if the infringement has been brought to an end in good time;
3. there was nothing in the provisions of Article 3(1) of Regulation 17/62 to justify the interference – even on the basis that the major premise includes the minor – that conferred a power to adopt measures which did not relate exclusively to the termination of an infringement but were intended to punish past conduct and nor was it possible to make such inference from Article 15(2) of Regulation 17/62 (imposing sanction);
4. the Council did not wish to confer purely declaratory powers on the Commission since the draft regulation contained separate powers for adopting declaratory decisions and decisions requiring the termination of a violation, but the final text of Regulation 17/62 did not showing that the Council did not provide for a separation of powers;
5. the list of sanctions contained in Regulation 17/62 had to be regarded as closed and its extension by analogy was against the principles of criminal law and legal certainty;
6. a desired publicity effect alone could not establish a competence to adopt a decision;
7. regarding civil litigations, an adopted decision did not have precedential but merely evidential value;
8. a purely declaratory decision was not indispensable in order to deal effectively with the danger of recurrence;
9. Regulation 17/62 did not provide for any power to take purely preventive measures;
10. no reasons for adoption of a declaratory decision were found in that particular case.

The Court ultimately opposed the opinion expressed by the Advocate General having no doubts that the Commission has indeed the power to adopt

\textsuperscript{37} Valid also for Regulation 1/2003.
a purely declaratory decision. The ECJ said that the power to take decisions which require undertakings to bring any established infringement to an end, and the power to take decisions imposing fines and periodic penalty payments in respect of an infringement, necessarily imply a power to make a finding that the infringement in question exists. In comparison to the detailed reasoning of AG Reischl’s opinion, the judgement did not give further explanations or reasons for its own findings. What the ECJ saw as the only remaining question before it was whether the Commission managed to show sufficient legal interest to justify the adoption of such decision in this case. GVL’s obligation to terminate the practice in question was not expressly confirmed by the Court. Ultimately it was the danger of recidivism and the resulting necessity to clarify the legal position on this issue that were seen by the ECJ as legitimate reasons for adopting a declaratory decision by the Commission.

Similar reasoning was presented in a later case albeit this time, the Court did not prove benevolent in its assessment of the legitimate interest in issuing a declaratory decision. In the joined cases T-22/02 and T-23/02 Sumitomo Chemical, Sumika Fine Chemical, the Court of First Instance first dealt with the scope of the notion of ‘sanction’ within the meaning of Regulation No. 2988/74 setting out limitation periods in competition matters. The CFI dealt also with the relationship between the title of Article 1 Regulation 2988/74 and limitation periods – a reference which could suggest that the scope of the limitation period referred to in Article 1 exceeds the mere power to penalise violations, so as to also cover the possibility of bringing an action or initiating proceedings seeking merely to establish an infringement. The CFI concluded that the term ‘penalties’ used in Regulation 2988/74 only covers pecuniary sanctions. As a result, ‘[a] decision finding an infringement is not a penalty within the meaning of Article 1(1) of Regulation No 2988/74 and is not therefore covered by the limitation period laid down by that provision.’ The power to find an infringement was thus considered autonomous and separate

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38 Case 7/82 GVL, para. 23.
39 Case 7/82 GVL, para. 24.
40 Case 7/82 GVL, para. 27.
43 T-22/02 and T-23/02 Sumitomo Chemical, Sumika Fine Chemical, paras. 39–63.
44 T-22/02 and T-23/02 Sumitomo Chemical, Sumika Fine Chemical, para. 60.
45 T-22/02 and T-23/02 Sumitomo Chemical, Sumika Fine Chemical, para. 61.
from other powers of the Commission, subject only to the test whether a legitimate interest existed to take such actions\textsuperscript{46}.

The CFI ultimately annulled the contested decision as far as it concerned the applicants because the Commission failed to consider whether it had a legitimate interest justifying the issue of a declaratory decision finding that the applicants have committed an infringement. According to the Court, the Commission thus committed an error of law. The authority justified its actions by the interest of clarifying the legal situation at hand, the need to promote exemplary behaviour on the market and discouraging recidivism. Given, however, the particularly serious nature of the infringements in question, and the interest in enabling the injured parties to bring matters before national civil courts, the CFI did not consider the Commission’s arguments sufficient to fulfil the requirement to show a legitimate interest for issuing a declaratory decision. The Court stated that the justification provided by the Commission ‘merely sets out in generic terms three premises, without demonstrating, by reference to the particular circumstances of the present case relating to the very serious and extensive infringements alleged against the applicants, that those premises are established and consequently establish its legitimate interest in adopting against the applicants a decision finding those infringements’\textsuperscript{47}. The Court blamed the Commission that it:

\begin{itemize}
  \item has not specifically explained to the Court why the gravity and geographic scale of the infringements in question made it necessary to find, by the Decision, infringements which had come to an end in the particular case of the applicants;
  \item has adduced no evidence whatsoever of the risk of recidivism on the part of the applicants;
  \item has not given any indication, relating to the particular circumstances of the present case, of legal proceedings undertaken or even capable of being envisaged by third parties injured by the infringements.\textsuperscript{48}
\end{itemize}

\textsuperscript{46} ‘Whilst under the system established by Regulation No 17 the Commission’s power to find an infringement arises only implicitly, inasmuch as the express powers to order cessation of the infringement and to impose fines necessarily imply this power (\textit{GVL v Commission}, para. 23), such an implied power is not however dependent solely on the exercise by the institution of those express powers. The Court acknowledged the existence of that implied power in a judgment – \textit{GVL v Commission} – which concerned the legality of a Commission decision finding an infringement which had been brought to an end and imposing no fine. It is not therefore possible to deny that the power in question is autonomous, or that this autonomy is unaffected by the fact that the exercise of that power was made subject to the existence of a legitimate interest of the Commission’ (T-22/02 and T-23/02 \textit{Sumitomo Chemical, Sumika Fine Chemical}, para. 63).

\textsuperscript{47} T-22/02 and T-23/02 \textit{Sumitomo Chemical, Sumika Fine Chemical}, para. 138.

\textsuperscript{48} T-22/02&T-23/02 \textit{Sumitomo Chemical, Sumika Fine Chemical}, para. 139.
In the T-474/04 Pergan case, the CFI confirmed again that the Commission has the power to adopt declaratory decision stressing, however, that the right for defence and presumption of innocence shall be retained even in such cases: ‘the Commission cannot adopt a decision finding an infringement after expiry of the limitation period, where such a finding is not justified by the existence of a legitimate interest and where the undertaking concerned has no possibility of seeking review of that finding by the Community judicature.’ Moreover, undertakings whose participation in an infringement is mentioned in a Commission decision shall be its explicit addressees; their involvement shall be declared in the operative part thereof and they shall be allowed to contest that decision in front of the Court. It is irrelevant in this context whether a fine was ultimately imposed or not.

A basic difference can be found when comparing Slovak and European provisions: the ‘declaratory’ power of the AMO is explicitly given to it by domestic legislation whereas the same power of the Commission is merely implicit. Neither of the jurisdictions considers, however, the declaration of an infringement to be a sanction for anti-competitive behaviour. Even AMO’s duty to show a ‘legitimate interest’ in issuing declaratory decisions is not required by law or case-law. Arguments presented in EU jurisprudence can be used to explain the necessity of declaratory decision in Slovak competition cases.

Since procedural rules are neither unified nor harmonized across Europe, limitation periods applicable to competition cases vary from country to country. In the UK, for instance, the Competition Act 1998 does not limit the possibility to impose sanctions for competition law violations. Even a comprehensive analysis of the laws of all European countries will therefore not help answer the questions posed herein. An analysis of the Czech practice is nevertheless useful because of its great similarity to Slovak provisions.


50 The question of powers of the Commission to issue a decision after expiring limitation period was also raised in other organic peroxide case – T-120/04 Peroxidos Organicos v. Commission of the European Communities, ECR [2006] II-4441.

51 T-474/04 Pergan, para. 79.

52 Albeit Professor Whish referred to the application of the six-year limitation period laid down by the general rule of the Limitation Act 1980 (R. Whish, Competition Law. 6th Edition., Oxford, 2008, p. 400.); this argument was however refused by the Competition Appeal Tribunal in Quarmby Construction case (Judgement of the Competition Appeal Tribunal of 15/04/11, case No. 1120/1/1/09, Quarmby Construction Company Limited, St James Securities Holdings Limited v Office of Fair Trading.).
VII. Czech Cathode Tubes cartel case and the similarity between Slovak and Czech regulation

It is worth noting that the Slovak and Czech legal environments are very similar as they both derive from the earlier Czechoslovak regime. Administrative courts in sanction matters have accumulated similar jurisprudence – where statutory periods for the imposition of sanctions have lapsed, the authorities are not empowered to proceed. This approach was formulated in a number of cases concerning minor offences\(^53\), trade inspections\(^54\) or tax audits\(^55\).

Czech legislation on competition law enforcement procedure is also very similar to Slovak provisions. Pursuant to § 7(1) of the Act on Protection of Competition\(^56\) (hereafter, CzAPC), if the Czech Office for the Protection of Competition (hereafter, OPC) finds that a prohibited agreement took place, it shall declare such fact in a decision by means of which it shall prohibit the performance of the agreement in the future. Under § 11(2) CzAPC, if the OPC finds that an abuse has been committed, it shall declare such fact in a decision and it shall prohibit such actions in the future. The OPC is also empowered to impose administrative fines for offences committed by natural persons and administrative offences of legal persons and natural persons-entrepreneurs pursuant to § 22 and § 22a CzAPC respectively. Responsibility for administrative offences is subject to a limitation period pursuant to § 22b(6) CzAPC\(^57\).

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\(^53\) See e.g. judgment of the Supreme Administrative Court of 15/12/05, case No. 3 As 57/2004.

\(^54\) Judgment of the City Court in Prague of 11/12/00, case No. 28 Ca 145/99: ‘There is no other power given to an administrative body by the provision in question than to impose a sanction. (…) The administrative body is not empowered by law to decide separately on guilt like a court in criminal proceeding; the law gives it only the power to impose sanction. The City Court in Prague holds the opinion that if the administrative body decided that the applicant committed an illegal action by fulfilling the criteria of the body of an administrative offence but it did not impose sanctions for such infringement, such decision is a null administrative act because of the lack of competence to decide’.

\(^55\) Order of the Supreme Administrative Court of 31/08/05, case No. 2 Afs 144/2004: ‘Illegal tax audit is for example (…) a tax audit executed in time when the period for levying a tax lapsed’.

\(^56\) In full: Act No. 143/2001 Coll. of 04/04/01 on the Protection of Competition and on Amendment to Certain Acts (Act on the Protection of Competition) as amended

\(^57\) ‘The responsibility for the administrative offence shall cease to exist if the administrative authority initiates administrative proceedings no later than 5 years following the day on which it learned of the administrative offence, however, no later than 10 years after the administrative offence was committed’.
The Czech competition authority had no doubt that it was entitled to declare the existence of an infringement and prohibit anti-competitive behaviour *pro futuro* even when the period for the enforcement of administrative sanction had already passed. This approach was confirmed by the Regional Court in Brno in its review of the OPC President’s decision in *Cathode Tubes cartel*. The Court provided here a broad reasoning for its conclusions and refused to be tied down by case-law regarding other than competition-related offences considering it to be not relevant to the scrutinised issue. The necessity to describe the actual infringement was identified as the reason for confirming the right of the OPC to declare that an undertaking has participated in a cartel, even if responsibility for the offence was already time-barred. The Court refused to accept the view that the necessity to respond to the offence disappears with the expiration of the limitation period in cases when the proceedings involve the conduct of all members of a cartel (even if some of them could no longer be punished). The Court confirmed, however, the general premise that the power of an administrative body to adjudicate guilt of a party to the proceedings expires together with the lapse of the period for imposing sanctions (not applicable in the case at hand).

The Regional Court in Brno confirmed also the dichotomy of the powers of the Czech competition authority and stressed the importance of declaratory decisions for competition protection: ‘(therefore) it is possible to agree with the defendant on its description of the specifics of CzAPC in the fields of legal regulation of other administrative offences, which goes alongside the power to declare and prohibit anti-competitive behaviour and power to punish such behaviour. This concept is not as absurd as the applicants claim. The autonomy of both of these elements of responsibility of cartel members for the committed offence not only derives from the lie out of CzAPC itself (...), which can be secondary, but from the very core of the broader responsibility of the defendant for the state of the competitive environment (...). This responsibility of the defendant can be fulfilled even by declaring and prohibiting anticompetitive behaviour in relation to such conduct even if not all participants can be subject to a sanction’.

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59 Judgment of the Regional Court in Brno of 23/02/12, case No. 62 Af 75/2010.
60 ‘The actions of the defendant after the lapse of the period for imposing a fine do not represent an enforcement of state power against the applicant a) but the only possible way to fulfil its duty to describe an offence as a behaviour of several competitors (...) to declare that the administrative offence occurred, prohibit such behaviour for the future and to punish such behaviour if the period for imposing fines had not terminated’.
Because of the similarity of Czech and Slovak competition rules, as well as the similarity of their overall legal systems, the judgement of the Regional Court in Brno in the Cathode Tubes case\(^{61}\) can be instructive also within the Slovak legal framework. Although the court did not answer the question concerning the application of the power to declare and prohibit anti-competitive behaviour in general, it seems that it saw the possibility of an exemption from the general rule whereby such decision can be issued only if at least some parties to the proceeding can still be punished. The court remained silent about whether there could be any other reasons to continue proceedings even after the lapse of limitation periods regarding all members of the scrutinised cartel.

**VIII. Conclusions**

Limiting *de facto* the length of the sanction procedure by the limitation period for the imposition of fines is closely related to the right to a speedy trial. On the other hand, only the right to impose sanctions is statute-barred in order to prevent overly-long proceedings. Slovak legislation remained silent as far as AMO’s power to issue ‘declaratory’ decision is concerned. It cannot be concluded, therefore, that the legislator meant to give the same level of protection against excessive length of sanction proceedings and in ‘declaratory’ matters. The Competition Appellate Tribunal reached similar conclusions regarding the impossibility of construing a duty to decide in reasonable time as an unexpressed limitation period (*de facto*) irrespective of the non-expressed will of the legislator to make such limitation: ‘Whilst it is desirable that the OFT concludes its investigations as quickly as possible, it is not appropriate to suggest that proportionality requires the OFT to be subject to a *de facto* subjective and uncertain limitation period in circumstances where the Parliament did not intend there to be any such constraint on the OFT’s powers’\(^{62}\). Therefore, infringing the right to a speedy trail does not entail the loss of the power to adopt a decision even if it can give grounds for other claims by the injured party (e.g. obligation to pay costs, to finish proceeding by decision). The administrative body can lose its powers because of an excessive

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\(^{61}\) Although judgements of the regional court are final and effective, they can still be reviewed by the Supreme Administrative Court on the basis of a cassation request.

\(^{62}\) Judgment of the Competition Appeal Tribunal of 15/04/11, case No. 1120/1/1/09, Quarmby Construction Company Limited, St James Securities Holdings Limited v Office of Fair Trading, para. 56.
length of proceeding only if the aim of such proceedings cannot be reached in that situation.

Although it seems that the AMO has the power to enforce its competences pursuant to § 22(1)(b) APC even after the expiration of the limitation period for imposing fines provided for under § 38(1) APC, there are at least three requirements that can limit the execution of this power:

1. the purpose of the APC – protection and promotion of economic competition that represents the ultimate criterion for the enforcement of all AMO’s powers;

2. the need to comply with the principle of procedural economy – pursuant to § 3(3) of Administrative Procedure Code: ‘Administrative authorities must ensure that administrative proceedings are economical and do not uselessly bother citizens and organizations’.

3. the need to comply with the principle of legality of administrative proceedings – pursuant to § 3(1) of Administrative Procedure Code: administrative bodies are obliged to ‘protect the interests of the State and society, the rights and the interests of citizens and organizations and require, in a consistent manner, the fulfilment of their duties’.

That is why every decision adopted by the AMO has to ultimately serve the protection or promotion of economic competition. Furthermore, it has to be adopted in an effective and economical manner and thus the total cost of AMO’s pro-competitive intervention cannot outweigh its total possible welfare gain.

As an administrative body, the AMO shall keep a permanent check on whether it meets all criteria and prerequisites for administrative proceedings. After the expiry of the limitation period for imposing a fine, it might be gradually more and more difficult to fulfil these three principles. After over four years of investigations and/or eight years after the termination of a cartel participation, public intervention can be ineffective, slow and costly because neither enough evidence nor suitable data is likely to remain. Furthermore, can a declaratory decision after so long effectively contribute to the fulfilment of the purpose of the APC and AMO’s tasks and thus, is the first of the criteria met? The Regional Court in Brno said that if at least one punishable cartel participant remains, there is an interest and duty to describe the cartel as a whole. The criterion of competition protection is therefore always met.

After the lapse of the right to impose a fine regarding all participants of a violation, AMO’s ability to facilitate competition protection can drastically decrees (depending on the general market situation, existence of competitors, extent of possible damages and probability of recurrence). The AMO cannot impose in such decisions a fine and is not capable to retrieve any gains of the illegal conduct. On the other hand, such decisions can aid deterrence
and legal certainty by helping to avoid similar infringements in the future and explain enforcement policy developments. Gains of a purely declaratory decision must be balanced with the costs incurred by both the authority and the parties to the proceeding as well as with the burden put on the latter by the investigation. To commit

Although decisions issued by competition authorities are said to be important for follow-on claims, as the basis for an effective private enforcement of competition law, it is necessary to note that pursuant to § 135(1) of the Slovak Civil Procedure Code, "the courts shall be bound by the decisions of competent bodies establishing the occurrence of criminal offences, administrative infractions or other administrative offences punishable under separate legal provisions and their perpetrators’ only. Decisions delivered before the lapse of limitation periods that declare responsibility for administrative offences can be used as a basis for court rulings in damages cases. Decisions that merely declare the existence of a past infringement (do not rule on responsibility) do not have such evidential powers. They provide a ‘summary of evidence’ only that must be reassessed by the civil court. It is worth recalling in this context an opinion presented by Advocate General Mazák in the Pfleiderer case. AG Mazák admitted that private enforcement of competition law is of low importance across Europe: ‘Indeed so reduced is the current role of private actions for damages in that regard that I would hesitate in overly using the term ‘private enforcement’.

For these reasons, the concept of AMO’s limited competence to adopt declaratory decisions after the lapse of its power to impose a fine (connected with the establishment of responsibility for a given administrative offence), closely resembles the ‘legal interest’ concept developed by ECJ jurisprudence. In general, irrespective of its power to impose a fine, the AMO has the power to adopt purely declaratory decisions. However, this power is lost if it is proven that such a decision does not represent an effective and economical means of protecting or promoting competition or if the proceedings are overly burdensome. If an intervention by AMO past the limitation period does not pass this test, it would be seen as a form of misconduct or an abuse of AMO’s powers rather than justified law enforcement. As such, it should be ceased pursuant to § 32(2)(c) APC.

65 Opinion of AG Mazák delivered on 16/12/10, Case C-360/09 Pfleiderer AG v Bundeskartellamt.
The analysis presented in this paper once again confirmed that the lack of a legislative act regulating uniformly the fundamental principles as well as key features of administrative offences results in a sea of doubt regarding an issue as important as the competences of particular administrative bodies, in this case the AMO.

A legal amendment formulating explicit rules in this field would clearly be the most appropriate way to solve this uncertainty. Among the ways to ensure maximal enforcement on the one hand, and avoid the wasting of resources on the other hand, could be the introduction of a three stage process for the AMO to ‘lose’ its powers after the lapse of limitation periods for the imposition of fines:

1. when it is still possible to impose a fine on at least one party to the administrative proceedings (e.g. at least one participant of the scrutinised cartel), the AMO shall retain its full competences to declare that the behaviour of every party to such proceedings was prohibited under the APC;
2. when it is not possible to impose a fine on any of the parties, but the limitation period for damages claims at least towards one of the participants has not yet lapsed, then, in order to facilitate private litigation, the approach could be somewhat more complex; the AMO shall suspend its proceedings for a certain period of time (e.g. 6 months) and continue to issue a decision only if it receives an order from a court dealing with a damages action; otherwise the AMO shall discontinue its proceeding;
3. after the lapse of all limitation periods for damages claims, the AMO shall stop its proceeding.

Admittedly, such three stage approach is rather complicated and respects merely a part of ‘legitimate interests’.

An alternative legislative approach could prepare a list of possible conditions (‘legitimate interests’) that the AMO would need to fulfil in order to continue its proceedings past the limitation period. The weakness of this solution is its potential rigidity.

The third and most flexible approach could require the AMO to show that a declaratory decision could contribute to the protection or promotion of economic competition.

The fourth possible way to deal with this issue would be to explicitly declare that there is no limitation period for ‘declaratory’ decisions.

However, the third and fourth solution, as well as leaving this issue as it currently stands (i.e. status quo) are very similar to each other as they all require the AMO to always check whether it still fulfils its duty to protect and promote economic competition.
Literature


Madleňáková L., ‘Probíhá v ČR řízení o uložení správních sankci a jejich ukládání dle zásad Rady Evropy?’ [‘Is the administrative sanction process and sentencing of sanctions in the Czech Republic harmonious with principles of the Council of Europe?’] (2010) XLIII(2) *Správní právo*.


Development of the Judicial Review of the Decisions of the Antimonopoly Office of the Slovak Republic

by

Silvia Šramelová* and Andrea Šupáková**

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Abstract

The article provides an analysis of the most important judgments rendered by Slovak courts at the end of 2010, in the course of 2011 and at the beginning of 2012. The article focuses solely on judicial review of decisions issued by the National Competition Authority of the Slovak Republic.

Slovak courts dealt with several key issues concerning public enforcement of competition law such as: the application of the so-called ‘general clause’; competences of the Slovak competition authority in regulated sectors; and the application of the economic continuity test. Some of the conclusions resulting from these judgments may be considered disputable. It may be argued, in particular, that they may jeopardize the effective enforcement of competition law in the Slovak Republic.

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Republic. At the same time, the discussed jurisprudence has managed to clarify a number of key issues which had been subject to debate for a number of years. The article presents a review of these judgments, summarizes their key conclusions and considers their possible impact on the system of public enforcement of competition law in the Slovak Republic. The article is divided into a number of parts, each of which covers an individual case, the titles of which refers to the main topic that was under discussion in the presented judgment.

Résumé


Les cours slovaques se sont penchées sur quelques questions clés relatif à l’application du droit de la concurrence tel que l’application de la clause générale, l’autorité de Bureau antimonopole de la République slovaque dans les secteurs régulés et l’application du test de la continuité économique.

Certains conclusions résultants de ces décisions peuvent être considérées comme litigieuses. En particulier, il peut être soutenu que ces décisions peuvent affecter l’application effective du droit compétitif en République slovaque. Il est à noter que certains de ces décisions ont éclairé les questions qui ont été discutées pendant plusieurs années.

Cette contribution donne un aperçu de ces susdites décisions, résume les principales conclusions découlant de ces décisions et analyse l’influence potentiel sur le système de l’application public du droit de la concurrence en République slovaque. La contribution est divisée en plusieurs parties, chacune d’entre elles consacrée à un cas particulier, les titres des articles sur des thèmes clés, qui se consacre à la décision.

Classification and key words: economic continuity test; mitigating circumstance; competence; sectoral regulation; general clause; reduction of fine; unlawful operation on the market

I. Introduction

When it comes to the judicial review of its recent decisions, the Slovak competition authority – the Antimonopoly Office of the Slovak Republic (hereafter, the AMO) – has little reason to celebrate. The number of cases that it has lost before Slovak courts significantly exceeds the number of its decisions being upheld.
Courts often either completely annul AMO’s decisions or reduce the fine imposed therein to a symbolic amount only. There can be no doubt that the enforcement of competition cases in Slovakia has become harder in recent years. Courts often annul AMO’s decisions merely with reference to procedural errors that occurred during the proceedings before the competition authority, without even beginning to deal with the merits of the case subject of the judicial review.

Considering the small number of court cases actually won by the AMO, years 2010–2012 do not differ substantially from earlier years. Nevertheless, a small amount of hope exists for the competition authority since the Supreme Court of the Slovak Republic, acting as the court of appeals for competition cases, reversed recently a number of first instance judgments that were adverse to the AMO upholding, in turn, the competition authority’s original decisions.

The aim of this paper is to present the most interesting cases subject to judicial review at the end of 2010, in the year 2011 and at the beginning of 2012.

II. General remarks

It is worth starting the paper with a brief introduction of the system of judicial review of the decisions issued by the AMO – the National Competition Authority (hereafter, NCA) of the Slovak Republic. In Slovakia, the rules of judicial review of administrative decisions are set forth by the Act No. 99/1963 Coll. – the Civil Procedural Code as amended (hereafter, Civil Procedural Code), particularly in its part named ‘Administrative justice’.

AMO decisions are taken on the basis of a 2-instance system. In the first instance, the executive body of the AMO1 issues a decision, which may be reviewed by the Council of the AMO. When a decision in a particular case is issued by the Council of the AMO and becomes final, the participants of the administrative proceedings have the right to bring the case before a court within 2 months from the day when the decision became final. The legal instrument used for that purpose is an action2 to be filed with the respective court within two months from the day when the last instance decision of the authority was delivered to the participant. The court that has the competence

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1 Division of Agreements Restricting Competition, Division of Abuse of a Dominant Position or Division of Concentrations.
2 The action is admissible only under the proviso that a party to a proceedings before the AMO appealed the decision of the executive body of the AMO to the Council of the AMO.
to review the decision of the AMO is the Regional Court in Bratislava, acting as the court of first instance in matters of competition law.

If the court decides that the contested decision and the preceding administrative procedures comply with the law, the court renders a judgment dismissing the action. If it rules against the appealed decision, it reverses the AMO decision and refers the case back to the competition authority for renewed assessment. Together with the decision of the Council of the AMO, the court may reverse also the first instance decision. Since 2002, the court has also the right to change the amount of the fine imposed by the AMO. Unsatisfied parties, usually both the claimant and the AMO, can appeal the judgment of the Regional Court.

The Supreme Court of the Slovak Republic reviews the judgment of the Regional Court acting in this respect as the court of appeals for competition law cases. The Supreme Court may reverse, affirm, or change the judgment of the court of first instance.

Even after the judgement of the Supreme Court becomes final, the party to the judicial proceeding may lodge a complaint to the Constitutional Court of the Slovak Republic, when it assumes, that the court breached its fundamental rights or freedoms during the foregoing judicial proceedings. In case the complaint of the complainant is justified, the Constitutional Court annuls the faulty judgement and refers the case back to the court, that issued the respective judgement.

### III. Application of the ‘economic continuity test’ as a mitigating circumstance

The judgment of the Supreme Court of the Slovak Republic concerning the abuse of a dominant position by the *Railway Company Cargo*, a.s. (hereafter, *Cargo*), case no. 1 Sžhpú/1/2011³

The Cargo proceedings are historically the first case where the European Commission submitted to Slovak courts its written observations to a competition law case under Article 15 (3) of Regulation 1/2003⁴.

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³ The judgment of the Supreme Court of the Slovak Republic of 31 January 2012.

⁴ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1: ‘Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations’.
In 2006, the AMO found that Cargo has abused its dominant position and imposed upon it a heavy fine in the amount of c. 2 490 000 Euro. Cargo is a company owned by the Slovak Republic. It carries out railway transport and business activities and, in particular, transport and carriage services of goods in rail-freight traffic. In respective time, Cargo provided a rail-freight transport of a large amount of cement on a number of routes, including the route Rohožník-Devínska Nová Ves state border to the company Holcim (Slovakia), a.s. (hereafter, Holcim). Holcim carried out business activities in a sector of producing and selling cement and other construction materials.

Holcim purchased rail-freight services from Cargo via three shipping companies. Cargo sold its services to shipping companies on the basis of consignments, which were concluded every year. The contracts included also agreements on prices. In terms of these agreements, Cargo provided its services to shipping companies for discounted prices compared to general tariffs, which otherwise applied.

The said abuse occurred when Holcim planned to purchase rail-freight services of cement on the route Rohožník-Devínska Nová Ves state border from the company LTE, a.s., instead of Cargo, because LTE’s offer was more advantageous to Holcim. At that time, LTE, a.s. was a new entrant on the recently liberalised railway market, making it a competitor of Cargo. As a reaction to this situation, Cargo terminated its existing agreements on prices with two shipping companies providing rail-freight transport services to the company Holcim.

Because of the actions of the dominant entity (Cargo), shipping companies planned to increase the prices for the transport on all the routes covered by the contract between Cargo and Holcim an unfavourable development for Holcim. Consequently, Holcim terminated the planned cooperation with LTE and signed a contract on the provision of all its rail-freight transport services with Cargo. Hence, the dominant company effectively eliminated LTE from the relevant market for the provision of rail-freight transport of a large amount of cement on the route Rohožník-Devínska Nová Ves state border.

The anticompetitive behaviour of Cargo affected trade between EU Member States. Thus, the Slovak competition authority applied Article 82 of the EC Treaty (current Article 102 of the Treaty on the Functioning of the European Union, hereafter TFEU).

Cargo was established on 1 January 2005 as a result of the division of the former passenger and freight rail traffic operator – Železničná spoločnosť, a.s. The former operator has been split into two legal successors: Železničná spoločnosť, a.s. (for the supply of passenger transport services) and Cargo (for

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5 Decision of the AMO Council no. 2006/DZ/R/2/144 issued on 22 December 2006 in conjunction with the decision of the AMO no. 2006/DZ/2/1/067 issued on 3 June 2006.
the supply of services of rail-freight transport). Considering the timeframe of the infringement, part of the alleged anticompetitive behaviour took place before the legal separation of the two operators, while part occurred during the existence of Cargo.

The Slovak competition authority applied here the ‘economic continuity test’ under the criteria set out by the jurisprudence of the Court of Justice of the European Union. On this basis, Cargo was found responsible for the entire duration of the anticompetitive behaviour despite the fact that no provision of Slovak law explicitly enables the AMO to prosecute a successor company for the conduct of its predecessor.

The Regional Court in Bratislava reviewed the decision issued by the AMO and decided to substantially reduce the fine originally imposed on Cargo (from 2,490,000 to c. 299,000 Euro). The Court confirmed the accuracy of the AMO’s use of the economic continuity test despite the lack of a clear legal basis for doing so. The Court stressed in particular that Cargo took over both material and legal assets of its predecessor and continued with the performance of the same economic activities.

Nevertheless, the Court decided to substantially reduce the fine. Above all, it referred to the fact that the sanction in this case did not fulfil a preventive function; the Court said that the AMO should have considered the fact that Cargo did not, in fact, participate in the illegal conduct for the whole duration of the abuse. The Court said, in essence, that it was necessary to consider the application of the economic continuity test as a quasi-mitigating circumstance in this case.

The conclusion reached by the first instance court is rather controversial. Does it mean that an undertaking can avoid responsibility or punishment by virtue of a mere structural change?

The AMO appealed the judgment to the Supreme Court of the Slovak Republic which changed the judgment of the Regional Court in Bratislava completely dismissing Cargo’s original appeal.

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6 According to EU jurisprudence, conditions to be met in this case are: 1) the new company continues the activity of the entity that has committed a violation, i.e. continuity of the economic activities of these two companies exists, and, 2) the original entity has ceased to exist. See judgments: joined cases 40-48, 50, 54-56, 111,113 and 114-73 Cooperatieve Vereniging Suiker unie UA (SU) and others v Commission, ECR [1975] 1163; joined cases 29/83 and 30/83 Compagnie Royale Asturienne des Mines SA and Rheizink GmbH v Commission, ECR [1984] 1679; C-49/92 P Commission v Anic Partecipazioni SpA, ECR [1999] I-4125; joined cases C-204/00 P, C-211/00 P, C-217/00 P and C-219/00 P Aalborg Portland A/S and others v Commission, ECR [2004] I-00123.

7 The AMO followed the concept whereby undertakings cannot escape antitrust liability under national company law by simply restructuring, see e.g. Van bael & Bellis, Competition law of the European Community, Hague 2005, p. 39

Cargo was the first case where the European Commission submitted to a Slovak court its written observations on the applicability of Articles 101 and 102 TFEU. The Commission pointed out that the economic continuity test should be applied equally in all EU Member States. The effective use of this concept does not only translate into the finding of a successor’s responsibility for the activities of its predecessor, but also the ascertainment of its responsibility in extenso. The Commission noted also that there was a strong link between finding responsibility and imposing a fine and stated that the consideration of the application of the economic continuity test as the mitigating circumstance would render the application of EU competition rules effective.

The Slovak Supreme Court referred first to the jurisprudence of the Court of Justice of the EU regarding the nature and function of the economic continuity test. Surprisingly, it refused to deal with the statements and pleas submitted by Cargo in its reaction to AMO’s appeal (including pleas impugning the responsibility of Cargo for the illegal conduct, the liquidating character of the fine imposed etc.). The Supreme Court referred to the Roman law principle – vigilantibus iura scripta sunt. It pointed out that since Cargo did not appeal the decision of the Regional Court in Bratislava, it acknowledged its responsibility for the anticompetitive behaviour at hand. The Supreme Court suggested also that by decreasing the fine imposed, the Regional Court usurped for itself the competences of the administrative body. The first instance court did so, despite the fact that it did not properly reason its conclusions and did not present any new evidence with regard to its possible doubts.

The Supreme Court referred to the jurisprudence of the Court of Justice of the EU in the case C-150/94 United Kingdom v the Council of the European Union9 where it was stated that: ‘the Court cannot substitute its assessment for that of the Council as to the appropriateness or otherwise of the measures adopted, if those measures have not been shown to be manifestly inappropriate for achieving the objective pursued’.

The Slovak Supreme Court concluded that neither the principle of legitimate expectations, nor the principle of equal treatment, was breached by the AMO in its administrative proceeding. It pointed out that the competition authority respected the limits set upon it by both Slovak and EU law and thus there was no reason to impugn the discretion of the administrative body. According to the Supreme Court, courts should not review the accuracy of the discretionary powers awarded to administrative bodies; it should review only the conformity of its discretion with the law.

With respect to the amount of the fine imposed, the Supreme Court did not agree with the opinion of the Regional Court in Bratislava whereby the AMO unreasonably stressed its repressive function. It emphasized that the aim of sanctions is both prevention and repression. According to the Supreme Court, these two functions of administrative fines cannot be separated.

All this notwithstanding, the Constitutional Court of the Slovak Republic reversed in 2011 the said judgment of the Supreme Court due to procedural mistakes that were committed by the Supreme Court. The subsequent judgment of the Supreme Court issued in January 2012 constrains, however, the same wording as its earlier ruling in this case.

This case shows how the cooperation between national courts and the Commission may help in judicial reviews of competition law decisions, especially in new Member States, where the courts do not have sufficient experience with the application of EU competition law.

IV. Competences of the Slovak Antimonopoly Office in regulated sectors

The judgment of the Supreme Court of the Slovak Republic in case eustream, a.s. (hereafter, eustream), case no. 4Sžh 1/2010

This case concerned the judicial review of an AMO decisions concerning the abuse of a dominant position committed by eustream on the relevant market for the provision of connection services to the natural gas transmission network. The scrutinised abuse took the form of the use by eustream of an unfair trading condition. According to the AMO, eustream made connecting a distributional company to its transmission network conditional upon the sale of the connecting facility. The said abuse occurred when eustream and the distributional company negotiated a contract of connecting a distributional network of a distributional company to a transmission network. In order to connect to the transmission network, the distributional company built up a connecting facility on its own expenses. At the end of the negotiating process,
eustream laid the claim of the sale of the connecting facility. The distributional company accepted this condition in order to prevent damages that might have resulted from breaking its own contractual obligations in case the connection to the transmission network had not been realized.

In its judgment, the Regional Court in Bratislava dismissed the appeal action submitted by eustream and upheld the decision of the AMO. One of the key issues discussed in the judgment was the NCA’s competences in regulated sectors and the potential risk of breaching the _ne bis in idem_ principle by the parallel exercise of the powers of the competition authority and sector-specific regulator (hereafter, National Regulatory Authority, NRA). The court stated that unless a NRA takes a particular action or a legal provision exists which enables it to punish an undertaking for certain unlawful behaviours, it is not possible to refuse the competences of the AMO in regulated sectors. The court apparently followed the concept whereby no anticompetitive behaviour should remain non-punishable. In other words, according to the first instance court, the competences of the AMO in regulated sectors would be excluded in cases when an appropriate sector-specific rule exists (provision of the law or a particular action of the regulator) that can be enforced by the relevant NRA.

The Supreme Court of the Slovak Republic took a different stance and changed the judgment of the Regional Court annulling at the same time the original decisions of the AMO. By doing so, it opened the discussion on the exercise of the powers of Slovak competition authority in regulated sectors. Nevertheless, the Supreme Court dealt with this issue in light of the facts of the case at hand making it difficult to draw general conclusions from the judgment. It is, however, possible to see that the Supreme Court’s attitude towards the competences of the AMO was different to that shown by the first instance court. It is apparent, that the Supreme Court did not accept the interpretation of the Regional Court. It seems that according to the Supreme Court, it is sufficient to establish whether the law potentially enables a NRA to act in order to assess the existence of the AMO’s competences in regulated sectors. In the opinion of the Supreme Court, the fact that market behaviour can be adjusted by a given NRA excludes the competences of the AMO in that regulated sector.

It is worth noting that the competition authority disagreed with the opinions of both courts, be it the judgment of the Regional Court or the ruling of the Supreme Court. However, the approach of the first instance court is somewhat more acceptable. It is important in this context to pay attention to the jurisprudence of the courts of the European Union. According to latest EU judgments, the competences to act of NCAs cannot be excluded unless a given

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14 Judgment of the Regional Court in Bratislava of 30 June 2010 in case no. 2S/204/2008.
15 In Slovakia, it is the Regulatory Office For Network Industries.
regulator had directly obliged an undertaking to engage in anticompetitive behaviour and the ‘regulated’ undertaking did not have any other possibility than to comply with the obligations set out by that NRA\textsuperscript{16}.

It is indisputable that competition authorities and sector-specific regulators are both established to protect competition. However, unlike NCAs, the purpose of NRAs is the imposition of \textit{ex ante} rules in areas where competition does not work properly. By contrast, competition authorities prosecute \textit{ex-post} anti-competitive behaviour\textsuperscript{17}. Both entities have at their disposal different legal instrument to exercise their powers. A NRA cannot, for instance, sanction the abuse of a dominant position or competition restricting agreements. Nevertheless, the scope of sector-specific regulation often closely resembles that of competition law, especially with respect to margin squeeze, predatory prices etc. However, the two set of rules only exceptionally overlap to an extent that would exclude the exercise of parallel competences of the given NRA and NCA.

Whilst the conclusion of the Regional Court concerning the question of the competences of the Slovak competition authority may be disputable to some extent, the conclusions of the Supreme Court are not sustainable at all. It is simply not possible to accept the opinion that sole subordination of a particular industry sector to the supervision of a regulator would totally exclude the competences of the competition authority in this field. Such an approach would seriously jeopardize the effectiveness of competition law enforcement in regulated sectors.

\textbf{V. Nullum crimen sine lege – application of the so-called ‘general clause’}

The judgment of the Supreme Court of the Slovak Republic in case of \textit{Marianum-Pohrebníctvo mesta Bratislavy, príspevková organizácia} (hereafter, \textit{Marianum})\textsuperscript{18}, case no. 3Sžh/3/2010

The Supreme Court decided here on an appeal lodged by Marianum against a judgment of the Regional Court in Bratislava.

\textsuperscript{16} See e.g. the judgment of the Court of Justice of the EU in joined cases C-359/95 P and 379/95 P \textit{Commission v Landbroke Racing}, ECR [1997] I-6301.

\textsuperscript{17} \textit{OECD policy roundtables: Relationships between Regulators and Competition Authorities}, 1998 (available at http://www.oecd.org/dataoecd/30/38/38819635.pdf): ‘Competition policy is chiefly \textit{ex post} (merger review excepted) whereas regulation is primarily \textit{ex ante} and continuous. When regulation is applied, there will typically be a pre-supposition that market forces cannot be relied on to produce a satisfactory outcome and this cannot be rectified merely by trying to change firms’ incentives’.

Marianum is an organisation established by the municipality of Bratislava which provides cemetery and funeral services within this city’s territory. The Slovak competition authority found in 2008\(^{19}\) that Marianum was engaged in exclusionary practices by not allowing competing undertakers to provide certain funeral services in the premises of cemeteries and crematories managed by Marianum. Its competitors were excluded from providing services such as religious activities or funeral carrier services. Simultaneously, the dominant company was fund to have directly exploited consumers by imposing upon them unreasonable fees: a fee for the disposal of flower donations after a funeral and a fee charged to new tenants for the disposal of an old gravestone inside the cemetery compound.

It was not possible to subsume such conduct under any of the forms of abuse explicitly listed in the Slovak Act on the Protection of Competition (hereafter, Competition Act). For that reason, the AMO applied in this case the general provisions of the Competition Act that prohibit any abuse, the so called ‘general clause’\(^{20}\). The application of the general clause is based on the general idea that competition law is very a dynamic field of law – an explicit enumeration of abuse forms (or, in fact, of the forms of competition restricting agreements) would be unable to cover all the possible variations of unilateral anticompetitive behaviour\(^{21}\). The Regional Court in Bratislava rejected the action submitted by Marianum which sought the annulment of the decisions of the AMO but the Supreme Court reversed the first instance judgment.

The use of the general clause was central to the ruling of the Supreme Court which decided that punishing Marianum for breaching the general clause came into conflict with the *nullum crimen sine lege* rule. The Supreme Court stated that although it was possible to apply the general clause to anticompetitive behaviour, but it was at the same time not possible to impose a punishment for it. According to the Supreme Court, the application of the general clause amounts to the creation of a new form of competition law violation. In other words, when the AMO decides to apply the general clause, it creates, in

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\(^{19}\) Decision of the Council of the AMO of 19 December 2008 (no. 2008/DZ/R/2/113) in conjunction with the decision of the AMO of 30 June 2008 (decision no. 2008/DZ/R/2/113).

\(^{20}\) The general clause is set out in Section 8 of the Slovak Act on Protection of Competition concerning the abuse of dominance; it reads: ‘Abuse of a dominant position in the relevant market is prohibited’.

\(^{21}\) See e.g. D. Raus, R. Neruda, *Zákon o ochraně hospodářské soutěže, Komentář a související české i komunitární předpisy*, Praha 2006, p. 174: According to the authors, the construction of the provision prohibiting abuse based on the use of the general clause is indispensable. It is simply not possible to cover all types of anticompetitive behaviour by the strict enumeration of their merits since the insidiousness of such behaviour and complexity of its evaluation increases with time. See also K. Kalesná, O. Blažo, *Zákon o ochrane hospodárskej súťaže (komentár)*, Brno 2012, p. 47.
essence, the merits of a new infringement. The term “merits” means, in this context, the characteristics of a particular anticompetitive behaviour. The Supreme Court stated that ‘the proportionality rule requires that if the AMO is, on the one side, competent to create new merits of the abuse of dominant position on the basis of the general clause then the undertaking has, on the other side, the right to be acquainted with the merits of the anticompetitive behaviour which is forbidden’.

The conclusions of the Supreme Court raise many questions.

The wording of the provisions of the Slovak Competition Act has been constructed in accordance with the text of the Treaty on the functioning of the European Union. Other Member States have constructed their national provisions likewise on the basis of the demonstrative enumeration of prohibited anticompetitive behaviours contained in EU legal system. Truthfully, the general clause does not specify any particular characteristic of anticompetitive behaviours\(^{22}\). It simply stipulates that: ‘abuse of a dominant position is prohibited’. The general rule can thus be considered at first sight to be a kind of blank norm which makes it possible to punish almost any kind of unilateral behaviour.

It is indisputable that competition law is a comprehensive and complex legal field and that it is often subject to wide-reaching inquiries and assessments by competition authorities. It is also not always clear at the beginning of an investigation whether the scrutinised undertaking actually engaged in a prohibited practice. Still, competition law and policy are largely harmonised among EU Member States and individual NCA usually base their decisions on the jurisprudence of the Court of Justice of the EU and case law of the European Commission. True originality of anticompetitive conduct is therefore rather rare.

This realisation leads to another problem. The Supreme Court associated here the ‘originality of the case’ with the application of the general clause. It presupposed that when the AMO applied the general clause, it identified a completely new form of anticompetitive behaviour that had never been considered before. However, the correlation between originality and the use of the general clause does not have to be necessarily true and, in fact, did


‘(1) Abuse of dominant position to the detriment of other undertakings or consumers shall be prohibited’.
not exist in the given case. In the Slovak Republic, the need to apply the
general clause may arise, for instance, when the merits of an anticompetitive
behaviour expressed in the Competition Act simply do not reflect the nature
of the scrutinised practice. Such is the case with margin squeeze, for instance,
a restrictive practice considered before by many competition authorities,
including the European Commission. Margin squeeze is, however, hard to
classify as an unfair price practice, a form of abuse explicitly listed both in the
Slovak Competition Act and Article 102 TFEU.

The assertion must be supported therefore that when a seemingly new
anticompetitive behaviour is under consideration, it is necessary to assess it with
reference to its actual originality. It is reasonable, for instance, to significantly
reduce the fine imposed in such cases23. This approach goes in line with the
case law of the European Commission, which has sometimes decided to refrain
from the imposition of a fine, if the scrutinised case contained a ‘new element’
that had not been considered before24. This approach takes into account the
necessary predictability of the actions of competition authorities25.

VI. Bank cartel judgment

The judgment of the Supreme Court in case of Československá obchodná
banka, a.s. (hereafter, CSOB), case no. 5 Sžh/4/201026

The Supreme Court of the Slovak Republic decided here on an appeal
submitted by the competition authority against a judgment of the Regional

23 See e.g. the decision of the AMO in case ENVI-PAK.
24 e.g. decision of the Commission no. 93/438/EEC of 30 June 1993 (IV/33.407 – CNSD)
or case no. 96/438/EC of 5 June 1996 (IV/34.983 – Fenex). Cf. F. Dethmers, H. Engelen,
‘Fines under article 102 of the Treaty on the Functioning of the European Union’ (2011) 2
E.C.L.R. 96. Authors criticise therein the fact that companies have only limited success in
arguing against (high) fines on such grounds under the per se illegality approach under art.
102 TFEU. According to the authors, there are few cases where no fines were imposed due to
the novel nature of the abuse concerned, but such defence is only accepted under exceptional
circumstances when there is no precedent to which the case might be compared.
E.C.L.R. 577. According to the author, Article 102 TFEU is not drafted in clear, precise and
unambiguous language and therefore does not create legal certainty. However the author
stresses that the lack of clarity of a rule of law may to some extent be remedied by the
interpretation of the provision given by the courts. This can only apply to the situation in which
the undertaking knew or clearly should have known that such conduct might be unlawful and
that the undertaking could not reasonably be in doubt as to its dominant position.
26 Judgment of the Supreme Court of the Slovak Republic of 19 May 2011 (case no. 5 Sžh
4/2010).
Court in Bratislava, which annulled AMO’s decision concerning a cartel of three banks. The decision issued by the competition authority established the existence and operation of a competition restricting agreement between three banks (including CSOB). The contested practice allegedly consisted of an agreement on the termination and consecutive non-conclusion of new contracts on current accounts with the company AKCENTA CZ, a. s. The competition authority had at its disposal a variety of evidence in this case and based its decision on the existence of a meeting between the parties to the proceedings, e-mails that followed, and their conduct on the market.

The decision of the AMO was annulled by the Regional Court in Bratislava as well as the Supreme Court of the Slovak Republic. The particularity of the judicial review of this case is worth noting. Despite the fact that Slovak law enables the courts to assess in one proceeding all actions lodged against the same administrative decision, the legality of decisions issued by the competition authority in this case was reviewed in three independent proceedings, by both courts, on the basis of three different actions submitted by the parties. In fact, the AMO still awaits a Supreme Court ruling in the case of two banks.

Both courts arrived at the same conclusions during their proceedings namely that AKCENTA did not hold the licence for the performance of business activities on the foreign-exchange market of the Slovak Republic. The courts refused the AMO’s objections that the conduct of the plaintiff (as well as of the other banks) should have been seen as anticompetitive irrespective of the fact whether it was directed at an existing or potential market player. As opposed to the competition authority, the courts concluded that the realisation whether the contested practice was directed against an entity that conducted its business in the Slovak territory legally, and thus enjoyed legal protection for its business, was of relevance to the assessment of the anticompetitive nature of the banks’ behaviour. In the opinion of the courts, the scrutinised banks had the right to eliminate such an activity. The courts did not accept the objections of the competition authority that the aim of its activities is not to protect particular undertakings but the competition process overall. In the AMO’s view, the conclusion cannot be accepted that the banks had the right to eliminate a company which had been operating unlawfully by way of their own anticompetitive behaviour.

The AMO stressed that the National Bank of Slovakia did not issue a decision finding that AKCENTA’s operations on the foreign-exchange market were illegal in the period when the agreement was concluded (and AKCENTA’s accounts cancelled). The courts replied that the AMO had not

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27 Decision of the Council of the AMO no. 209/KH/R/2/054 of 19 November 2009 in conjunction with the decision of the AMO no. 2009/KH/1/1/030 of 9 June 2009.
28 The Regional Court in Bratislava annulled the decision of the AMO in all three cases.
proven that the said company had in fact operated in the territory of the Slovak Republic legally, that is, that it had indeed held a licence for the performance of the contested activity.

The issue of the illegality of AKCENTA’s business operation is especially interesting from the point of view of an anticompetitive object and/or effect. The agreement subject of the decision of the AMO was a multilateral practice which had as its object the prevention, restriction or distortion of competition. According to the jurisprudence of the Court of Justice of the EU, it is unnecessary to consider the actual effects of an agreement if it is apparent that it has an anticompetitive object. The distinction between infringements by object and infringements by effects arises from the fact that certain forms of collusion can be regarded as being injurious to the proper functioning of normal competition by their very nature. These agreements are prohibited per se, even when they are directed against only a ‘potential’ market player. Making a distinction between ‘legal’ and ‘illegal’ market players would distort the perception of economic reality. Public enforcement of competition law is not intended to protect particular competitors, but the competition process as such.

The question of the illegality of AKCENTA’s activities has proven crucial to the remaining proceedings concerning the actions of the rest of the alleged participants of the anticompetitive practice. The Supreme Court of the Slovak Republic has recently brought this question to the Court of Justice of the EU expecting a preliminary ruling to resolve the original case. Interestingly,

29 See R. Whish, *Competition law*, 5th edition, London 2003, p.110: ‘The word ‘object’ in this context means not the subjective intention of the parties when entering into the agreement, but the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied’.


31 C-209/07 Beef industry Development and Barry Brothers, ECR [2008] I-8637, para. 17, See also R. Whish, *Competition law*, p. 11.: ‘The classification of an agreement as having as its object the restriction of competition means that the parties, for example to a price-fixing agreement, cannot argue that the fixing of prices does not restrict competition: the law has decided, as a matter of policy, that it does...’.

32 Case no C-68/12, Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky (the Supreme Court of the Slovak Republic), lodged on 10 February 2012 – Slovenská sporiteľňa, a.s. v Protimonopolný Úrad Slovenskej Republiky (the AMO).

Questions referred:

Is Article 101(1) TFEU (formerly Article 81(1) EC) to be interpreted as meaning that it is of legal relevance that a competitor (trader) adversely affected by a cartel agreement between other competitors (traders) was operating on the relevant market illegally at the time when the cartel agreement was concluded?

For the purposes of interpreting Article 101(1) TFEU (formerly Article 81(1) EC), is it of legal relevance that, at the time when the cartel agreement was concluded, the legality of that
one of the questions submitted by the Slovak court concerned the relevance of the fact that when the scrutinised practice was concluded, the legality of AKCENTA’s activities was not impugned. Awaiting a preliminary ruling, the proceedings before the Slovak Supreme Court are pending33.

**VII. Infringement of a decision prohibiting a concentration**

The judgment of the Supreme Court in case of *Phoenix – medical supply, a.s.* (hereafter, *Phoenix*), case no. 1 Sžhpú 4/200834

In 2005, the Slovak competition authority imposed a fine amounting to c. 1 000 000 Euro on two undertakings, Phoenix and Biama, for their non-compliance with an earlier decision prohibiting their merger35. The AMO considered the conduct of these two undertakings to be a serious offence, and thus imposed such a large fine. Both companies acted on the same relevant market for the wholesale distribution of pharmaceuticals and medical instruments. The merger would have led to the creation of a dominant position on the relevant market.

The Regional Court in Bratislava reviewed the decision of the AMO and by its judgment36 substantially reduced the fine (from 1 000 000 to c. 16 600 Euro.) Pursuant to the Court, the fine originally imposed was too repressive. The competitor’s (trader’s) conduct was not called in question by the competent supervisory bodies in the Slovak Republic?

Is Article 101(1) TFEU (formerly Article 81(1) EC) to be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is necessary to demonstrate personal conduct on the part of the representative authorised under the undertaking’s constitution or the personal assent, in the form of a mandate, of that representative, who has (or may have) taken part in that agreement, to the conduct of one of the undertaking’s employees, where the undertaking has not distanced itself from the conduct of that employee and, at the same time, the agreement has even been implemented?

Is Article 101(3) TFEU (formerly Article 81(3) EC) to be interpreted as also applying to an agreement prohibited under Article 101(1) TFEU (formerly Article 81(1) EC) which by its nature has the effect of excluding from the market a specific individual competitor (trader) which has subsequently been found to have been carrying out foreign currency transactions on the cashless payment transactions market without holding the appropriate licence as required under national law?

33 See also: M. Nosa, ‘Vec AKCENTA CZ, alebo dokazovanie kartelu’ (2011) 1 Antitrust 32–37.
34 The judgment of the Supreme Court of the Slovak Republic of 25 January 2011.
Court concluded that the fine fulfils both preventive and repressive functions. According to the Court, the authority focused on the latter purpose only.

The Supreme Court did not agree with the conclusions of the Regional Court in Bratislava and upheld the fine originally imposed by the AMO. Its judgment is particularly interesting in terms of the scope of the powers of the court when reviewing administrative decisions. The Regional Court acted in accordance with the provisions of the Civil Procedural Code. Aside from upholding or annulling an administrative decision, the Civil Procedure Code empowers the courts to change the amount of fines imposed in administrative proceedings.

Nevertheless, the Supreme Court of the Slovak Republic stated that a court should not assess the expediency and suitability of an administrative decision. When reviewing it, courts should only examine whether the decision did not go beyond its legal limits, whether it complied with the rules of logical thinking and whether it was based on comprehensive information collected by appropriate procedures. If these conditions are met, courts should not draw from the same circumstances different or contrary conclusions to those of the administrative body.

The Slovak judicial review system of administrative decisions was traditionally based on the cassation principle – courts did not have the power to change administrative decisions; they could only annul them or dismiss the action of the claimant (i.e. uphold the decision of the administrative body). The requirements of Article 6 of the European Convention on Human Rights led to the creation of a new power for the courts when reviewing decisions of administrative bodies, such as the AMO. Since 2002, Slovak courts have thus the right to change the amount of the fine imposed on the parties of administrative proceedings. When reviewing administrative decisions, courts usually base their analysis on facts established by the administrative body. However, they can consider new evidence if necessary in order to review an administrative decision.

This raises questions as to the role of the courts when reviewing administrative decisions. Do they have the power to replace administrative bodies in the fulfilment of their functions?

Taking into consideration all aspects of the administrative justice system, the most satisfactory conclusion to arrive at is that the role of the relevant authorities, such as the AMO, should be preserved. The purpose of judicial review should not replace the functions of administrative bodies. Instead, courts should solely examine if the authorities adhered to the corresponding laws. Since full jurisdiction should be understood in the context of the role of the competition authority has to play, courts should explore new evidence only exceptionally and only if it is of sufficient importance. It is hard to imagine
the judiciary resolving issues such as relevant market definition\textsuperscript{37}, for instance. In such cases, courts should simply ensure that administrative bodies conduct properly the fact-finding process\textsuperscript{38}. This opinion complies with the judgment of the Court in the Phoenix case where it was said that courts could not interfere with the discretion of administrative bodies when assessing particular cases.

VIII. Conclusions

It follows from the jurisprudential review above that when it comes to the application of competition rules, Slovak courts often diverge from the European decision-making practice.

Even after 20 years of the functioning of the market economy, competition rules are often viewed as a new element in the Slovak legal order. This may be partly caused by the specific character of competition law, the most important attribute of which is its dynamic character which enables it to cover most anticompetitive market practices. In order to do so, competition law is based on a limited number of sparse written rules that are subject to extensive jurisprudential interpretation. Competition law is also characterised by the increasing use of economic evidence. Both the dynamics and economisation of competition law may conflict the nature of the Slovak legal order which is traditionally based on comprehensive written rules and where jurisprudence is not considered to be a legal source (this conflict was evident, for instance, in the Marianum judgment).

Judgments such as the Railway Company Cargo and the Phoenix Biama case show that it is necessary, above all else, to clarify the relationship between the role of the Slovak competition authority and the role of national courts when assessing competition cases.

It appears also that coherent application of competition law within the EU requires closer cooperation between Slovak courts and the European Commission as well as between national judiciary and the AMO. This

\textsuperscript{37} This concept resembles the concept of the scope of judicial review of administrative decisions in the EU developed by the jurisprudence of the Court of Justice of the EU. Accordingly, as far as the complex economic assessment of the Commission are concerned, EU courts are confined to verifying if the rules on procedure and on statement of reasons were complied with, whether the facts have been accurately stated and if a manifest error of appraisal or misuse of power occurred (see joined cases C-204/00P, C-205/00P, C-213/00P, C-217/00P and C-219/00P Aalborg Portland v Commission) in: F.O.W. Vogelaar, The European competition rules, landmark cases of the European Courts and the Commission, 2nd ed., Groningen 2007, p. 341.

\textsuperscript{38} See also S. Šramelová, T. Britvík, ‘Plná jurisdikcia súdov pri preskúmavaní správnych rozhodnutí’ (2010) 6–7 Justičná revue 819–827.
cooperation may be based on informal discussions on contentious issues or on the organization of workshops and training courses in the field of competition law. Whichever way is used, active participation of both Slovak judges and AMO representatives is vital to its success. This may help intensify informal dialogue on the most controversial competition law issues and deepen the understanding of the entire competition law field.

**Literature**

Dethmers F., Engelen H., ‘Fines under article 102 of the Treaty on the Functioning of the European Union’ (2011) 2 *E.C.L.R.*


Nosa M., ‘Vec AKCENTA CZ, alebo dokazovanie kartelu’ [‘Case AKCENTA CZ, or on proving a cartel’] (2011) 1 *Antitrust*.


Universal Service Obligation and Loyalty Effects: 
An Agent-Based Modelling Approach

by

Dilyara Bakhtieva and Kamil Kiljański*

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I. Introduction
II. Choice of methodology
III. Model specification
IV. Main results
V. Conclusions

Abstract

In network industries, a Universal Service Obligation (USO) is often seen as a burden on an incumbent, which requires compensation for the net cost of such service provision. This paper estimates the effects of consumer loyalty as an intangible benefit of USO in the postal sector. In doing so, the agent-based modelling (ABM) approach is applied, which makes it possible to model the behaviour of boundedly rational consumers and is thus particularly appropriate for taking into account intangibles considerations. The analysis shows that loyalty is crucial to whether the USO uniform pricing constraint results in loss-making or profitability. Under certain conditions and in the presence of a loyalty parameter, uniform pricing gives a USO provider an advantage, when the size of the rural area is sufficiently big and a disadvantage, if its size is too small. This finding is counterintuitive as USO providers in countries with sparsely populated areas are typically expected to incur a significant net cost of USO.

* The authors are officials at the European Commission in Brussels. The expressed views are strictly their own. We thank two anonymous referees for their comments.
Résumé

L’obligation de service universel (USO) est souvent perçu par les industries de réseau comme un charge sur le fournisseur historique ce qui nécessite une compensation pour le coût net d’un tel fourniture de service. Cet article évalue les effets de la fidélité des consommateurs comme un avantage intangible de l’USO dans le secteur postal. Par cela, la modélisation multi-agents (GPA) est appliquée, ce qui permet de modéliser le comportement des consommateurs à rationalité limitée et qui est donc particulièrement approprié pour la prise en compte des considérations intangibles. L’analyse montre que la fidélité est essentielle pour savoir si la contrainte de prix uniforme de l’USO aboutit à la perte de décision ou de rentabilité. Sous certaines conditions et en présence d’un paramètre de fidélité, la tarification uniforme donne à un fournisseur de l’USO un avantage, lorsque la taille de la zone rurale est suffisamment grande et un inconvénient, lorsque sa taille est trop petite. Ce résultat est contre-intuitif, car on attend généralement que les fournisseurs de l’USO dans les pays ayant des zones peu peuplées encouragent un coût net important de l’USO.

Classifications and key words: agent-based modelling; liberalisation of the postal markets; postal sector; Universal Service Obligation (USO); USO provider.

I. Introduction

A Universal Service Obligation (hereafter, USO) is often seen as a burden on an incumbent, which requires compensation for the net cost of such service provision. The question of the net cost of USO is relevant to all network industries, but the debate is at its most heated when discussing the postal sector. This is because the provision of postal services in sparsely populated areas – often combined with high delivery frequency – is typically seen as a significant cost for the operator as opposed to its overall revenues. The gradual phasing out of letter weight-based reserved areas was motivated by the perceived net cost of USO. Such monopoly rents were seen as a necessary, albeit implicit, form of subsidy for the cost of USO. With the liberalisation of the postal markets, this mechanism was replaced by a right for USO providers to (e)mail an invoice for the net cost of this service to the relevant regulator, seeking its review and, eventually, due compensation1. The significance of USO costs in the sector is lately exacerbated by decline in postal demand, largely due to the increasing use of electronic communication.

Academic literature has traditionally focused on the issue of cost allocation between USO and the remaining ‘commercial’ services of a USO provider\(^2\), placing lesser emphasis on the calculation of the benefits of USO to the incumbent\(^3\). Barkatullah (2002) et al and London Economics (2002) speak of demand complementarities (between USO and non-USO or even non-postal products) as a benefit of USO. In the same study, London Economics (2002) analyses economies of scale and scope for a multiproduct USO provider. In order to account for the benefits of USO on the supply side, another approach associates a monetary value with intangible assets such as: the commercial value of advertising space on postal outlets and fleets (Postcomm, 2001); contingent valuation/surveying of the value of a USO provider’s brand; corporate reputation in general (Burns et al, 2002).

The uniform pricing requirement – often an explicit component of USO – is rarely discussed in the context of USO benefits. Instead, it is seen as a burden imposed on the incumbent that facilitates selective entry (‘cherry-picking’) by new operators. ‘Menu costs’, and the related lowering of transaction costs, are the only mechanism through which uniform pricing has been considered as a USO benefit so far (London Economics, 2002).

In this paper, uniform pricing plays a role in terms of loyalty and for that reason can also be also hypothesised as an intangible benefit of USO. The analysis will commence with the presentation of the reasons for choosing the agent-based modelling approach for this analysis followed by an overview of its specification. The paper will continue on to present its main results and conclude, in the last section, with regulatory implications and suggestions for future research.

II. Choice of methodology

Agent-based modelling (herefater, ABM) is a relatively new approach to the simulation of complex systems. Agent-based modelling has a unique and very useful feature – instead of investigating the dynamics of an entire system, it assumes the perspective of its individual agents. It then studies the results


\(^3\) Strictly speaking, USO does not have to be vested with the incumbent but so far postal USO has never been offered to a new entrant or even put up for a tender in any EU member state.
of their interactions that often cannot be analytically inferred from individual behavioural rules. The starting point of an ABM simulation is defined as: the agents and theory of their behaviour; the rules governing the relationships and interactions between agents and; agent-related parameters (Macal and North, 2005).

When applied to social sciences, agents usually represent people or groups of people (e.g. firms or regulatory bodies). Formally, agents are described by means of their attributes which include: personal characteristics, location, or preferences and behaviours (i.e. decision-making algorithms). Among the advantages of ABM lies the fact that agents do not need to be defined as rational or to possess ‘representative’ characteristics, as is the case in traditional equilibrium-based modelling approaches. Agent-based modelling simulations are characterised by their flexibility because attributes and behaviours may vary across agents within the same model, as well as change during the simulation as a result of a ‘learning process’.

Recent advances in computer science made ABM a powerful tool for simulations and forecasts, with direct applications in network industries. Telecommunications and postal markets are promising fields for the use of ABM given, on the one hand, their complexity and on-going structural changes and, on the other hand, important regulatory implications of their analysis. The postal sector, in particular, has traditionally been monopolised and was only very recently opened to competition. To date, there is not enough reliable empirical data for a traditional economic analysis, as there is limited market entry and hardly any competition in the provision of USO products. Postal markets are also highly dependent on individual preferences, network effects and interactions, making simulations one of the suitable tools for making predictions and reasoning ex-ante regulatory decisions. Another reason for applying ABM in this context is that intangible benefits are inherently difficult to capture with standard analytical tools such as account calculations, for example, or equilibrium-based economic models.

In this paper, the ABM method is applied to analyse the relationship between USO and profitability in a postal market open to competition. For that purposes, focus is placed on the demand side of the market, which eventually determines market shares and profitability of postal operators. The agents considered here represent a population of consumers defined by: their location (urban or rural area); the operator currently used (Incumbent or Entrant); loyalty to the current operator; price elasticity and; accumulated

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4 Behaviour resulting from a series of individual interactions is referred to as ‘emergent’.
5 For example, EMCAS, a large-scale simulation model of the electric power market, was designed and used for regulatory purposes by the Illinois Commerce Commission (Cirillo et al., 2006).
past utility with each of the operators, remembered for a certain number of individual time periods (e.g. months). The flexibility of ABM makes it possible to assume that consumers are boundedly rational and not perfectly informed – present decisions are based on past experiences with each of the operators. This assumed behaviour seems to reflect reality well. It would be unrealistic to assume that postal consumers are perfectly informed of existing postage prices or can calculate them as a function of location of their recipients, and that they solve an optimisation problem each time they send a piece of mail.

III. Model specification

A stylised model of competition in the postal sector is applied here, with an Incumbent initially serving the whole market and an Entrant competing for market share. The market is assumed to be geographically divided into two broad segments, called for simplicity, ‘urban’ (with lower costs of service provision) and ‘rural’ (with higher costs). The cost structure and the proportion of each segment in the total market (by number of consumers) are known. Both operators are in principle able to deliver throughout the entire geographical market. The cost functions are assumed to be identical for both operators.

For the purpose of this analysis, only one stylised type of mail is considered and service quality is assumed to be identical for both operators. From the point of view of consumers, the services provided by the two competing operators are thus only different in terms of price.

The Incumbent is assumed to be the ‘Universal Service Provider’, i.e. guaranteeing the provision of postal services of a certain pre-defined quality throughout the entire geographical area. Additionally, the obligation is assumed to include uniform pricing, i.e. the same price of delivery to the rural and to the urban area. By contrast, the Entrant is not bound by uniform pricing, a fact which seems to immediately provide him with a competitive advantage.

Nevertheless, this model takes into account the effect on market outcomes of consumer ‘loyalty’. It is assumed here that consumers are boundedly rational and do not solve the standard optimisation problem each time they use postal services. Instead, they remember their past utilities, obtained with each of the operators, for a certain time period (e.g. several months) and base their current decisions on these accumulated experiences. As shown below, this assumption alone can significantly change the results achieved by the two postal operators both in terms of market share and profit.
It needs to be noted that ‘loyalty’ is not understood here as a fixed preference for a given brand but as a tendency to consistently use the same postal operator, changing over time and resulting from positive experiences with its services accumulated in the past. Moreover, to reflect reality better, some randomness is introduced in determining customer preferences, i.e. a service provider may occasionally be chosen by chance, even if the other operator performed better in the past. Additionally, ‘loyalty’ is fully symmetric between the Incumbent and the Entrant, i.e. both can profit from the decision-making inertia of consumers.

At the beginning of each time period (e.g. each month), consumers send mail to each other with a certain predefined probability. Mail can be sent to ‘urban’ or ‘rural’ areas, with probabilities depending on the proportion of recipients living therein. Consumers choose a postal operator each time according to the following rules:

- At the beginning of period 1, all consumers are served by the Incumbent.
- At the end of each subsequent period \(i\), consumers calculate their utility from the postal service (if they used it), which is:

\[
U^i_{\text{incumbent}} = r - p^I,
\]

if the consumer is served by the Incumbent, and

\[
U^i_{\text{entrant}} = p r_{\text{rural}} (r - p^{E\text{rural}}) + (1 - p r_{\text{rural}})(r - p^{E\text{urban}}),
\]

if the consumer is served by the Entrant, where:

- \(r\) is a constant ensuring the ensuing utilities at least to equal the reservation utility of consumers;
- \(p^I\) is the uniform price charged by the Incumbent;
- \(p^{E\text{rural}}\) and \(p^{E\text{urban}}\) are the prices charged by the Entrant in rural and urban areas respectively;
- \(pr_{\text{rural}}\) is the proportion of consumers living in the rural area.

In this model, two types of consumers are considered: those with zero price-elasticity who send mail every time they need to, irrespective of the price of such service and; the ‘price-elastic’ ones who can refrain from sending mail if they consider the price to be too high (above some pre-set reservation value). In reality, the latter category can be thought of as consumers having access to alternative means of delivery such as e-mail, for instance. In this simulation, the proportion of ‘price-elastic’ consumers is assumed to be quite high (70%).

The utility obtained from sending mail with either of the operators is remembered for a predefined number of periods (e.g. months), weighted according to how recent they were:
Here $m$ is the pre-defined memory span of consumers; $V_i^I$ and $V_i^E$ are the accumulated utilities with the Incumbent or the Entrant for the last $m$ periods up to period $i$. While $i < m$, only $i$ past utilities are included.

At the beginning of each time period, consumers review their accumulated utilities and on this basis determine their 'loyalty' level to the current operator, that is, they 'calculate' the probability of switching to another operator. This probability is modelled here according to the logistic distribution density function. The logistic probability distribution was chosen as an approximation, widely used in social sciences, for example, to model the learning processes as well as many other aspects of human behaviour (e.g. Modis, 1992). After calibration, the density function parameters were fixed at $\mu = 0$ and $s = 3$. However, these values are not restrictive in terms of the qualitative outcomes below. The probability of switching is:

$$L_i = \frac{1}{1 + e^{-\frac{x_i}{s}}} ,$$

where $x_i$ is the difference between accumulated utilities obtained with the Incumbent and the Entrant in the last $m$ periods, i.e.:

$$x_i = V_i^E - V_i^I ,$$

if the Incumbent is currently used;

$$V_i^I - V_i^E ,$$

if the Entrant is currently used.

If sending mail, consumers switch in period $i + 1$ to another operator with probability $L$ (1 – L is, therefore, consumers’ loyalty to the current operator). The process continues for a certain number of periods (usually, several years), fixed in advance.

As for the price setting mechanism of postal operators, some bounded rationality is assumed to exist as well. Operators cannot solve the optimization problem for prices each and every time (as the demand function is unknown in
advance), they maximize profits locally by adjusting their prices in the ‘trial and error’ process. In fact, in order to benefit from the inertia in consumer loyalty, operators change prices with a certain delay. More precisely, at the beginning of the first period, both the Incumbent and the Entrant set their prices slightly above marginal costs of delivery. For the Incumbent, the price is uniform and is based on the average marginal cost between the rural and the urban area. In the subsequent periods, with a certain interval (e.g. every five periods in the simulations below), both operators review their prices and change them by a certain predefined amount. The direction of the change is determined by the previous results in terms of profit (profit is defined in a standard way and depends on total demand, prices and costs). If the average profit in the current interval is lower than the average profit in the previous interval, the direction of the change is reversed. Otherwise, both operators change their prices in the same direction as long as the profit is non-decreasing. Additionally, the Incumbent’s price is limited from above by the pre-set regulatory ceiling.

It is assumed here that the cost structure is as follows: service costs in the urban and the rural area are both fixed; they are higher in the rural area. Variable (per item) costs are higher for the rural area as well. These costs, as well as the initial values for delivery prices, were chosen arbitrarily on the assumption that only their relative values matter for the below outcomes.

Specifically, the following parameters were used in all the following simulations:

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population size</td>
<td>1000</td>
</tr>
<tr>
<td>Number of periods</td>
<td>100</td>
</tr>
<tr>
<td>Probability of sending mail in each period (equal for all consumers)</td>
<td>0.8</td>
</tr>
<tr>
<td>Proportion of ‘price-elastic’ consumers</td>
<td>0.7</td>
</tr>
<tr>
<td>Constant ( r ) in the utility function of consumers</td>
<td>6</td>
</tr>
<tr>
<td>Fixed costs in the rural area</td>
<td>200</td>
</tr>
<tr>
<td>Fixed costs in the urban area</td>
<td>100</td>
</tr>
<tr>
<td>Variable per-item cost of delivery to the rural area</td>
<td>3</td>
</tr>
<tr>
<td>Variable per-item cost of delivery to the urban area</td>
<td>1</td>
</tr>
<tr>
<td>Incumbent’s uniform price start value</td>
<td>3</td>
</tr>
<tr>
<td>Entrant’s price in the rural area start value</td>
<td>4</td>
</tr>
<tr>
<td>Entrant’s price in the urban area start value</td>
<td>2</td>
</tr>
<tr>
<td>Reservation price for price-elastic consumers</td>
<td>5</td>
</tr>
<tr>
<td>Initial loyalty to the Incumbent</td>
<td>0.5</td>
</tr>
<tr>
<td>Step for price changes</td>
<td>0.2</td>
</tr>
<tr>
<td>Number of periods with unchanged price</td>
<td>5</td>
</tr>
</tbody>
</table>

**Figure 1. Parameters used in the simulations.**
It is clear that with the above starting prices, the Incumbent provides higher utility to consumers sending mail to the rural area. On the other hand, using the Entrant is beneficial when sending to the urban segment. Intuitively, given the assumptions of this model, this should form a positive perception of the Incumbent when consumers often send mail to the rural area. It follows that in terms of market share, the Incumbent benefits from the larger size of the rural area. This relationship is investigated in more detail below.

IV. Main results

The results of the following simulation demonstrate these effects for the population of 1000 consumers, spanning 100 time periods (e.g. 100 months, meaning approximately eight years). At first, it is assumed that the rural segment occupies half of the geographical area to be served. To see the effect of consumer loyalty on market outcomes, it is first assumed that consumers are not able to remember their past experiences, that is, they are indifferent to the two operators at the beginning of each period. The simulation with a zero memory span results in the following distribution of market shares and profits:

Figure 2. Market shares and profits of postal operators when rural and urban areas are equal, and consumers’ memory span is 0.
It can be immediately observed that the evolution of market shares in this case is totally random. This is explained by the fact that consumers make no reference to their past experiences when choosing which operator to use. Moreover, as at the beginning all consumers are served by the Incumbent and have little incentive to switch, the Incumbent tends to keep a higher market share and, with the assumed cost-price structure, tends to enjoy superior profits.

When consumer loyalty is introduced into the model but keeping the same geographical division, the situation does not change significantly. What happens, however, if it is assumed that consumers are able to memorise their experience for 10 subsequent periods? The simulation, with other parameters unchanged, now yields the following results:

![Graph showing market shares and profits of postal operators when rural and urban areas are equal, and consumers’ memory span is 10 periods.](image)

**Figure 3.** Market shares and profits of postal operators when rural and urban areas are equal, and consumers’ memory span is 10 periods.

Although market shares evolve more systematically in this model, the two operators tend to perform at the same level. Indeed, given that the Incumbent gives better service experiences in the rural area and the Entrant in the urban segment and that the two areas are of equal size, both operators provide on average the same experiences to their consumers, who are therefore equally loyal to both operators.
As discussed above, the scale of the importance of consumer loyalty changes, intuitively, depending on the respective size of the rural area. That relationship is investigated in more detail below. When the size of the rural area is relatively large, the Incumbent enjoys an obvious competitive advantage. For example, let’s assume that the share of the rural area is 80% and the memory span of consumers is, as before, 10 time periods (e.g. months):

The outcome is now very different. The Incumbent gains a steadily superior market share and also enjoys, after a certain point (around 20 months), a significant advantage in terms of profits. Moreover, running several simulations with different parameters, it can be concluded that the Incumbent starts to enjoy some competitive advantage when consumers can only recall one period back, the exact effect depending on the simulation parameters including the importance associated by consumers with the last memorised utility.

Importantly, the above result is only due to the change in the size of the rural area. To stress this result, let’s assume now that the proportion of the rural area is very small (20%). The situation reverses: the Incumbent clearly loses market share to the Entrant and faces a significant disadvantage in terms of profits:

Figure 4. Market shares and profits of postal operators when rural area occupies 80%, and consumers’ memory span is 10 periods.
The profits of the Incumbent eventually fall lower than those of the Entrant, although the urban segment (where the Incumbent’s uniform price is higher than the Entrant’s urban price), accounts for 80% of the market. As before, this is due to the loss in the Incumbent’s market share, which occurs because the Entrant persistently performs better in the urban sector, which is very large in this simulation.

Although it is generally believed that the larger the loss-making segment, the greater the competitive disadvantage imposed by uniform pricing, the backward-looking nature of consumer demand may inverse this relationship in this model. The Incumbent enjoys a competitive advantage due to consumer loyalty unless the size of the rural area is too small, in which case the uniform price is a disadvantage.

It needs to be noted that the above simulations assumed that uniform prices allow the Incumbent to cover its marginal costs in both geographical areas. Restricting regulatory conditions further, what would happen, however, if the Incumbent is forced by the uniform price ceiling to serve both areas at its average marginal cost (i.e. at a loss, taking into account the fixed costs incurred)? Running the simulation with the rural area accounting for 80% of the market, the following results can be observed:
Figure 6. Market shares and profits of postal operators when rural area is 80% of the total, consumers’ memory span is 10 periods, and rural area is loss-making.

As before, the Incumbent’s market share is steadily increasing and eventually covers almost the entire market. However, the Incumbent is clearly suffering a loss in each period, due to serving a significant part of the market at a below-marginal-costs price. In this case, although advantageous for consumers who clearly prefer to be served by the Incumbent throughout the entire geographical area, uniform pricing hurts the Incumbent and needs to be compensated accordingly. Moreover, the Entrant who cannot compete on these restrictive terms eventually loses market share to the Incumbent and is forced out of the market. The total welfare effect of the uniform pricing in this case is, therefore, ambiguous, but most probably negative.

However, it is possible to find a size of the rural area that allows the Incumbent to do both: gain market share and enjoy positive economic results even under restrictive pricing conditions. For example, let’s assume that the size of the rural segment is 55% (Figure 7).

The rural segment is now big enough to allow the Incumbent to gain a significant market share without the rural area being too big, however, to hinder its profitability. At some point, the Incumbent’s profits become equal to, or even slightly higher, than those of the Entrant. In other words, a rural area of a particular size allows the Incumbent to have a competitive advantage due to consumer loyalty. However, as shown before, if the size of the rural segment
Figure 7. Market shares and profits of postal operators when rural area is 55% of the total, consumers’ memory span is 10 periods, and rural area is loss-making.

It is worth plotting this relationship for the parameters above and for the size of the rural area increasing from 0 to 100%. Figures 8 and 9 below show the Incumbent’s advantage in terms of average market share and total profits over 100 time periods depending on the size of the rural area.

Figure 8. Incumbent’s advantage over Entrant in terms of market share as a function of the rural area size.
In other words, even under restrictive pricing conditions, the loss-making segment does not constitute for the Incumbent a competitive disadvantage \textit{a priori} and, for that reason, does not call for compensatory regulatory intervention merely because of its existence. Empirically, the exact size of these effects and the breakpoint size of the rural area certainly need to be estimated on a case-by-case basis. While the results above were obtained with arbitrary parameters and cannot be readily used for regulatory decisions, they have shown that the relationship between consumer loyalty and the size of the area with high service costs is crucial for the welfare analysis of USO.

\section{Conclusions}

The above simulation results show that consumer loyalty is a crucial factor for the profitability of postal operators. Moreover, consumer loyalty can provide an incumbent with a competitive advantage, even when forced – through uniform pricing constraint – to operate unprofitably in some areas. These results are counter-intuitive, as it is generally believed that the larger the loss-making segment, the bigger the competitive disadvantage imposed by uniform pricing is. The backward-looking nature of consumer demand, assumed in the above model, inverses this relationship. Due to consumer loyalty, an incumbent enjoys a competitive advantage unless the size of the loss-making area is not big enough to form a positive perception, or indeed, if it is too big to allow for overall profitability.

When discussing policy implications, however, it is important to be prudent. There are limits to the predictive and prescriptive abilities of ABM (discussed e.g. in Twomey and Cadman, 2002). While the ABM method undoubtedly...
provides useful qualitative insights, the exact impact of specific policy changes cannot be conclusively predicted without further refinements to the model. First of all, identifying the rules governing individual behaviour is in itself a complex task, often involving arbitrary assumptions. To some extent, this problem can be solved by testing different calibrations of the above model, which this paper has partially done. Second, in order to closely reflect reality, ABM simulations should be based on adequate empirical data in terms of defining individual rules as well as specifying relevant parameters.

What recommendations can be made, therefore, for further research? First, at least partial empirical estimation of the parameters used in the above model could improve its robustness and predictive ability. Second, further calibration refinements could be made. The model is flexible enough to allow for different kinds of extensions (e.g. ‘business’ and ‘retail’ customers, or different kinds of services). Moreover, interactions between consumers, such as synchronisation of decision-making or knowledge sharing, could be introduced. Finally, the issue of which mechanism is preferable for compensating the net cost of USO was left beyond the scope of this analysis. One could extend it to, for example, the implications of different ways of compensation or to a bargaining process over the net cost between a USO provider and the respective regulatory authorities.

**Literature**


To regulate or not to regulate? – Economic Approach to Indefeasible Right of Use (IRU)

by

Magdalena Olender-Skorek*

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Abstract

The aim of this paper is to present an Indefeasible Right of Use (IRU) as a possible remedy for telecom infrastructure EU projects that (in Poland) have been lagged behind the time. Thanks for IRU, Beneficiaries of these EU projects will be able to save both: time and money and will finish projects successfully. The author discusses two possible methods of implementing IRU: via regulatory obligation and via incumbent’s goodwill. The author proposes a game theory model with payoffs depending on regulator’s and incumbent’s strategies. Using a game theory tree, the author shows that if only the incumbent is willing to offer his own network, IRU may be signed and most delays in EU projects disappear. The success is not so obvious while implementing IRU as an obligation – in this case EU projects will probably fail.

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Résumé

Le but de cet article est de présenter le droit irrévocable d’usage (IRU) comme un remède possible pour les projets d’infrastructure de télécommunications de l’UE qui, en Pologne, ont été lancés avec du retard. Grâce à l’IRU, les bénéficiaires de ces projets européens seront en mesure d’épargner à la fois le temps et l’argent pour terminer des projets avec succès. L’auteur décrit deux méthodes possibles de mise en œuvre de l’IRU: par l’obligation réglementaire et par le bias de bonne fois de l’opérateur historique. L’auteur propose un modèle de la théorie des jeux avec des gains qui dépendra de la stratégie choisie par le législateur et par l’opérateur historique. Par l’utilisation d’un arbre de la théorie des jeux, l’auteur montre que si seulement l’opérateur historique est prêt à offrir son propre réseau, l’IRU peut être signé, ce qui en effet aboutira à la disparition de la plupart des retards dans la mise en œuvre des projets. Le succès n’est pas si évident dans le cas où la mise en œuvre de l’IRU est une obligation – là, les projets européens échoueront probablement.

Classifications and key words: Indefeasible Right of Use (IRU); long-term agreement; third party access; telecom market; entry barriers; infrastructure owner; entrants; infrastructure; EU projects.

I. Introduction

The telecommunications market is one of the fastest-growing in the economy nowadays. The expansion of ICT will continue since knowledge and information flow are crucial for competitive advantages. Still, in many countries such as Poland there is a bottleneck in the telecom market: entry barriers. These have caused problems with quality and accessibility to infrastructure as well as with upgrades and investment.

The aim of this article is to analyze a new remedy for entry barriers – an Indefeasible Right of Use (IRU). IRU is a long-term agreement between infrastructure owners and newcomers. Although it is similar to leased lines and other third party access mechanisms, it is a better substitute to building a new network than the two aforementioned solutions (the licensee is treated as an owner of infrastructure, usually with amortization rights).

An Indefeasible Right of Use may be imposed as a regulatory tool or as a good will gesture of the incumbent. This article focuses on this aspect providing a voice in the debate on whether to regulate IRU or not. The first part presents the applicable theoretical background. As mentioned, the main problem with infrastructure investments and the development of competition in telecoms are entry barriers. A taxonomy of entry barriers in light of existing
economics literature is presented next and crucial entry barriers related to the use of IRU identified.

The second part of the article contains practical aspects of entry barriers. Many instruments have already been used in order to handle them: third party access, wholesale price regulation, improving the investment process and public aid. Even the European Union has provided funds for telecom infrastructure building and modernization. The problem is how to spend these EU funds properly and achieve from then the biggest possible added value. Few regulatory tools similar to IRU were presented with entry barriers they were to fight with.

The next part of the paper is devoted strictly to IRU. Differences between IRU and previous regulatory tools, setting up IRU prices and challenges in implementing IRU are stressed. A game theory model is presented next to show different results depending on the methodology used of IRU implementation (by regulatory obligation or by choice of the incumbent). The assumptions of such a model are key here and thus they are described in detail. The analysis and assumptions applied in this paper are all coherent with the Polish telecoms market and Polish experiences. The Polish example is visible in problems with infrastructure investments, spending EU funds and documents prepared by Polish regulatory authority, but it does not mean that the paper is not useful for other country.

The article closes with a resolution of the game theory model. It leads to the conclusion that IRU may improve the level of infrastructure investments, but only under certain circumstances.

II. Theoretical background

The concept of Indefeasible Right of Use (hereafter, IRU) is based on a theoretical problem called entry barriers. Entry barriers differ in their origins: some are caused by legal measures, some derive from behavioral issues and others have an economic background. A taxonomy of entry barriers, under economics literature studies, is shown below:

1) legal entry barriers – appear only as an effect of law restrictions and may be characterized by asymmetric treatment of market players (the rules are in favor of enterprises that were given an exclusive right to run a business); they are the most volatile and unstable of all entry barriers: they may be cancelled with a regulatory decision; common examples are: licenses, quality service obligations (formal standards), and patents;

2) behavioral entry barriers – are considered to exist wherever one firm tries to abuse its market power (and fights with competitors in an
uncompetitive way); these barriers are not as easy to eliminate as legal ones, but may be limited by the imposition of new regulatory obligations (dedicated to significant market power enterprises); examples are usually: mobility costs, localization, experience and asymmetric information, and price reactions to entry attempts;

3) technological barriers – are linked with the specifics of a given sector, type of activity, cost structure and difficulties resulting from historical reasons; they are constant, steady and hard to remove by regulation; most popular examples are: cost advantages, sunk costs, capital restrictions, time-consuming startup of a business, uncertainty and asymmetric information.

IRU is most relevant to economic entry barriers. An overview of literature made it possible to summarize certain theories in Table 1, where each mentioned economic author treats different factors as entry barriers. Aside from their division, there is little consensus about counting each economic factor as a barrier. Herein, the assumption is made that a barrier is anything that literature has ever considered as such.

### Table 1. A set of factors treated as entry barriers in different economic theories (chronological order)

<table>
<thead>
<tr>
<th>Author</th>
<th>Scale effect</th>
<th>Product differentiation</th>
<th>Cost advantage</th>
<th>Capital requirements</th>
<th>Time-consuming</th>
<th>Uncertainty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bain</td>
<td></td>
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<tr>
<td>Stigler</td>
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<tr>
<td>Caves/Porter</td>
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<tr>
<td>Gilbert</td>
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<tr>
<td>Noga</td>
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<tr>
<td>Carlton/Perloff</td>
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<tr>
<td>McAfee/Mialon/Williams</td>
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<tr>
<td>Schmalensee</td>
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<td>Pindyck</td>
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<tr>
<td>Carlton</td>
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</tbody>
</table>

- the factor is a barrier  - the factor is partly treated as a barrier  - the factor is not a barrier

Source: Author’s own studies


2 The table presents ‘capital requirements’ together with ‘sunk costs’.
Among factors listed in table 1, only product differentiation is distanced from IRU. The rest are linked to IRU, either directly or indirectly. Especially capital requirements and time-consuming activities are factors IRU is believed to remedy. The reasoning on the link between the IRU (or other third party access tools) and entry barriers was always well analyzed by the polish regulatory body or by researches conducted by experts. What is both clear and obvious here is that if a new entrant has no infrastructure, it needs to build it. Network design, research of local conditions and finally construction are costly and time consuming. Entering the market simultaneously alerts the incumbent of the emergence of a new competitor. Delay means more time for an incumbent to prepare a strategy to fight against the new competitor. In this case the entrant has no chance. What a regulatory body usually does, is to ensure a fast and effective entry – usually by granting fair access to the incumbent’s existing infrastructure.

III. Practical background

The telecommunication market has been trying to solve issues related to entry barriers for years. Many activities have already been undertaken to remove this bottleneck. Privatisation, third party access and quality or price regulation were the most popular and effective types of regulation. It is suggested by other world’s examples, where the situation was changed after the incumbent’s privatization. Most of them are asymmetric, imposing an obligation only upon the incumbent enterprise, giving free choice to its competitors. That is why it is crucial to set payments carefully and make an honest cost-benefit analysis.

Product differentiation in the telecoms market is only a marketing matter. If networks look the same and technology and technical standards are the same, there is no place to compete through product differentiation. The only way to compete is creating different bundles of services, different prices and level of post-sale service.

Cost advantages come from amortization and scope effects. An incumbent has obviously the biggest client database, access to the best market research and most experience. That is why it is not a problem for an incumbent to proceed in the cheapest and yet effective way – provided there is an impulse to do so. It is hard to regulate and remove this barrier and treat the incumbent in a fair way compared to new entrants. In this case, a regulatory body usually

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3 To get detailed information please see The analysis of TP’s functional separation, UKE 2008; The regulatory strategy for telecom market in years 2008-2012, UKE, Warsaw 2008.
concentrates on improving newcomers’ financial prospects, by setting price-cost obligations whereby each fee should be based on a reasonable cost of services. Regulatory accounting obligations have a similar aim.

Crucial for entry barriers are those telecom regulations that relate to third party access. Wholesale line rental (WLR), Bitstream Access (BSA) and Local Loop Unbundling (LLU) are the most popular ones which impose upon the incumbent an obligation to make its network accessible. The aforementioned tools differ as to the level of access to the incumbent’s network, the type of technology and the range of retail services that the entrants can provide. In all cases the regulator sets (or at least accepts) access prices. Actually, WRL, BSA and LLU are very similar to IRU, as far as IRU is a long-lasting access obligation.

Capital requirements have been solved lately with EU funds. A variety of activities that can be funded through EU resources gives the newcomers the opportunity to build their own networks even in unattractive areas, i.e. areas with low population density. It does not mean that European Union is wasteful and spends its money in inappropriate way. The primary EU’s aim is to prevent social exclusion and it is more important than business profitability. The EU is willing to help in telecom infrastructure development. Through different countries’ institutions, it helps in exchanging experience between EU projects. Beneficiaries (in Poland the most of Beneficiaries are municipal authorities),

Table 2. Regulations and their influence on entry barriers

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Entry barrier</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Scale effect</td>
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<tr>
<td>Quality regulation</td>
<td></td>
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<tr>
<td>Price regulation</td>
<td></td>
</tr>
<tr>
<td>Accountant regulation</td>
<td></td>
</tr>
<tr>
<td>Price-cost relationship</td>
<td></td>
</tr>
<tr>
<td>Third Party Access (WLR, BSA, LLU)</td>
<td></td>
</tr>
<tr>
<td>EU funds</td>
<td></td>
</tr>
<tr>
<td>IRU</td>
<td></td>
</tr>
</tbody>
</table>

- the regulation affects a certain entry barrier  - the regulation does not affect an entry barrier


**Note:** For more information see *Digital Agenda for Europe* (European Commission, 2010)
improves qualifications by way of courses and training, and controls schedules and funding. The one thing the EU is not able to control is investment process – just because the lack and the lag of information about real progress of projects’ realization. This variable seems to be crucial for infrastructure build-out.

Table 2 is a summary of the considerations presented above.

**IV. Game theory model for Indefeasible Right of Use – economics approach**

**1. IRU definition**

Talking about IRU and infrastructure investments may flow in different ways. The way of thinking about the subject is determined by definitions. The first question to ask is what does IRU stand for? This article treats IRU as an agreement between the infrastructure owner and the telecoms enterprise interested in leasing it on a long-term basis. The IRU user can unconditionally and exclusively use some part of the telecom network (usually optical fibres) for about 20 years. From an accounting point of view, the user of infrastructure is treated as the network owner. Depending on the type of IRU agreement, it can be treated as a leasing, usufruct or right familiar to financial leasing. The type of IRU agreement used has its implications for cost eligibility. Herein a simplification is made whereby IRU expenditure is an eligible cost in all cases. It means that the beneficiaries of EU projects can always get back the money that they have spent.

Payment for IRU is typically divided into two parts:
- lump sum (also called balloon amount) – the greatest part of the IRU budget that is paid at the beginning of the IRU period; it should correspond to infrastructure costs;
- periodic fee – paid every month or year, not budget consuming; should be calculated taking into account the inflation rate, economic fluctuations, plus infrastructure upgrades and maintenance of IRU services.

IRU is usually treated as a co-investment solution to build joint infrastructure. Typically co-investors are an incumbent operator (infrastructure owner) and a state-owned shareholder (including municipal agencies). It provides a huge benefit when considering inefficient duplication of infrastructure, the time consuming investment process or problems with financing a new network. But under these great sounding phrases, IRU generates many problems, mainly because of future uncertainty. Businesses participated in the IRU should take into account: What if the infrastructure grantor goes bankrupt? What
if he loses its ‘significant market power’? How is the proper value of IRU calculated? What about infrastructure upgrades and new technologies? Who should bear the risk of a long-lasting contract? And policy-makers should keep in mind: Is it an appropriate way of stimulating competition? Is it really helpful for EU projects?

2. Model assumptions

The important question is thus: should IRU be regulated or not? In other words: what effects would these two alternatives generate (regulated or non-regulated IRU)? This problem is analyzed using game theory.

A few assumptions are made here for the model of the consequences of IRU.

1. First, the main aim is to spend EU funds on time by building telecoms infrastructure wherever there is a lack thereof. Thinking this way makes it possible to formalize the following statement: investments should proceed fast, as beneficiaries have only 3 years to finish their projects. Beneficiaries should also make their investments cost-effectively – otherwise they won’t get their expenditure reimbursed by the EU.

2. The second assumption is about players. 3 main actors exist here: an infrastructure owner (typically an incumbent), the EU funds Beneficiary (the public sector who is actually an executor of an EU project5) and the regulator. The first wants to maximize its profits. Moreover, it obstructs the fulfillment of all obligations that the regulator imposes upon it. Threatened by a new obligation, the incumbent will try to hold it off by spending money to postpone the arrival of regulation. As a result, the EU-funded project fails – the infrastructure is built too late. This is a catastrophe, because the EU won’t reimburse the project and the aim of building the infrastructure won’t be achieved. The second actor, the Beneficiary, has its own goal: to finish the project on time because it’s the only way to get its costs reimbursed. Its success is determined only by the time of the IRU offer. If the facilities owner is ready to sign an IRU contract on time, the Beneficiary will finish its project. Otherwise, it won’t. The third actor, the regulator, wants to maximize social benefit no matter which of the other actors it will support. That is why the regulator should take into account the costs of failed projects as well as the costs of regulation and make a regulatory impact assessment before acting.

5 There are some projects leading by private sector units but most of EU telecom infrastructure projects are executed by municipal authorities or by public-private partnerships.
3. The third assumption is about payoffs – the costs of regulation and IRU delays (this is why only half of EU projects are successful). Additionally, regulation is usually accompanied by a loss of flexibility. It diminishes the incumbent’s profit gained from IRU. In payoffs, certain factors are taken into account, fulfilling the following assumptions:

- \( \Pi_B > 0 \) – Beneficiaries’ profits is higher than zero;
- \( \Pi_{BE} > 0 \) – Beneficiaries’ fines in case of failed EU projects they lead;
- \( \Pi_p > 0 \) – incumbent’s profit in optimistic scenario is positive (more than zero);
- \( \Pi_n < 0 \) – incumbent’s profit in pessimistic scenario is negative (less than zero);
- \( C_R > 0 \) – cost of IRU regulation;
- \( C_O > 0 \) – cost of incumbent’s opportunity behaviour;
- \( \epsilon > 0 \) – cost of the lack of elasticity, caused by regulatory obligation;
- \( 0.5*\Pi_n + C_O < 0 \) – cost of incumbent’s opportunity behavior is less than the loss of pessimistic scenario.

4. The last assumption is about the uncertainty included in the model. There are two options:

- optimistic (market will develop well and IRU will generate profit),
- pessimistic (market will not develop as one should expect and IRU will generate a loss).

3. Strategic behaviours

A set of strategies is dedicated only to the regulator (government) and infrastructure owner. The regulatory body may impose an IRU regulation or let the actors act in a spontaneous way. This means that IRU may be chosen as a regulatory tool, may be launched by the incumbent according to its own rules or may not happen at all. The incumbent may be willing to sign the IRU contract or it might not. If it is not happy to sign the contract, it will try to delay the imposition of IRU. The EU funds Beneficiary has no choice in this game scenario – it can only deal with the results of the actions of the other two players. Still, the regulator’s interest takes into account the Beneficiary’s goals.

The regulator is first to make a choice as it is the one who sets the rules. Unfortunately, there is a lack of information: no one knows the future and no one is able to say whether in 20–25 years (at the end of the IRU contract) the situation will be positive (optimistic option) or negative (pessimistic option). The uncertainty of the game is taken into account with the 4th assumption of the model.

The optimistic option, from the infrastructure owner’s point of view, means it will gain positive result (above zero): profits denoted as \( \Pi_p \). The pessimistic
option means that the incumbent’s profits will be negative (below zero) – denoted as $\Pi_n$.

Moreover, implementation of regulation always takes time: the regulator needs to analyze the market, prepare a proper regulatory act, conduct a public consultation, analyze all comments and make a cost-benefit analysis. This means that only some infrastructure projects will be finished successfully (those with the biggest delays will not). In the payoff, it is denoted as $0.5^*\Pi_B$ (half of all EU funds that are able to be reimbursed). IRU without regulatory intervention gives all EU funds: $\Pi_B$, because in this case all projects will be finished successfully. Figure 1 shows the game tree representation of the payoffs (also known as the extensive form representation).

![Game Tree](image)

**Figure 1. An extensive version of the IRU model**

4. The results

In the game theory tree (Figure 1) eight different results are visible. Suppose the game is played with the optimistic option. The regulator decides to regulate IRU or not and it chooses the first possibility: regulated IRU. The next step belongs to the facilities owner (the incumbent) that may behave obstructively to signing an IRU agreement or not. Suppose it will also choose
the first option. What is the result? From the regulator’s point of view we have a double delay: one caused by the implementation of the regulation and the second caused by the delay tactics of the incumbent. Because of this, several EU projects fail and Beneficiaries lose all incurred expenditure. The EU will punish the Beneficiary with a quota denoted as \(-\Pi_{BE}\). The negative sign of profit shows that (in the above scenario) it was better not to start the EU project at all. The amount will be diminished by the cost of regulation \((C_{R})\). What about the incumbent? It behaves obstructively so effectively that it manages to block the implementation of the IRU obligation. That is why it ‘earns’ 0 from IRU contracts, but because of its obstructive effort, \(C_{O}\) will not be saved. From the incumbent’s point of view, the payoff with regulation is worse than without regulation, i.e. as a loss of elasticity, which is denoted as \(\varepsilon\). The incumbent, however, stayed away from the IRU contract, so it loses \(- (C_{O} + \varepsilon)\).

Supposing now that the incumbent is willing to sign the IRU contract (in accordance with the regulator’s orders and the optimistic option). Other previous assumptions are ceteris paribus. The change in its payoff is obvious: now it will earn \(\Pi_{p}\) from IRU minus \(\varepsilon\). The incumbent is not against regulation, and will not bear the obstruction cost \(C_{O}\). From a social (or regulatory) point of view, half of the projects end successfully: 0,5*\(\Pi_{B}\), minus the costs of regulation: \(C_{R}\). In this case, using a backward induction points out that if only the IRU is regulated, the infrastructure owner will choose to sign an IRU contract – it prefers \(\Pi_{p} - \varepsilon > 0\) to \(0 - C_{O} - \varepsilon < 0\) provided the incumbent proceeds in a rational way.

Staying with the optimistic variant, let’s suppose that the regulatory body chooses not to regulate IRU. There are no regulation costs \(C_{R}\) and elasticity costs \(\varepsilon\). The incumbent may still behave in the same way: either sign the IRU contract or not. The final results are as follows:

- the incumbent doesn’t sign an IRU contract:
  - no project succeeds, so social result equals \(-\Pi_{BE}\);
  - the incumbent has no agreement and earns 0;
- the incumbent signs an IRU contract:
  - all projects succeed, social result equals \(\Pi_{B}\);
  - the incumbent earns \(\Pi_{p}\)

The pessimistic option will proceed similarly, as can be seen in Figure 1. The game theory model (with the above assumptions, strategies and aims) suggests the conclusion that irrespective of external circumstances (in other words, irrespective of a ‘Nature’ factor), there is no justification for implementing IRU through a regulatory path. Rationality alone will lead an incumbent to choose an IRU agreement in the most efficient way. If the regulator comes into action, an incumbent will become opportunistic and delay IRU. This
is why, if IRU is to support EU funds, it should be left out of the ambit of regulatory obligations. Otherwise, most of delayed EU projects are going to fail.

V. Problems and conclusions

There are some limitations in above game theory model. First of all it ignores some behavioural aspects as blocking IRU and blocking market entries, using cross subsidy and gaining higher incumbent’s profits because of the lack of competition. It may be developed in a further and more detailed research. The analysis may also be developed with other countries cases. Although these obvious limitations, the presented model is not unrealistic as far as polish telecom market review seems to be constant. First of all, Polish incumbent is interested in long-term agreements. The argument is Polish incumbent’s involvement in preparing IRU offer (the half of the year 2012), preliminary negotiations with some of these EU projects’ Beneficiaries, consulting these works with external advisors. The second mentioned limitation (using cross subsidy) is illegal from competition law point of view. The incumbent may gain higher profits but (as a significant market power) it will probably have to pay huge fine for it (so it is not worth).

Literature


6 Reference Offer for Infrastructure, TP, 2012, consultations with experts from National Institute of Telecommunications, business talks with municipal.


Public consultation on the IRU Reference Offer, UKE, document of public consultation, 2012

Response to the public consultation on the IRU Reference Offer, UKE, Warszawa 2012.

Response to the public consultation on costing methodologies for key wholesale access prices in electronic communications, Bouygues, public consultations, 2011.


The explanatory note about eligibleness of telecom infrastructure leasing costs (including IRU), according to Development of Eastern Poland and Regional Operational Programmes, UKE, Warszawa 2012.
**Abstract**

This third overview of EU competition and sector-specific regulatory jurisprudential and case law developments with a nexus to Poland covers the years 2010 and 2011. This period of time is worth noting for several reasons. First, EU courts delivered a significant number of judgments in ‘Polish’ cases including an increased number of preliminary rulings. Second, 2010-2011 developments were dominated by judgments and decisions concerning telecoms. Finally, the Commission adopted only a handful of Polish State aid decisions following a formal investigation procedure under Article 108(2) TFEU.

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* Krzysztof Kuik is an official of the European Commission (DG Competition). The views expressed in this overview are personal and do not necessarily represent the position of the European Commission. Anna Mościbroda has previously worked for the European Commission (DG Competition) and is currently a researcher at the Research Group Law Science Technology & Society (LSTS) at the Vrije Universiteit Brussel.
The main developments in telecoms relate to the Court of Justice’s preliminary reference judgment in *Tele 2 Polska* focusing on the interpretation of Regulation 1/2003 and the *PTC v UKE* ruling that dealt with number portability charges. Relevant is also the antitrust prohibition decision issued by the Commission against Telekomunikacja Polska S.A. for its refusal to grant access to its wholesale broadband services.

In other fields, the Court of Justice delivered three State aid judgments (including two appeals against pre-2010 judgments of the General Court) and two judgments in infringement proceedings (regarding pre EU Accession marketing authorisations for medicines and the reutilisation of data from the public sector). The General Court ruled on appeal in the butadiene rubber cartel case (e.g. in *Trade-Stomil v Commission*). Finally, the Commission dealt with a merger case with a truly Polish specificity (*Kraft Foods/ Cadbury*), approved subject to divestiture of the E. Wedel brand.

**Résumé**

Ce troisième aperçu portant sur les développements de la réglementation relative au droit de la concurrence de l’UE et droit sectriel, ainsi qu’à la jurisprudence ayant un lien important avec la Pologne, couvre les années 2010 et 2011. Cette période vaut l’intérêt pour plusieurs raisons. Premièrement, les tribunaux de l’UE ont délivré un nombre important d’arrêts dans les cas « polonais » dont un nombre croissant de questions préjudicielles. Deuxièmement, les développements en 2010-2011 ont été dominés par les jugements et décisions concernant les télécommunications (télécoms). Enfin, la Commission n’a adopté qu’un petit nombre de décisions sur les aides de l’État polonais à la suite d’une procédure formelle d’examen conformément à l’article 108 (2) du TFUE.

Les développements principaux dans les télécoms se rapportent au renvoi préjudiciel de la Cour de justice dans le cas *Tele 2 Polska* portant sur l’interprétation du règlement 1/2003 et celui relatif au cas *UKE v PTC* sur les frais de portabilité des numéros. La décision concernant une infraction en application adoptée par la Commission contre Telekomunikacja Polska SA pour son refus d’accorder l’accès à ses services de gros de la large bande est également pertinente.

Dans les autres domaines, la CJCE a rendu trois arrêts sur les aides d’État (deux recours contre les arrêts rendus par le Tribunal de première instance avant 2010) et deux arrêts dans une procédure d’infraction (en ce qui concerne les autorisations de marketing pour la médecine préalables à l’adhésion à l’UE et la réutilisation des données du secteur public). Le Tribunal de première instance a statué sur le recours dans le cas de cartel caoutchouc butadiène (par exemple le cas *Trade-Stomil v Commission*). Enfin, la Commission a traité un cas de fusion avec une spécificité typiquement polonaise (*Kraft Foods/ Cadbury*), approuvé assujetti à la cession de la marque E. Wedel.

**Classifications ad key words:** telecommunication; pharmaceuticals; antitrust; cartel; competition law; Commission decision; state aid; merger control; case law; regulatory cases; infringement; preliminary ruling; Electronic Communications Framework;
broadband; alternative operators; powers of NCA; Regulation 1/2003; modernisation; procedural autonomy; number portability; conditional approval; general prohibition of combined sales; publication requirements; Act of Accession; internet tariffs; Universal Service Directive; Framework Directive; retail broadband tariffs; generic products; marketing authorisations.

I. Introduction

From the perspective of a regular contributor to YARS, the years 2010–2011 are notable for a number of reasons. First, as expected by the Authors, far more regulatory than competition law decisions and judgments were delivered. A particularly large number of them concerned the telecoms sector, seven in total, far more than in any other economic area. Second, the Commission adopted only a handful of State aid decisions following a formal investigation procedure under Article 108(2) TFEU. Third, some EU merger and infringement decisions directly considered Polish specificity.

Four out of the seven ‘Polish’ telecoms cases of 2010–2011 were preliminary references submitted to the Court of Justice of European Union (hereafter, Court of Justice or CJ) by Polish courts. Three preliminary rulings were issued in the context of disputes between the UKE President – the national regulatory authority responsible for telecoms (hereafter, NRA) – and Polish telecoms operators. The fourth, concerning the interpretation of Regulation 1/2003, had its origins in a dispute between the UOKiK President – the national competition authority (hereafter, NCA) – and the telecoms incumbent Telekomunikacja Polska S.A. (hereafter, TP). In two preliminary rulings (concerning Regulation 1/2003 and number portability charges), the CJ sought the written opinion of the Advocate General. The CJ also rendered judgments in infringement proceedings brought by the Commission against Poland for its failure to perform a market analysis necessary to impose regulatory measures in telecoms and for its non-compliance with the EU Directive on reutilisation of public information. The General Court (hereafter, GC) issued an order dismissing, on formal grounds, the action for annulment submitted by the UKE President against a Commission decision adopted in the framework of the Article 7 mechanism. The significant size of the Poland-related output

1 GC Order of 23 May 2011 in Case T-226/10, UKE v Commission, not yet reported. The GC dismissed the action for annulment brought by the NRA against the Commission decision (C (2010) 1234) as inadmissible on formal grounds (improper representation before the CJ of the EU); the GC order was upheld in the CJ Judgment of 06/09/12 in Joined Cases C-422/11 P UKE v Commission and C-423/11 Poland v Commission, not yet reported.
of the Court of Justice in 2010–2011 shows the potential for an increase in the number of ‘Polish’ cases dealt with in the EU and the resulting need to focus on key developments in the future. Finally, the Commission has adopted a prohibition decision against TP (an appeal against this decision is pending).

It should be noted also that the Commission adopted in 2010-2011 very few Polish State aids decisions following a formal investigation procedure under Article 108(2) TFEU. There may be several reasons behind this phenomenon. The Commission is focusing its enforcement efforts, particularly on the financial sector, which limits the scope for ex officio enforcement against cases of lesser importance. The Polish authorities may also have been less pro-active in notifying aid. It is also possible, however, that the UOKiK President’s work and the overall efforts made in the run up to and during Poland’s EU Presidency may have lowered the scope for contentious issues with the Commission. The economic crisis may also be taking its toll drying up the sources of State support. In addition to the low number of State aid decision, no new infringement cases were brought to the CJ against Poland and no veto decisions were issued under the Article 7 mechanism for telecoms.

Finally, account has to be taken of particular Polish aspects of other EU decisions and judgments. This concerns Kraft’s purchase of Cadbury and the resulting sale of the E. Wedel to an independent Japanese purchaser. It also concerns Poland’s approach to granting marketing authorisations for medicine which, while facilitating market entry of generic drugs and thus arguably lowering healthcare costs, was found to be in breach of applicable EU law.

II. Case summaries

1. Antitrust Jurisprudence

_UOKiK v Tele 2 Polska_

On 3 May 2011, the CJ’s Grand Chamber ruled on two preliminary reference questions regarding the ability of NCAs to adopt ‘negative’ decisions, i.e. decision stating that no infringement of Article 102 TFEU occurred. The

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2 CJ Judgment in Case C-375/09 UOKiK v Tele 2 Polska, not yet reported.
3 Under Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1-25), when an NCA applies national competition law to an abuse prohibited by Article 102 TFEU, it should also apply the later Article alongside its national law (Article 3). To this effect, Regulation 1/2003 authorises the NCA to adopt decisions requiring an infringement to be brought to an end, ordering interim measures, accepting commitments, imposing fines, periodic penalty payments or any other penalty provided for in their national law (Article 5(1)). In case
ruling clarifies the division of competences between the European Commission and NCAs as laid down in Regulation 1/2003.

The problem arose in the context of antitrust proceedings before the Polish NCA concerning the potential abuse of dominance by the incumbent operator, TP. Following an investigation, the UOKiK President concluded that TP’s behaviour did not constitute an abuse and thus, that its conduct did not amount to an infringement of national laws and of Article 102 TFEU. If an antitrust infringement was not established, Polish law applicable at that time required the NCA to adopt a decision declaring that the practice in question had not restricted competition. The UOKiK President adopted such decision stating that TP had not implemented any restrictive practice under Polish competition law. As far as Article 102 TFEU was concerned, the UOKiK President merely brought the procedure to an end on the grounds that it was devoid of purpose.

In other words, the NCA did not adopt a negative decision with respect to Article 102 TFEU because it considered that Regulation 1/2003 did not allow it to issue a negative decision on the merits as regards the assessment of the compatibility of the scrutinised practice with EU competition law.

Tele2 Polska, one of TP’s key competitors and a third party to the antitrust proceedings, challenged the UOKiK decision. In the course of this dispute, the Polish Supreme Court asked the CJ two preliminary questions, i.e. whether (i) EU law precludes the NCA, if the latter fails to establish a restriction of competition, from adopting a decision on the merits, and (ii) Article 5 Regulation 1/2003 is directly applicable and can constitute a legal basis for a decision issued by an NCA.

In line with Advocate-General Mazak’s opinion, the CJ replied to both questions in affirmative. It confirmed that Article 5 Regulation 1/2003 precludes the application of national rules insofar as they empower NCAs to issue ‘negative decisions’ with respect to EU competition rules. It is the sole competence of the Commission to find that a given practice does not breach Article

5 Regulation 1/2003, supra note 4.
6 Art. 8 of the Competition and Consumers Protection Act of 15 December 2000 (consolidated text: Journal of Laws 2003 No. 86, item 804, as amended). Such obligation has been abolished by subsequent legislative changes: the Competition Act 2000 has been repealed and replaced by the Competition and Consumers Protection Act of 16 February 2007 (Journal of Laws 2007 No. 50, item. 331, as amended).
7 AG Mazak’s opinion of 7 December 2010.
101 and 102 TFEU. Otherwise, the uniform application of EU competition law would be undermined as a national decision finding that no infringement of Article 101 or 102 TFEU occurred could prevent the Commission from later adopting a decision finding that a breach of EU competition rules has taken place. The CJ also confirmed that Article 5 Regulation 1/2003 was directly applicable and could constitute a legal basis for a decision issued by an NCA.

The judgement gave rise to a renewed discussion on the rationale and objectives of the 2004 reform of the EU competition law enforcement model. Some commentators point out to the inconsistency in giving power to the NCAs to adopt infringement decisions while preventing them from finding no breach of EU competition law. Such model is understood as maintaining the Commission’s exclusive power to issue ‘negative clearance’ letters as used before 2004. The CJ judgment is therefore perceived as running counter to the logic of the decentralisation of EU competition law enforcement introduced by Regulation 1/2003. It is seen as resulting in legal insecurity for companies, and a definite restriction in the procedural autonomy of Member States in their enforcement of EU competition law. The judgment might also be considered as impeding the judicial review of national antitrust decisions for those whose interests are affected by an NCA de facto finding that no infringement of Article 101 and 102 TFEU has taken place despite the fact that such finding is not articulated in the form of a formal decision on substance.

**BR/ESBR cartel**

On 13 July 2011, the GC rendered several judgments concerning the BR/ESBR Decision issued by the Commission on 29 November 2006. The
**BR/ESBR Decision** found that 13 companies had entered into a cartel concerning certain types of synthetic rubber [butadiene rubber (BR) and emulsion styrene butadiene rubber (ESBR)]\(^{13}\). Among the 13 addressees of the **BR/ESBR Decision** was the Polish trading company Trade-Stomil Sp. z o.o., as well as two Czech producers of petrochemicals, Unipetrol a.s. and Kaučuk a.s., both controlled by Polish petrochemical and chemical groups\(^{14}\).

The **BR/ESBR Decision** found that Trade-Stomil had represented the Polish producer Chemical Company Dwory S.A. (Dwory) in its export business for around 30 years, until at least 2011\(^{15}\). Trade-Stomil was said to have participated in the meetings of the investigated trade association (a forum for cartelists) and was thus found to have participated in the cartel. Kaučuk was seen as liable for the behaviour of the dissolved Czech trading company Tavorex s.r.o., which run Kaučuk’s exports between 1991 and 2003 and was also found to have participated in the cartel. Unipetrol, Kaučuk’s parent company, was found liable for the infringement committed by Kaučuk. The Commission imposed upon the participants of the cartel a fine totalling EUR 519 million, including EUR 3.8 million on Trade-Stomil and EUR 17.55 million jointly on Kaučuk and Unipetrol.

Several parties, including Trade-Stomil, Kaučuk and Unipetrol appealed the **BR/ESBR Decision**. The three Central and Eastern European (CEE) companies argued, *inter alia*, that the Commission had failed to prove to the required standard that they participated in the cartel or were liable for the infringement. They have also made a number of arguments challenging the level of their fines\(^{16}\).

In succinct judgments\(^{17}\), the GC annulled the **BR/ESBR Decision** in its entirety where it concerned Kaučuk and its parent company Unipetrol. The **BR/ESBR Decision** was also annulled with respect to Trade-Stomil but this judgment is not yet published. The GC noted that the evidence presented in the part of the **BR/ESBR Decision** which related to Tavorex’s participation

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\(^{13}\) For details, see K. Kuik, ‘2007 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland’ 2008 1(1) *YARS* 168–170.

\(^{14}\) Unipetrol a.s. was since 2005 part of the Polish petrochemical group PKN ORLEN S.A., and Kaučuk a.s., was a subsidiary of the Polish chemical group Synthos S.A known since 2007 as SYNTHOS Kralupy a.s. For details, see K. Kuik, ‘2007 EU Competition Law...’, p. 171.

\(^{15}\) Dwory was also targeted by the Commission’s investigation but was not an addressee of the Decision because the Commission at an earlier stage took a view that there was insufficient evidence of Dwory’s participation in the cartel to establish its liability (para. 88 of the **BR/ESBR Decision**).

\(^{16}\) For more detail on Trade-Stomil’s appeal, see OJ [2007] C 95/45; for more detail on Kaučuk’s and Unipetrol’s appeals, see OJ [2007] C 82/49.

\(^{17}\) The judgments in Kaučuk’s and Unipetrol’s appeals do not exceed 69 paragraphs. The judgment in Trade-Stomil’s appeal is not yet published.
in cartel meetings (e.g. expense reports, notes from the meetings and witness statements) was not sufficient to support the conclusion that Tavorex (and thus Kaučuk/Unipetrol) participated in the cartel. While some other evidence (notably the general leniency statement given by Bayer referred to in the part of the BR/ESBR Decision that relates to the description of the cartel) was considered to have a certain probative value, the GC found such general statements insufficient\(^\text{18}\) to justify the finding that Tavorex (and thus Kaučuk/Unipetrol) participated in the cartel.

As the GC annulled the BR/ESBR Decision due to lacking evidence with respect to the three aforementioned CEE companies, it did not examine their other pleas in law, notably the issue of the relationships between principals and agents in the context of competition law infringements.

The Commission did not challenge the GC judgments regarding Trade-Stomil, Kaučuk and Unipetrol. Neither did it appeal the partial annulments of the BR/ESBR Decision with respect to the Italian producer ENI SpA (‘ENI’) and its subsidiary Polimeri Europa SpA\(^\text{19}\), or the US producer The Dow Chemical Company and its subsidiaries (Case T-42/07). Commission Decisions

**Telekomunikacja Polska**

On 22 July 2011, the Commission adopted a decision (hereafter, TP Decision)\(^\text{20}\) finding that the Polish telecoms incumbent TP\(^\text{21}\) had abused its dominant position on two Polish markets for wholesale broadband services by refusing to grant access to its fixed telephone network to Alternative Operators (hereafter, AOs). Taking into account the gravity and duration of the infringement (4 years 2 months), the Commission imposed on TP a fine of EUR 127.5 million (after deducting several fines previously imposed by the Polish NRA). The TP Decision followed an unannounced inspection of TP’s

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\(^\text{19}\) Cases T-38/07 and T-59/07, not yet published. That said, in 2012, the Commission sent ENI a letter in which it communicated its decision to recommence the BR/ESBR procedure despite the judgment in which the GC re-determined the amount of the fine. ENI appealed the letter in Case T-240/12 and argued lack of competence (in light of the GC’s exercise of its unlimited jurisdiction, the Commission could not recommence the procedure with a view to adopting a fresh decision imposing fines). The appeal is pending.


\(^\text{21}\) TP was formed in 1991 from the previous state monopoly ‘Polish Post, Telegraph and Telephony’, and privatised in 1998.
premises in autumn of 2008\textsuperscript{22} and the opening of formal proceedings against the incumbent on 17 April 2009\textsuperscript{23}.

The Commission applied Article 102 TFEU to the telecoms sector before in a number of cases\textsuperscript{24}. However, the TP decision is the first Article 102 decision addressed to a company from a Member State that joined the EU in 2004\textsuperscript{25}.

Poland’s fixed telephone network (specifically, the digital subscriber line, DSL) is its main platform of broadband internet access. TP is the only operator with a country-wide DSL network. If AOs wish to provide broadband internet access services to end users via a DSL, they can either build an alternative local access network (which is uneconomical due to high sunk costs) or obtain remunerated access to TP’s network. To obtain access, AOs can in principle purchase from TP either: (a) wholesale broadband access (BSA) or (b) unbundled access to the local loop (LLU). BSA wholesale services consist of selling to AOs data transmission capacity over TP’s fixed telephone network\textsuperscript{26}. The LLU wholesale services involve the grating of physical access to the ‘last meters’ of the telephone network infrastructure leading to end user premises (the so-called local loop\textsuperscript{27} or the sub-local loop\textsuperscript{28}).

Both the EU and national regulatory framework in force at the time of the proceedings imposed an obligation on TP (as on the operator with significant market power on the fixed public telephone network) to grant access – both BSA and LLU under Polish law – and to publish a Reference Offer (‘RO’) in that respect\textsuperscript{29}.

The Commission identified three relevant product markets in this case: two separate wholesale services markets for BSA and LLU as well as the downstream retail product market for standard broadband access services

\textsuperscript{22} European Commission, MEMO/08/666 of 30 October 2008. On 03 December 2008, TP lodged an appeal (Case T-533/08) with the CFI (now the GC) against the Commission inspection decision but it withdrew the appeal on 18 February 2010.

\textsuperscript{23} European Commission, MEMO/09/203 of 27 April 2009.

\textsuperscript{24} Commission decisions in Wanadoo (a subsidiary of France Telecom) in a predatory pricing case (Commission Decision of 16 July 2003 in Case COMP/38.233), as well as Deutsche Telekom (Commission Decision of 21/05/03 in Case COMP/37.451) and Telefonica (Commission Decision of 4 July 2007 in Case COMP/38.784) regarding margin squeeze practices in Germany and Spain, respectively.


\textsuperscript{26} BSA is defined in recital 50 of the TP Decision.

\textsuperscript{27} As defined in recital 53 of the TP Decision.

\textsuperscript{28} As defined in recital 53 of the TP Decision.

offered at a fixed location to end users. The relevant geographic market for all three services was found to cover the entire territory of Poland.

The Commission found TP dominant on all three relevant markets. In particular, as regards the wholesale markets for BSA and LLU, it identified TP as the only supplier of such services in Poland and thus an unavoidable trading partner. The decision identifies also TP’s high market share in the retail market and the existence of significant barriers to both entry and expansion.

The Commission found that TP had abused its dominant position on the two wholesale markets by refusing to supply BSA and LLU wholesale services to AOs. The incumbent was seen as deliberately preventing, or at least postponing, the entry of AOs onto the Polish market for broadband services with the view of protecting its customer base and revenue on the downstream retail broadband access market. To this effect, TP was, inter alia, proposing unreasonable conditions for access to its network and wholesale broadband products, delaying access negotiations, obstructing the implementation of access agreements (e.g. by rejecting orders in an unjustifiable manner), as well as refusing to provide reliable and accurate general information indispensable for AOs to operate (e.g. technical specifications relating to data transmission and equipment, etc.). The Commission concluded that TP’s abusive conduct was likely to reduce the rate of entry and expansion of its DSL competitors on the downstream retail market for broadband Internet access services. As a result, TP delayed the growth of competition and thereby the development of alternative infrastructure. The incumbent’s conduct could have been detrimental for final consumers, possibly leading to a low broadband penetration rate, high broadband prices and low average broadband connection speeds. The Commission ordered TP to cease the infringement in so far as it had not done so already and to refrain from engaging in the same or equivalent conduct in the future.

The Commission also discussed TP’s arguments as regards the Commission’s lack of competences to act in a field which is highly regulated by national law, and which is subject to the supervision and intervention of an NRA (the UKE President). The Commission considered, however, that its competence was not affected by the existence of regulatory decisions imposing fines with respect to TP’s obligations to provide network access and to treat AOs in a non-discriminatory manner. The Commission referred to the CJ judgment in Deutsche Telecom where it was held that sector specific regulations did not exclude the application of EU competition law.

30 The market for retail broadband access services encompasses all technologies providing broadband access (incl. DSL lines, cable, LAN/WLAN and others) except retail broadband access provided via mobile networks.

rules. It emphasised also the regulatory character of the intervention by the NRA (UKE decisions did not consider the applicability of Article 102 TFEU) and the fact that TP did not change its behaviour despite being already fined by the UKE President. The Commission did, nevertheless, deduct the amounts of several fines imposed earlier by the NRA and already paid by TP from the total fine it imposed on TP32.

Moreover, TP argued that the Polish competition authority had in 2008 closed its own investigation against TP without finding an infringement. As regards the effects of such decision and its impact on the Commission’s competences to investigate, the TP Decision noted a different scope and different focus of the two investigations33. It also recalled the conclusions of the Tele 2 Polska preliminary ruling where the CJ held that NCAs do not have the competence to formally declare that an infringement of Article 102 TFEU had not taken place. Therefore, a negative decision issued by an NCA cannot prevent the Commission from subsequently finding that the same practice is in breach of EU competition law34.

TP appealed the TP Decision on 2 September 201135 alleging failure to demonstrate a legitimate interest in pursuing a case regarding historic conduct, the violation of human rights (imposition of a criminal penalty by an administrative body) and rights of defence, as well as several factors leading to fine reduction. The appeal is pending.

2. Mergers

Commission Decisions

Not unlike in previous years, most merger decisions concerning Polish companies or Polish markets issued in 2010-2011 did not raise competition concerns. Notified transactions were either (i) unconditionally approved in Phase I, or (ii) identified concerns were eliminated by way of remedies but neither the concerns nor the remedies related to markets in Poland36.

32 D. Kamiński, A. Rogozińska, B. Sasinowska, supra note 25.
33 According to the TP Decision, the UOKiK investigation had much narrower scope. The NCA investigated TP’s practices in the context of providing BSA services to Netia and GTS only and the investigation was conducted in the context of the potential infringement of the collective consumer interests (Art. 24 Competition Act 2007 rather than its Art. 9 (Article 102 TFEU’s equivalent).
34 CJ Judgment of 03 May 2011 in Case C-375/09, supra, paras 22–23, 28.
36 E.g. Case No. COMP/M.5865, Teva/Ratiopharm; Case No. COMP/M.5721, Otto/Primondo Assets; Case No. COMP/M.5855, DB/Arriva.
The Commission adopted three decisions with competition concerns relating to Polish markets. Two cases related to pharmaceuticals: *Abbott/Solvay Pharmaceutical*\(^37\) and *Novartis/Alcon*.\(^38\) Both led to divestitures of businesses across the EEA which removed overlaps in the problem areas. Kraft’s takeover of Cadbury\(^39\) raised, however, concerns relating specifically to Polish (and Romanian) markets for chocolate confectionary. The Commission approved the operation on condition that Kraft divested the famous Polish E. Wedel businesses and brand as well as its Romanian businesses.

**Kraft Foods/Cadbury**

On 6 January 2010, the Commission conditionally approved\(^40\) the takeover of Cadbury (United Kingdom) by Kraft Foods (United States). Kraft Foods is a global food and beverage company active in over 150 countries. Cadbury is a producer and seller of chocolate and sugar confectionary active in over 60 countries. The companies’ activities overlapped mainly with regards to the production and sale of chocolate confectionary and, to a minor extent, sugar confectionery, biscuits, soft cases and chocolate drinks. The consolidation of their chocolate confectionary businesses gave rise to significant overlaps in 19 Member States, including Poland and Romania where preliminary competition concerns were identified.

The Commission distinguished three separate market segments within the overall market for chocolate confectionary: (i) chocolate tablets (chocolate blocs of more than 59 g); (ii) countlines (small individually wrapped chocolate bars) and; (iii) pralines. In line with its earlier decisions, the geographic market for chocolate confectionary was seen as national.

The Commission observed that the transaction would lead to high combined market shares of Kraft/Cadbury (significantly out-sizing their competitors) on the markets for chocolate tablets in Poland and Romania, and on the market for chocolate pralines in Poland. The decision emphasised the close competition existing between the brands of the two companies prior to their merger. In Poland, the tablets and pralines offered by Kraft under its Milka and Alpen Gold brands are regarded as the closest substitutes for the Polish ‘iconic’ Wedel brand, belonging to Cadbury. To address these concerns, Kraft offered to divest Cadbury’s domestic Romanian chocolate confectionary businesses as well as the Polish business conducted under the Wedel brand. The Commission accepted the commitments and approved the transaction.


\(^{38}\) Case No. COMP/M.5778, *Novartis/Alcon.*

\(^{39}\) Case No. COMP/M.5644, *Kraft Foods/Cadbury.*

\(^{40}\) *Idem.*
in Phase I. As a consequence of the decision, the Polish E. Wedel brand and business were sold in 2010 to the Japanese food company Lotte Holdings.\textsuperscript{41}

3. State Aid Jurisprudence

\textit{ISD Polska judgment (Huta Częstochowa)}

On 24 March 2011, the CJ issued a judgment in the appeal brought by ISD Polska\textsuperscript{42} and Industrial Union of Donbass Corp., against a GC judgment\textsuperscript{43} dismissing their appeal against a Commission decision\textsuperscript{44} concerning State aid for Huta Częstochowa (hereafter, \textit{HCz Decision}). The CJ upheld the GC judgment and dismissed the appeal in its entirety\textsuperscript{45}. As a result, the 2005 \textit{HCz Decision} was upheld.

The CJ examined whether the GC had infringed Protocol 8 of the Act of Accession\textsuperscript{46} by holding that the Commission was competent to monitor Poland’s compliance with EU State aid rules in its pre-Accession period from 1997 to 2003. The appellants claimed by contrast that the Commission’s power covered only the time period between the publication of the Protocol on 23 September 2003 and the end of 2003. The CJ unequivocally confirmed that, taking into account the wording, purpose and general scheme of Protocol No. 8, it constituted a \textit{lex specialis} which extended the power of the Commission to monitor aid during the period from 1997 to 2003.

\begin{footnotes}
\item[41] UOKiK President Decision of 16 August 2010, DKK-83 /2010.
\item[42] Due to restructuring, the appeal was brought by ISD Polska sp. z o.o. and ISD Polska sp. z o.o. (formerly Majatek Hutniczy sp. z o.o.).
\item[43] GC Judgment of 01 July 2009 in joined cases T-273/06 and T-297/06 \textit{ISD Polska and Others v Commission} [2009] ECR II-2185 dismissing the appeal (see below). In a parallel appeal against this Decision, judgment of 01/07/07 in Case T-291/06 \textit{Operator ARP v Commission}, the GC annulled the Decision in so far as it concerned Operator ARP sp. z o.o. (to which HCz’s non-steel assets were transferred during HCz’s restructuring in 2002-2005), see also Koska D., Kuik, K. ‘2008 and 2009 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland’ 2010 3(3) \textit{YARS} 194–196.
\item[45] CJ Judgment of 24 March 2011 in case C-369/09 P, \textit{ISD Polska and others v Commission}, (the ISD Polska (Huta Częstochowa) judgment), not yet reported.
\item[46] Protocol No. 8 on the restructuring of the Polish steel industry, annexed to the Act of Accession (OJ [2003] L 236/948) authorised Poland (derogation from general state aid rules) to grant aid for the restructuring of its steel sector according to detailed rules set out in the restructuring plans and the conditions stipulated in that protocol.
\end{footnotes}
The CJ also examined whether the procedures, laid down by Protocol No. 2 of the 1991 Europe Agreement\(^{47}\) by which the aid was brought to the notice of both the Commission and the Council gave rise to legitimate expectation for the appellants regarding that aid.\(^{48}\) The CJ noted that the right to rely on the protection of the legitimate expectations principle extended to any person in a situation where an EU authority had, by giving it precise assurances, caused that person to entertain justified expectations\(^{49}\). While the appellants argued that various documents and acts had given them such precise assurances, the CJ upheld the finding of the GC that the condition of precise assurances had not been met and the 2005 HCz Decision had not undermined the appellants’ legitimate expectations.

Finally, the CJ dismissed as inadmissible or unfounded the claims concerning the ‘appropriate’ interest rate applicable at the time of recovery.

**Commission v Poland (Buczek – Recovery)**

On 14 April 2011, the CJ delivered a ruling\(^{50}\) in an infringement case concerning Poland’s failure to implement Commission Decision 2008/344 (hereafter, Buczek Decision)\(^{51}\). CJ concluded that addressees of Buczek Decision, i.e. Technologie Buczek (TB), Huta Buczek (HB) and Buczek Automotive (BA), had made no repayment or only partly repaid the illegal aid identified in the Buczek Decision. In their defence, the Polish authorities relied on several technical (e.g. missing documents) and legal (notably a risk of ‘double repayment’\(^{52}\)) arguments to justify the delays in aid recovery.

The CJ agreed with the Commission’s application and found Poland in breach of Article 249 EC and Articles 3 and 4 of the Buczek Decision. It held,

\(^{47}\) Protocol No 2 of the Europe Agreement, signed in Brussels on 16 December 1991 (OJ [1993] L 348/2), concerning European Coal and Steel Community products provided that public subsidies were prohibited in principle while containing five-year derogation for the ECSC steel products from the general prohibition. The five-year derogation period was subsequently extended until the Accession.

\(^{48}\) The ISD Polska (Huta Czestochowa) judgment, supra, para. 130.

\(^{49}\) The ISD Polska (Huta Czestochowa) judgment, supra, para 123 and the case law cited therein.

\(^{50}\) CJ Judgment in Case C-331/09 Commission v Poland, not yet published.

\(^{51}\) Commission Decision 2008/344/EC of 23 October 2007 on State Aid C 23/06 (ex NN 35/06) which Poland has implemented for the steel producer Technologie Buczek Group (OJ [2008] L 116/26). See K. Kuik, supra note 14 for the summary of the rescue and restructuring cases in the steel sector, including the Buczek Decision.

\(^{52}\) Poland argued that a risk of ‘double repayment’ arose from the absence of a legal basis enabling administrative bodies to abandon the debts owed to them by TB, including amounts which should be recovered from TB’s subsidiaries. Moreover, if those debts were repaid, there would be no longer any legal basis in Polish insolvency law enabling TB to recover from its subsidiaries the sums paid by it.
in particular, that the registration of the addresses’ debts was delayed and had not constituted a proper implementation of the Buczek Decision, and that the amount recovered from TB had not corresponded to the amounts meant to be recovered. It also held that Poland had failed to show that implementing the Buczek Decision has proven absolutely impossible. The CJ re-confirmed established jurisprudence that apprehension of internal difficulties in the course of implementing a State aid decision could not justify a failure by a Member State to comply with its obligations under EU law.

While the judgment confirms once again the principles applicable to Member State obligations to recover unlawful State aid, its practical implications appear limited in light of the GC judgment in Case T-1/09 Buczek Automotive v Commission, as discussed below.

**Buczek Automotive v Commission**

On 17 May 2011, the GC issued a judgment concerning an appeal submitted by Buczek Automotive sp. z o.o. against the 2007 Buczek Decision which required Poland, among other things, to recover approximately EURO 1.8 million (PLN 7.2 million) (plus recovery interests) from Buczek Automotives.

The Commission stated in the Buczek Decision that Polish authorities had failed to recover public debts from BA’s parent company, Technologie Buczek. Their behaviour was found to have failed to comply with the ‘private creditor’ test whereby non-enforcement of public debt constitutes State aid if it is done on terms unacceptable for a private creditor operating under normal market conditions. The Commission found that Polish authorities not only held ‘good’ securities against which they could have enforce the debts but were also aware of the poor prospects for TB’s future performance. The Commission thus concluded that their behaviour amounted to granting illegal aid to TB. As the company has meanwhile fallen into bankruptcy, the Commission required debt recovery from two of its subsidiaries: Huta Buczek and Buczek Automotive considering that these companies had, according to the Commission, benefitted from the alleged aid. All three companies had filed appeals against the Buczek Decision, although TB and HB withdrew their submissions at a later date.

The GC judgment is notable for two main reasons. First, it held that the Commission had not presented sufficient evidence that State aid had indeed

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53 The ISD Polska (Huta Czestochowa) Judgment, supra para.72 and the case-law cited therein.
54 GC Judgment in Case T-1/08 Buczek Automotive v Commission, not yet published.
55 Supra note 52.
56 Before delivering its judgment on the merits, the GC issued orders on interim measure applications submitted by TB and HB- GC Orders of 14/03/08 in Case T-1/08 R Buczek Automotive v Commission and Case T-440 R Huta Buczek v Commission. See also Koska D., Kuik. K., supra note 43, pp. 191–193.
been granted to TB by misapplying the ‘private creditor test’. Second, the GC stated the Commission did not prove that the aid distorted competition\(^{57}\).

As regards the first point, the ‘private creditor test’ is used to establish the conditions under which a public sector debts is to be repaid to avoid being categorised as State aid\(^{58}\). The ‘private creditor test’ was developed along the lines of the ‘private investor test’\(^{59}\). While the latter involves a comparison of a private investor who is investing money with a view to receiving a return on that investment, the ‘private creditor test’ considers whether the State, just like a private creditor, seeks to maximise the re-payment of debts owed to it\(^{60}\). The GC held that BA was granted an advantage in that the authorities allowed it a period of time during which it could freely dispose of its assets without being forced into insolvency\(^{61}\). The GC proceeded to analyse whether the Commission had shown if such approach is consistent with the behaviour of a private creditor. The Commission did not perform a detailed analysis / comparison of the returns to be obtained under different recovery solutions available to the Polish authorities. The GC ruled therefore that the Commission had lacked the material elements enabling it to assert that a private creditor would have opted for insolvency proceedings as the best debt recovery method. As a result, the Buczek Decision was annulled in so far as the Commission had found that Poland had unlawfully granted State aid to TB\(^{62}\).

\(^{57}\) It is worth noting also that BA and HB argued that the aid had been granted to a different legal entity, TB, and that the Commission was not entitled to require recovery from BA and HB (no legal basis for assuming that the subsidiaries could have been the actual beneficiaries of the aid which had been granted to their parent). However, the GC did not address the question of liability.

\(^{58}\) E.g., a payment facility granted by a public authority must be regarded as State aid whenever the recipient would manifestly have been unable to obtain the resulting economic advantage from a private creditor in a comparable situation (Case C-256/97 DM Transport, [1999] ECR I-3913, para. 30). For non-recovered public debts, public bodies must be compared to a private creditor who is seeking to obtain recover overdue debts from a debtor in financial difficulties (Case T-152/99 HAMSA v Commission, ECR [2002] II-3049, para. 167). Advocate-General Sharpstone’s opinion in C-73/11 P Frucona Košice a. s. v European Commission provides the most recent discussion of the private creditor principles.

\(^{59}\) Under the ‘private investor test’, a measure involves State aid if fresh capital is offered in circumstance that a private investor would not accept. See CJ Judgment in Case C-124/10 P Commission v EDF, not yet reported.


\(^{61}\) According to the GC, the Buczek Decision was based on the fact that Polish authorities could use a different method of claim enforcement (i.e. insolvency) which would make effective recovery possible.

As regards the second point, the GC annulled the Buczek Decision because it found that the Commission had not provided sufficient reasons for finding that competition and trade between Member States had been distorted / affected by the measure. This approach follows other judgments in which the GC and CJ presented similar considerations.

The Commission appealed the GC judgment on 28 July 2011. The appeal focuses on the requirement envisaged by the GC whereby the Commission must calculate gains from various debt enforcement methods and to compare the duration of the various public debt recovery procedures. The Commission argues that it is not obliged to carry out precise calculations of this kind but merely to take account of the factors that a private creditor would consider. The Commission challenges the GC ruling as it placed upon it the obligation to adduce additional evidence to reject the argument concerning the conduct of a private creditor. The Commission is also of the opinion that Protocol No. 8, used as its decision’s legal basis, is sufficient to show that the aid in question distorts or threatens to distort competition.

**Commission Decisions**

During 2010–2011, the Commission adopted only two Polish State aids decisions following a formal investigation procedure under Article 108(2) TFEU. This may be explained by various factors, including: (i) the Commission focusing its enforcement efforts on the financial sector; (ii) lack of Polish notifications (and UOKiK’s efforts to screen and advise Polish authorities on State aid issues), and; (iii) the economic crisis.

**PZL Hydral**

PZL Hydral S.A. (hereafter, PZL Hydral) was established shortly after World War II as a state enterprise. The company specialised until 2008 in the production of civil and military aviation hydraulics and related services. Since 2008, PZL Hydral operated as a holding company and ceased industrial activities. Its activities concerning aviation hydraulics and related services were gradually taken over by its subsidiary, PZL Wroclaw S.A. (hereafter, PZL Wroclaw).

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65 Decisions in cases concerning aid to PZL-Hydral, and to WRJ / WRJ-Servis (formerly Huta Jednosć). Only the former was decided on merits. In the WRJ decision, the Commission held it was not competent under Protocol No 8 to the Accession Treaty to review the measures granted by Poland in 2001–2003.
PZL Hydral has had difficulties in repaying private and public liabilities since 1998. On 27 March 2008, Poland notified a restructuring plan for PZL-Hydral under the Guidelines for State aid for rescuing and restructuring firms in difficulty\textsuperscript{66}. The plan envisaged the transfer of PZL-Hydral’s profitable assets to PZL Wroclaw. While the latter was to be privatised (and resources obtained from privatisation were to cover part of the accumulated debts), PZL Hydral was to be liquidated. Approximately PLN 130 million (EUR 37.5 million) of public funds were estimated to be spend in the form of capital injections and a loan\textsuperscript{67} from the Polish Industrial Development Agency\textsuperscript{68}.

On 10 September 2008, the Commission adopted a decision initiating a formal investigation procedure with respect to the aforementioned measures. However, a further decision was adopted on 12 November 2008 which extended the investigation to cover additional State support measures which the Commission meanwhile identified (amounting to PLN 218.6 million\textsuperscript{69}).

Polish authorities have subsequently modified PZL Hydral’s restructuring plan and, notably, withdrew the investment injections of PLN 113 million. In light of such developments, the Commission adopted a decision on 4 August 2010\textsuperscript{70} closing the PZL Hydral investigation because it concluded that the various measures provided to that company did not constitute State aid as they had been granted on market terms (met the private investor and/or private creditor principles).

4. Regulatory cases (preliminary rulings and infringements)

Electronic communication

\textit{Telekomunikacja Polska v UKE}

On 11 March 2011, the CJ ruled\textsuperscript{71} on two preliminary reference questions from the Polish Supreme Administrative Court (in Polish: \textit{Naczelny Sąd Administracyjny}, hereafter, NSA) regarding regulatory obligations imposed by the UKE President on the incumbent operator Telekomunikacja Polska S.A. (TP).

\textsuperscript{66} Communication from the Commission – Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ [2004] C 244/2.

\textsuperscript{67} Invitation to submit comments pursuant to Article 88(2) of the EC Treaty in case State aid C 40/08 (ex N 163/08) – Restructuring aid to PZL Hydral S.A., OJ [2008] C 324/10.

\textsuperscript{68} In 2003, IDA acquired 80.94\% PZL Hydral’s shares and gradually increased its stake to 92.42\% in January 2010 (the remaining shares were held by PZL Hydral’s employees).

\textsuperscript{69} Invitation to submit comments pursuant to Article 88(2) of the EC Treaty in case State aid C 40/08 (ex N 163/08) – Restructuring aid to PZL Hydral S.A., OJ [2010] C 158/08.


\textsuperscript{71} CJ Judgment in Case C-522/08 \textit{Telekomunikacja Polska v UKE}, ECR [2010] I-02079.
The preliminary reference was made in the context of a dispute between UKE and TP. In its decision of 28 December 2006 and another of 14 March 2007 upholding the earlier decision, the UKE President required TP to terminate its practice of making the provision to end users of its ‘neostada tp’ broadband internet access service conditional upon the conclusion of a telephony services contract. The NRA based its decision on Article 57(1) of the Telecommunications Law Act (hereafter, Telecommunications Law) which expressly prohibited making the conclusion of a contract for the provision of publicly available telecoms services contingent upon the conclusion of a contract for other services, or for the purchase of equipment from the service provider. Article 57(1) Telecommunications Law imposed this general prohibition without reference to the degree of market competition and market position of the undertakings concerned. TP challenged the regulatory decision and claimed that its legal basis [Article 57(1) Telecommunications Law] was incompatible with the EU electronic communication framework (notably the Universal Services Directive 2002/22/EC).

The dispute reached NSA which decided to ask the CJ for a preliminary ruling regarding whether the contested national provision is compatible with the Electronic Communications Framework. The CJ ruled that neither the Framework Directive nor the Universal Service Directive precluded national legislation which, in order to protect end-users, prohibited bundling. The Court focused on the fact that the Polish provision, which generally and without discrimination prohibited linked sales, did not affect the powers of the NRA to, inter alia, define and analyse markets or impose regulatory obligations. Neither did the Directive provide for full harmonisation of the consumer protection field. The Universal Service Directive is explicitly without prejudice to EU rules on consumer protection or national consumer protection legislation conforming to EU law.

Nevertheless, the CJ found that national legislation which, with certain exceptions and without taking account of specific circumstances, imposes a general prohibition of combined offers by a vendor to consumers was in fact incompatible with EU consumer protection law (notably the Unfair

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72 The UKE decisions have not been published.
73 Article 57(1) of the Telecommunications Law (see supra note 29).
Commercial Practices Directive 2005/29/EC\textsuperscript{76}) which \textit{harmonises the relevant consumer protection aspects}\textsuperscript{77}.

Following the preliminary ruling, the NSA dismissed as unfounded TP’s appeal (cassation)\textsuperscript{78}. Given that the scope of the appeal was limited to the scope of the complaint (compatibility of Article 57(1) of Telecommunications Law with the Electronic Communication Framework), the NSA could not rule on the compatibility of Article 57(1) of Telecommunications Law with the Unfair Commercial Practices Directive\textsuperscript{79}.

\textit{Polska Telefonia Cyfrowa (PTC) v UKE (number portability charge)}

On 1 July 2010, the CJ answered\textsuperscript{80} a preliminary question submitted by the Polish Supreme Court regarding the interpretation of the Universal Service Directive. The latter obliges Member States to, \textit{inter alia}, ensure that all subscribers of publicly available telephone services (including mobile networks) may retain, if they so request, their numbers despite switching telephone providers. The preliminary question related to the direct fee that could be charged for the use of number porting service.

The number portability service carries with it certain costs for operators. Typically, the donor operator (the number is ported from its network) charges the recipient operator (to whom the subscriber ports his number) an interconnection charge incurred when dealing with such request. The recipient may recover all or part of that cost by passing it on to its subscribers. This is done either directly (by way of a one-off payment charged to the subscriber using number porting facility) or indirectly (where the cost is included in the price of telecoms services).

In addition to ensuring the availability of number porting services, the Universal Service Directive obliges Member States to ensure that its pricing


\textsuperscript{77} CJ Judgment in Joined Cases C-261/07 and C-299/07 VTB/VAB and Galatea ECR [2009] I-2949, para. 68. See note on this case by A. Pisarkiewicz '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)' 2011 4(5) YARS 235–240.

\textsuperscript{78} NSA Judgment of 27 May 2010, II GSK 355/10.

\textsuperscript{79} See A. Pisarkiewicz, supra note 7.

\textsuperscript{80} CJ Judgment in Case C-99/09, Polska Telefonia Cyfrowa v UKE, (the PTC judgment), ECR [2010] I-06617.
for interconnections related to the provision of number portability is cost-oriented and that direct charges, if applied, do not discourage consumers from using that facility. The relevant Polish provisions are found in Article 71 of Telecommunications Law. On 1 August 2006, the Polish NRA adopted a decision imposing a fine of PLN 100 thousand (approximately EUR 24 thousand) on the mobile operator Polska Telefonia Cyfrowa sp. z o.o. (PTC) for infringing Article 71 of Telecommunications Law by charging, for approximately two months in 2006, its subscribers a one-off fee of 122 PLN (approximately EUR 30) for number porting. On the basis of a consumer survey, the UKE President decided that the level of the contested fee dissuaded PTC’s subscribers from porting their numbers to a new mobile operator. The results of the survey indicated that phone users were prepared to pay for that service no more than 50 PLN (approximately 12 Euro). PTC challenged the UKE decision on the grounds that a number porting charge could not be set without reference to costs incurred when providing it. PTC’s appeal eventually reached the Supreme Court which asked a preliminary reference question to the CJ. As clarified by Advocate-General Bot, the matter before the CJ was not whether the service should be free of charge (although he noted in his Opinion that such a solution, if pursued by the EU legislator, would have several advantages). Rather, the question arose as to how best to control the pricing of number portability. AG Bot criticised the UKE President’s ‘subjective’ methodology relying solely on the results of a consumer survey. He noted that the method used by an NRA to assess whether a direct charge had a dissuasive effect had to be consistent with principles governing interconnection pricing to ensure its objectivity, full effectiveness and transparency.

The CJ examined the preliminary question in the context of its earlier Mobistar judgment concerning the interconnection fees charged between operators. The CJ stated therein that such prices were to be set up on the basis of their costs and that NRAs can fix, in advance and on the basis of an abstract model, the maximum costs which may be charged by the donor operator to the recipient operator as set-up costs. That is so provided that prices are fixed on the basis of costs in such a way that subscribers are not dissuaded from making use of the number portability facility. Agreeing with AG Bot, the CJ stated in the PTC judgment that NRAs must identify, using an objective and reliable method, both the actual cost incurred by operators

81 Article 30 (2) of the Universal Service Directive.
82 The UKE decision has not been published.
84 CJ Judgment of 13/07/06 in Case C-438/04 Mobistar v IBPT, ECR [2006] I-06675.
85 Mobistar, supra, para. 33.
86 Mobistar, supra, para 37.
and the level of direct charge beyond which subscribers are unlikely to port their numbers. Following that examination, an NRA must oppose a direct charge likely to act as a disincentive to consumers even if it is in line with costs incurred by operators when providing the service. In other words, always taking into account the actual cost of number porting, an NRA can fix a ceiling for the direct charge lower than the actual costs if it arrives at the informed conclusion that a fully cost-oriented direct fee would be likely to dissuade users from porting numbers.87

Some commentators argued that while cost levels remain an objective factor, the notion of a charge that does not discourage consumers from number porting is in principle a subjective benchmark.88 This subjectivity would remain despite the fact that the CJ judgement requires that objective cost factors must be taken into account to define the maximum permissible number porting charges. It seems that the difficulty in balancing those objective and subjective elements have not gone unnoticed by the Polish regulator and thus the revised Telecommunications Law Act of 24 April 2009 abolished altogether the possibility of using direct charges for the number portability service.

**PTC v UKE (Publication requirements)**

On 12 May 2011, CJ ruled in another dispute between the Polish mobile operator PTC and the UKE President. This judgment concerned a preliminary reference question regarding the publication requirements for guidelines adopted by the Commission and the interpretation of rules on languages and publication contained in the 2003 Act of Accession.90

The dispute arose following a UKE decision of 17 July 2006 identifying PTC as an undertaking having significant market power in the market for the provision of voice call termination services and imposing upon it certain

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87 Para. 28 of the PTC judgment: ‘[NRA] retains the power to fix the maximum amount of that charge levied by the operators at a level below the costs inquired by them, when a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility.’

88 C. Flynn, ‘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)’ (2011) 4(5) YARS 242. See also 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 06/03/07 (Ref. No. XVII AmT 33/06) – Portability fee’ (2008) 1(1) YARS 266–270.

89 CJ Judgment in Case C-410/09 PTC v UKE, not yet reported.

90 OJ [2003] L 236/33.
regulatory obligations. PTC launched an action contesting the UKE decision, which was however unsuccessful both at first instance and on appeal. Eventually, PTC brought the case before the Polish Supreme Court claiming that the 2002 Commission Guidelines for market analysis and the assessment of significant market power (2002 Guidelines)\footnote{Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ [2002] C 6.}, on which the UKE decision was based, cannot be relied upon because they were not published in the Polish language in the Official Journal of the European Union (OJEU).

The Supreme Court was uncertain as to the conclusions to be drawn from this fact, particularly in light of judgments such as \textit{Skoma-Luc}\footnote{Case C-161 \textit{Skoma-Luc} ECR [2007] I-10841, paras 57–59.} and \textit{Balbiino}\footnote{Case C-560/07 \textit{Balbiino} ECR [2009] I-4447, para. 30.}, which preclude obligations contained in EU legislation\footnote{SN understood the CJ’s case-law on the concept of ‘obligations contained in Community legislation’ as possibly covering all acts of EU institutions affecting individuals’ rights or obligations, which are governed by provisions of national law implementing provisions of Community directives (C/410-99, para 19).} that was not published in the OJEU in the language of a new Member State (where that language is an official EU language) from being imposed upon individuals in that State, even though they could have become acquainted with that legislation by other means. The Polish Supreme Court asked the CJ whether the 2002 Guidelines can be applied to individuals established in a given Member State even though that act was not published in the OJEU in the language of that state.

The CJ confirmed that, in line with \textit{Skoma-Luc} and \textit{Balbiino}, it follows from Article 254(2) EC (now Article 297 TFEU) that EU regulations and directives which are addressed to all Member States cannot produce legal affects unless they have been published in the OJEU. They cannot be enforced against natural or legal persons in a State before those persons have had an opportunity to get acquainted with them through their proper publication. The publication requirement also applies to situations in which EU legislation obliges Member States to adopt measures imposing obligations on individuals.

The CJ concluded that the 2002 Guidelines did not lay down any obligations capable of being imposed, directly or indirectly, on individuals. It was also found that the transitional regime applicable to the accessions period (Article 58 of the Act of Accession) implied that Member States and institutions were to select EU acts for publication in the OJEU. The possibility that certain acts might not be published was thus not ruled out. The fact, therefore, that the 2002 Guidelines had not been published in the OJEU in the language of
a given Member State did not prevent its NRA from referring to them in a decision imposing certain regulatory obligations on a telecoms operator\textsuperscript{95}.

\textit{Commission v Poland (Access to broadband internet)}

On 6 May 2010, the CJ ruled\textsuperscript{96}, following an action brought by the European Commission\textsuperscript{97}, that Poland had failed to fulfil its obligations under the Electronic Communications Framework (in particular the Universal Service Directive and the Framework Directive) by regulating retail tariffs for broadband access without previously carrying out a market analysis. The controversy dated back to 2006 when the UKE President imposed on TP an obligation to submit for approval its retail broadband internet tariffs, and to have such tariffs cost-oriented. In 2007, the Commission initiated an infringement procedure against Poland\textsuperscript{98} after it discovered that no market analysis preceded the imposition of such obligations despite the fact that a market analysis was required under the Electronic Communications Framework.

The CJ confirmed that under the 2002 Universal Service Directive\textsuperscript{99}, NRAs may impose regulatory requirements on undertakings with significant market power only after analysing the relevant market first. The 2002 Framework Directive\textsuperscript{100} regulates the market analysis procedure. The provisions of these two 2002 Directives differ from the earlier electronic communications framework which imposed regulatory obligations on undertakings with significant market power by virtue of legislation, without any prior market analysis. While the 2002 Framework Directive\textsuperscript{101} allows Member States to maintain in force, as transitional measures, obligations imposed under the previous regulatory regime, transitional measures can only relate to tariffs for the use of the fixed public telephone network and fixed public telephone services and not broadband access. Moreover, the UKE President imposed the contested obligations in 2006, two years after the entry into force of the new EU telecoms package. Those obligations could thus not be treated as transitional measures.

The CJ ruling led to the delivery of a national judgment on 18 April 2011 by the Polish Competition and Consumer Protection Court (in Polish: \textit{Sąd})

\textsuperscript{95} Case C-410/09, para 34. For detailed analysis of the judgment, please see I. Kawka in the current issue of YARS.
\textsuperscript{96} CJ judgment in Case C-545/08 \textit{Commission v Poland} ECR [2010] I-00053* (summary publication).
\textsuperscript{97} See K. Kuik, supra note 3.
\textsuperscript{98} Case INFSO 2007/2120.
\textsuperscript{99} Articles 16 and 17.
\textsuperscript{100} Article 16.
\textsuperscript{101} Article 27.
Ochrony Konkurencji i Konsumentów, hereafter, SOKiK)\textsuperscript{102}. SOKiK quashed the contested NRA decision which had imposed on the incumbent a fine of approximately PLN 339 million (approximately EUR 82 million)\textsuperscript{103}. SOKiK found that the UKE President had no legal basis for imposing the fine in light of the CJ judgment in Case 545/08. SOKiK’s judgment was upheld by the Court of Appeals\textsuperscript{104}.

**Pharmaceuticals**

*Commission v Poland (Pre-Accession marketing authorisations)*

On 22 December 2010, the CJ delivered a judgment\textsuperscript{105} in infringement proceedings brought by the Commission against Poland in relation to its authorisation requirements for medicinal products.

The case had its origin in Polish administrative practice predating its EU accession on 1 May 2004. Transitional provisions annexed to the Act of Accession\textsuperscript{106} contained derogation from the applicability of quality, safety and efficacy requirements contained in Directive 2001/83 EC\textsuperscript{107}. They stated that all authorisations for pharmaceutical products issued under Polish law prior to its EU accession should stay valid until they are prolonged in compliance with the *acquis* or until 31 December 2008 (whichever is the earlier)\textsuperscript{108}.

Several marketing authorisations were issued immediately before Poland’s EU accession, including an authorization for generic versions of the reference product Plavix. The Commission challenged the administrative practice of Polish authorities granting such authorizations under national law applicable at the time despite the lack of required documentation and on a conditional basis (although issued before the accession, the authorisations have not become effective until after that date). The Commission argued that such conditional authorizations should not benefit from the derogation provided in the Act of Accession. They should, therefore, have complied with EU law from 1 May 2004 onwards. In the Commission’s view, the contested authorisations did not comply with the requirements and procedures of relevant EU directives and

\textsuperscript{102} SOKiK Judgment of 18/04/11 r. sygn. akt XVII AmT 22/07.
\textsuperscript{103} UKE President Decision of 21/02/07 no. DRTD-WUD-079-33/2006(42).
\textsuperscript{104} Sygn. akt VI ACa 1001/11.
\textsuperscript{105} CJ judgment of 22 December 2010 in Case C-385/08, Commission v Poland, ECR [2010] I-00178* (Summary publication).
\textsuperscript{106} Annex XII, chapter 1, para 5.
\textsuperscript{108} Paragraph 1.5, Annex XII to the Act of Accession (supra note 46).
regulations (i.e. Directive 2001/83/EC, Regulation 2309/93\(^{109}\) and Regulation 726/2004\(^{110}\)). In particular, they did not respect the 10-year period of protection enjoyed by the reference product Plavix (until the end of 2008).

The Polish government argued that the validity of marketing authorizations issued before its EU accession remains the issue of national law; therefore, the EU lacks competence in that respect.

The CJ disagreed and ruled that the Commission proceedings concerned Poland’s compliance with the conditions of the derogation granted under the Act of Accession, rather than the validity of Polish administrative acts. The CJ confirmed the competence of the EU to examine the conditions for the derogation, and whether they have been met. As regard the latter, the CJ found to the contrary. Therefore, CJ concluded that Poland had failed to fulfil its obligations under EU law by maintaining in force the contested authorisations and by placing and keeping on the market of medicinal products whose marketing authorisations were not issued in accordance with EU law even after 1 May 2004.

**Literature**

Brammer, S., ‘Case C-375/09, Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska sp. z o.o (now: Netia SA), Judgment of the Court of Justice (Grand Chamber) of 3 May 20011’ (2012) 49(3) *C.M.L.R*.

Flynn, C., ‘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)’ (2011) 4(5) *YARS*.


Kawka, I., ‘Commission guidelines on market analysis and the assessment of significant market power do not impose obligations on individuals Case comment to the preliminary ruling of the Court of Justice of the European Union of 12 May 2011 Polska Telefonia


Cyfrowa sp. z o.o. (PTC) v Prezes Urzędu Komunikacji Elektronicznej (Case C-410/09)’ (2012) 5(7) YARS.
Kośka D., Kuik K., ‘2008 and 2009 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland’ 2010 3(3) YARS.
Kuik K., ‘2007 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland’ 2008 1(1) YARS.
Pisarkiewicz, A., ‘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)’ 2011 4(5) YARS.
Wach, M., ‘Should a fee for mobile phone number portability be determined solely by subscriber preferences? Comments to the judgments of the Court of Competition and Consumers Protection of 8 January 2007 (Ref. No. XVII AmT 29/06) and 6 March 2007 (Ref. No. XVII AmT 33/06) – Portability fee’ (2008) 1(1) YARS.
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Source: CJEU’s website.
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Source: Website of DG Communications Networks, Content and Technology.
Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2011

by

Agata Jurkowska-Gomulka*

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* Dr. Agata Jurkowska-Gomulka, Department of European Economic Law, Faculty of Management, University of Warsaw; Scientific Secretary of the Centre for Antitrust and Regulatory Studies.
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Abstract

The article presents key developments in Polish antitrust legislation and jurisprudence of 2011. Its legislative part focuses on the renewal of Polish Group Exemption Regulations for vertical agreements, specialization and R&D agreements as well as cooperation agreements in the insurance sector. Noted is also the sole amendment of the Competition Act introduced in 2011 which concerns the financial liability of the Polish competition authority. The article covers also the new Guidelines of the UOKiK President on the criteria and procedures of merger notifications. Presented in its jurisprudential part is a number of 2011 rulings, mainly those rendered by the Supreme Court and the Court of Appeals, divided according to their subject matter with respect to particular types of restrictive practices and other problems related to the decision-making process of the UOKiK President.

Résumé

Cet article présente les développements principaux relatifs à la législation et jurisprudence antitrust polonaise en 2011. La partie législative de l’article se concentre sur le renouvellement de la réglementation portant sur l’exemption collectif des accords verticaux, ceux relatifs à la spécialisation et R&D, ainsi que les accords de coopération dans le secteur des assurances. De plus, l’article mentionne un seul amendement à la Loi sur la concurrence. Les directives délivrées par le Président du Bureau de la concurrence et protection des consommateurs (UOKiK) en Pologne sur des critères et des procédures relatives à la notification d’une concentration à une autorité nationale de la concurrence sont y également brièvement décrites. Dans la partie sur la jurisprudence, l’article présente les décisions, surtout celles de la Cour suprême et de la Cour d’appel, qui sont divisées selon leur objet en faisant référence à des types particuliers de pratiques restrictives et d’autres problèmes liés au processus de la prise de décision par le Président de l’UOKiK.

Classifications and key words: abuse of a dominant position; anticompetitive agreements; antitrust case law; antitrust legislation; bid-rigging; common competition rule of the EU; group exemption; fines; Regulation 1/2003; relevant market; resale price maintenance; R&D agreement; specialisation agreement.
I. Antitrust legislation

1. Competition Act amendment

The Act of 16 February 2007 on Competition and Consumer Protection (hereafter, Competition Act\(^1\)) was changed only once in 2011. The amendment was introduced by Article 15 of the Act of 20 January 2011 on Financial Liability of Public Servants for Manifest Law Violations\(^2\). On this basis, Article 81(3) of the Competition Act was supplemented by an additional provision imposing upon the UOKiK President a duty to determine, while annulling or amending his/her own decision, if the original decision was in fact adopted without a legal basis at all or with a manifest infringement of the law. A final determination of that type constitutes according to Article 6(10) of the Public Servants Liability Act, a manifest law violation within the meaning of this Act.

2. Renewal of group exemption regulations

2.1. Group exemption for horizontal co-operation in the insurance sector

The most significant legislative initiatives of 2011 in Polish antitrust are to be found in three regulations issued by the Council of Ministers that establish new group exemptions for certain categories of anticompetitive agreements. Based on Article 8(3) of the Competition Act, they replaced their respective predecessors issued in 2007. This way, the Council of Ministers responded in affirmative to doctrinal voices arguing in favour of adopting new Polish group exemptions rather than replacing national legislation by EU regulations\(^3\). Domestic group exemptions apply to agreements having an impact solely on the Polish market; EU regulations apply to co-operation affecting intra-EU trade. However, the new Polish acts are somewhat inspired by EU law. In comparison to their 2007 predecessors, the detailed conditions for exemption and the categories of exempted agreements covered by the regulations remained unchanged (vertical agreements, R&D and specialisation agreements, horizontal agreements in the insurance sector) albeit amendments were made to the scope of some of these categories.

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\(^1\) Journal of Laws 2007 No. 50, item 331, as amended.
\(^2\) Journal of Laws 2011 No. 34, item 173.
\(^3\) See G. Materna, ‘Wpływ prawa UE na polskie wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję’ [‘The impact of EU law on Polish block exemption from the prohibition of agreements restricting competition’] (2010) 5 Europejski Przegląd Sądowy.
Issued first was the Council of Ministers’ Regulation of 22 March 2011 on the exemption of certain categories of agreements concluded by undertakings in the insurance sector from the prohibition of competition restricting agreements\(^4\) (hereafter, the Insurance Regulation). The new regulation replaced the Council of Minister’s Regulation of 30 July 2007\(^5\) in force till 31 March 2011\(^6\). Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector\(^7\) acted as a reference point for the new Polish block exemption. Following the EU pattern, the national act decided to cut down the number of exempted fields of cooperation from six to just three. The current Polish group exemption applies therefore only to horizontal co-operation in: 1) joint compilation and distribution of information necessary for the calculation of average costs of specified risk coverage or the creation of mortality tables, etc\(^8\); 2) joint research on the probable impact of general circumstances, external to the interested undertakings, either on the frequency or on the scale of future claims for a given risk and the distribution of such studies\(^9\); 3) common coverage of certain types of risks (insurance pools)\(^10\). Co-operation in the compilation of information and research activities is eligible for exemption regardless of quantitative conditions. The block exemption for insurance pools created in order to cover new risks is time-limited to three years only but it is not dependent on market thresholds. Pools created for other types of risks can benefit from the block exemption if a market threshold of 20% for co-insurance groups and 25% for co-reinsurance is observed. The Insurance Regulation will expire on 31 March 2018 (a year after the corresponding EU act).

### 2.2. Group exemption for vertical agreements

A few days after the issuance of the Insurance Regulation, the Council of Ministers adopted another act: Regulation of 30 March 2011 on the exemption of certain categories of vertical agreements from the prohibition of competition

\(^4\) Journal of Laws 2011 No. 67, item 355.
\(^5\) Council of Ministers’ Regulation of 22 March 2011 on the exemption of certain categories of agreements concluded by undertakings in insurance sector from the prohibition of competition restricting agreements (Journal of Laws 2007 No. 137, poz. 964).
\(^7\) OJ [2010] L 83/1.
\(^8\) See para. 3(1) and paras. 4 and 6 of the Insurance Regulation.
\(^9\) See para. 3(2) and paras. 5 and 6 of the Insurance Regulation.
\(^10\) See para. 3(3) and paras. 8-14 of the Insurance Regulation.
restricting agreements\textsuperscript{11} (hereafter, the Vertical Agreements Regulation). Starting from 1 June 2011, the new act replaced its predecessor of the same name issued on 19 November 2007\textsuperscript{12}. The Polish legislator directly admitted in a document explaining its reasons for adopting a new national block exemption that the 2001 act follows Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices\textsuperscript{13}. The Council of Ministers stated that reference to EU law guarantees transparency – undertakings potentially interested in using the block exemptions do not have to adapt their agreements to different sets of exempting conditions. Another reason was associated with the fact that market conditions in Poland do not differ greatly from those found in other Member States and the EU as a whole.

The scope of the Polish Vertical Agreements Regulation is based on Regulation 330/2010 and thus it presumes only one type of quantitative conditions for a ‘standard’ exemption – a market share threshold (the situation changes for vertical agreements between associations of undertakings or between undertakings being members of associations). The market share threshold of 30\%, either for a supplier or a buyer, remains the same in both the Polish and the EU block exemption\textsuperscript{14}. If an agreement covers many parties each operating on a different level of the market, all of them have to fulfil the market share condition\textsuperscript{15}. In comparison to its predecessor, the new act contains an amended definition of selective distribution\textsuperscript{16} and added a totally new legal definition of ‘a customer of a buyer’\textsuperscript{17} (inspired by Regulation 330/2010\textsuperscript{18}). The 2011 block exemption introduced also detailed rules on exempting agreements between associations of undertakings and their members or between associations of undertakings and their suppliers\textsuperscript{19}. Such practices were so far treated as ‘normal’ vertical agreements between ‘independent’ undertakings; now they benefit from the block exemption only if they fulfil additional conditions: all association members must be retailers of goods (not services) and the turnover of any of the members cannot exceed 50,000,000 EUR\textsuperscript{20}. The list of hardcore restrictions (black-listed provisions) remained almost unchanged but the new provisions stipulate that a prohibition

\textsuperscript{11} Journal of Laws 2011 No. 81, item 441.
\textsuperscript{12} Journal of Laws 2007 No. 230, item 1691.
\textsuperscript{13} OJ [2010] L 102/1.
\textsuperscript{14} See para. 8(1) of Vertical Agreements Regulation.
\textsuperscript{15} See para. 8(2) of Vertical Agreements Regulation.
\textsuperscript{16} See para. 3(5) of Vertical Agreements Regulation.
\textsuperscript{17} See para. 3(15) of Vertical Agreements Regulation.
\textsuperscript{18} See Article 1(1)(i) of Regulation 330/2010.
\textsuperscript{19} See para. 5 of Vertical Agreements Regulation.
\textsuperscript{20} See Article 3(2) and 2(2) of Regulation 330/2010.
of sales of goods to distributors outside the selective distribution system on a territory where a supplier operates in a selective distribution system does not constitute a black-listed clause\textsuperscript{21}. The Vertical Agreements Regulation will stay in force till 31 May 2023.

2.3. Group exemption for specialisation and R&D agreements

The last block exemption issued in 2011 was the Council of Ministers’ Regulation of 13 December 2011 on the exemption of specialisation agreements and research and development agreements from the prohibition of competition restricting agreements\textsuperscript{22} (hereafter, the Horizontal Agreements Regulation). The new act replaced the identically named block exemption of 19 November 2007\textsuperscript{23}. Issuing a single regulation covering both categories of horizontal co-operation, regulated in the EU by two separate acts, is a type of Polish legislative tradition. Still, the detailed provisions of the new Polish block exemption are patterned on the two existing EU acts: Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of Article 101(3) [TFEU] to certain categories of research and development agreements\textsuperscript{24} and Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of Article 101(3) [TFEU] to certain categories of specialisation agreements\textsuperscript{25}. The key change introduced into the new Polish block exemption is the broadened scope of exemption provided for R&D agreements which now covers, aside from joint research and development, joint exploitation of R&D research and a combination thereof, as well as the so called ‘paid-for research and development’ and ‘joint exploitation of results from paid-for research and development’\textsuperscript{26}. The latter type of R&D cooperation refers to a situation where only one party conducts the actual R&D activities while the other party finances it. In comparison to its predecessor, the new Polish Regulation introduced a number of new legal definition: ‘paid-for research and development’\textsuperscript{27}, ‘financing party’\textsuperscript{28}, ‘common distribution’\textsuperscript{29}, ‘specialisation in research and development’\textsuperscript{30}, ‘specialisation in exploitation of R&D results’\textsuperscript{31}

\textsuperscript{21} See para. 11(2)(d) of Vertical Agreements Regulation.
\textsuperscript{22} Journal of Laws 2011 No. 288, item 1691.
\textsuperscript{24} OJ [2010] L 335/36.
\textsuperscript{25} OJ [2010] L 335/43.
\textsuperscript{26} See para. 3(1)(2)(d-f) of Horizontal Agreements Regulation.
\textsuperscript{27} See para. 2(7) of Horizontal Agreements Regulation.
\textsuperscript{28} See para. 2(8) of Horizontal Agreements Regulation.
\textsuperscript{29} See para. 2(10) of Horizontal Agreements Regulation.
\textsuperscript{30} See para. 2(12) of Horizontal Agreements Regulation.
\textsuperscript{31} See para. 2(13) of Horizontal Agreements Regulation.
and ‘goods of a downstream market’\textsuperscript{32}. The latter is useful when goods covered by a specialisation agreement are used as input for the manufacturing of goods on a downstream market by one or more parties to the specialisation agreement. Market share thresholds as a condition for the application of the block exemption were left unchanged but the rules on measuring market shares of the parties seem more precise now\textsuperscript{33}.

Unlike the 2007 regulation, certain clauses that used to be considered admissible in horizontal co-operation agreements were modified, mainly in order to make them clearer\textsuperscript{34}. The list of hard-core restrictions (black-listed clauses) in specialisation agreements was not changed but the list of prohibited clauses in R&D agreements was substantially amended. For instance, the 2011 Regulation specifies that the prohibition of using a clause on resale price fixing of goods extends also over the prices of the licensing processes. The new Horizontal Agreements Regulation broadens one of the conditions for joint exploitation of R&D results whereby parties to R&D agreement are now allowed to require compensation for giving access to R&D results in order to continue research or to exploit its results; compensation cannot, however, be excessive so as to limit or impede access to R&D results\textsuperscript{35}. The new exemption entered into force on 1 January 2012 and will be valid till 31 December 2023.

All of the new regulations contain provisions making it possible for undertakings to adapt their existing agreements to the new conditions (if any) established in the acts of 2011 in order to maintain the benefit of block exemptions granted under the acts adopted in 2007.

3. Guidelines of the UOKiK President on criteria and procedures concerning a notification of a concentration

Guidelines issued by the UOKiK President are not a source of binding law but the fact that they are published in the UOKiK Official Journal\textsuperscript{36} make them, to a certain extent, binding for the UOKiK President himself/herself (as it is stated in their introduction that ‘the UOKiK President applies them’). The objective of the Guidelines is enhancing legal certainty for undertakings regarding the duty to notify an intention to concentrate as well as other issues connected with antitrust proceedings in merger cases. The Guidelines cannot

\textsuperscript{32} See para. 2(14) of Horizontal Agreements Regulation.
\textsuperscript{33} See para. 4 of Horizontal Agreements Regulation.
\textsuperscript{34} See para. 3(2) of Horizontal Agreements Regulation.
\textsuperscript{35} See para. 9(1)(c) and 9(2) of Horizontal Agreements Regulation; Article 3(2) of Regulation 1217/2010.
\textsuperscript{36} UOKiK Official Journal 2011 No. 1, item 1.
regulate concentration-related problems in a way contrary to the provisions of the Competition Act; they only explain how the UOKiK President assesses selected problems associated with merger control. The document is divided into three parts: 1) criteria of notification of an intention to concentrate, 2) notification procedure, 3) sanctions for failure to fulfil the notification duty and violating other concentration-related provisions.

II. Antitrust jurisprudence

1. General characteristics of 2011 jurisprudence

This review covers selected judgments delivered in 2011 by three Polish courts engaged in antitrust cases: the Supreme Court (in Polish: Sąd Najwyższy; hereafter, SN), the Court of Appeals in Warsaw (in Polish: Sąd Apelacyjny w Warszawie; hereafter, SA) and the Court of Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK). According to last year’s UOKiK Activity Report37, SOKiK delivered 58 rulings in antitrust cases in 2011; the Court of Appeals rendered 30 judgments and the Supreme Court only 338.

All the judgments subject to this analysis are based on the Competition Act, mainly the Competition Act of 2007 which is currently in force. Some of the rulings refer also to practices that infringed, or at least had been declared to have done so, the provisions of the earlier Competition Act of 200039 (cases resulting from an earlier intervention by the higher instance courts). The article focuses on rulings delivered by the Supreme Court and the Court of Appeals; SOKiK’s first instance judgments are covered to a lesser degree since they can find themselves subject to further juridical revision, 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 rulings assessed here was made on the basis of the resources collected by CARS.

Not unlike in previous years, the jurisprudence of 2011 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 (or were alleged to have taken the form of): imposition of unfair prices (e.g. SA judgment of 29 April 2011, VI Aca 1171/10, ZWiK w Strzelinie; SA judgment of 31 May 2011, VI Aca 1028/10, STALEXPORT; SOKiK judgment of 3 October 2011, XVII Ama 4/10, PKS w Elblągu; SOKiK judgment of 11 March 2011, XVII Ama 56/10, Marquard Media; SOKiK judgment of 22 December 2011, XVII Ama 65/10, PGK EKOM); limiting production, sale or technological progress (SOKiK judgment of 17 March 2011, XVII Ama 227/09, Galicjanka); imposition of onerous contractual terms yielding unjustified profits to the dominant undertaking (e.g. SN judgment of 5 May 2011, III SK 36/10, ENION; SA judgment of 7 June 2011, VI Aca 415/11, ENION; SA judgment of 15 July 2011, VI Aca 1301/10, Dolnośląska Spółka Gazownictwa); discriminatory practices (e.g. SOKiK judgment of 27 September 2011, XVII 35/10, Sped-Pro); counteracting the formation of conditions necessary for the emergence or development of competition (e.g. SA judgment of 26 May 2011, VI Aca 1081/10, Rychwal Commune; SA judgment of 14 April 2011, VI Aca 1084/10, Przedsiębiorstwo Uslug Komunalnych in Grajewo; SOKiK judgment of 13 April 2011, XVII Ama 223/09, Przedsiębiorstwo Uslug Komunalnych w Olszynie; SOKiK judgment of 14 September 2011, XVII Ama 2/10, Celowy Związek Gmin; SOKiK judgment of 11 April 2011, XVII Ama 62/08, Telekomunikacja Polska; SOKiK judgment of 11 April 2011, XVII Ama 123/09, FAMIS; SOKiK judgment of 17 February 2011, XVII Ama 231/10, PZU); tying (SA judgment of 29 March 2011, VI Aca 1087/10, Krajowa Stacja Chemiczno-Rolnicza; SA judgment of 21 July 2011, VI Aca 1303/10, RPWiK w Tychach); market sharing (e.g. SOKiK judgment of 31 March 2011, XVII Ama 19/10, Horbaczewski; SOKiK judgment of 13 April 2011, XVII Ama 223/09, Przedsiębiorstwo Uslug Komunalnych w Olszynie).

The majority of the scrutinised abuses took place on local, often municipal, markets including: a local market for streets, squares and public roads lightening services on the territory of the Bochnia Commune (SN judgment of 5 May 2011, III SK 36/10, ENION; SA judgment of 7 June 2011, VI Aca 415/11, ENION); a local market of liquid waste collection and transport (SA judgment of 26 May 2011, VI Aca 1081/10, Rychwal Commune; SOKiK judgment of 11 April 2011, XVII Ama 123/09, FAMIS); a local market for waste transport (SA judgment of 14 April 2011, VI Aca 1084/10, Przedsiębiorstwo Uslug Komunalnych in Grajewo); a local market for the provision of water and/or sewage collection (e.g. SA judgment of 29 April 2011, VI Aca 1171/10, ZWiK w Strzelinie; SA judgment of 21 July 2011, VI Aca 1303/10, RPWiK w Tychach; SOKiK judgment of 22 December 2011, XVII Ama 65/10, PGK EKOM); a local market for cemeteries
and funeral services (SOKiK judgment of 13 April 2011, XVII Ama 223/09, Przedsiębiorstwo Usług Komunalnych w Olszynie); a local market for bus transport services (SOKiK judgment of 3 October 2011, XVII Ama 4/10, PKS w Elblągu); a local market for waste management (SOKiK judgment of 30 June 2011, XVII Ama 24/08, MPO w Krakowie); a local market for cable television and products connected to the provision of cable television services (SOKiK judgment of 31 March 2011, XVII Ama 127/08, Toya); a local market for timber sales (SOKiK judgment of 31 March 2011, XVII Ama 19/10, Horbaczewski); a local market of paid access to the A-4 Katowice–Kraków motorway (SA judgment of 31 May 2011, VI Aca 1028/10, STALEXPORT); a local market for the administrating and executing of a concession for the exploitation of mineral water from a certain spring (SOKiK judgment of 17 March 2011, XVII Ama 227/09, Galicjanka). Some relevant markets covering a territory of more than one commune were not seen as ‘local’ but as ‘regional’: a regional market for gas distribution (SA judgment of 15 July 2011, VI Aca 1301/10, Dolnośląską Spółką Gazownictwa), a regional market for waste storage (SOKiK judgment of 14 September 2011, XVII Ama 2/10, Celowy Związek Gmin).

A few abuse cases, mainly those assessed by the Supreme Court, concerned practices employed on national markets such as: a market for chemical soil analysis (SA judgment of 24 May 2011, VI Aca 1334/10, Przybysz-Kosiady); a market for rail transport of goods (e.g. SOKiK judgment of 27 September 2011, XVII 35/10, Sped-Pro; SOKiK judgment of 18 April 2011, XVII Ama 155/09, PKP Cargo); a market for sport newspapers sales (SOKiK judgment of 11 March 2011, XVII Ama 56/10, Marquard Media); a market for the provision of services of Internet access to final users connected to public telecoms networks (SOKiK judgment of 11 April 2011, XVII Ama 62/08, Telekomunikacja Polska); a market for the organization of the provision of healthcare services financed from public funds (SOKiK judgment of 20 April 2011, XVII Ama 201/09, NFZ); a market for collective life insurance for employees (SOKiK judgment of 17 February 2011, XVII Ama 231/10, PZU).

Most of the multilateral practices subject to juridical review in 2011 were price-related (SN judgment of 3 November 2011, III SK 21/11, Röben; SA judgment of 20 July 2011, VI ACa 141/11, Chemik J.D. Krieger; SOKiK judgment of 8 June 2011, XVII Ama 23/09, ZAIKS, SFP; SOKiK judgment of 18 January 2011, XVII Ama 25/10, Budmex; SOKiK judgment of 27 April 2011, XVII Ama 44/09, Castorama; SOKiK judgment of 28 April 2011, XVII Ama 133/09, Hajduki and other judgments related to this agreement; SOKiK judgment of 18 July 2011, XVII Ama 167/09, ACS Sluchmed). One practice ruled on by SOKiK concerned an agreement on the terms of sales of goods – a prohibition to resell by distributors goods purchased from a certain supplier (SOKiK judgment of 4 April 2011, XVII Ama 100/09, AKPOL). One of the judgments
concerned bid rigging (SA judgment of 8 April 2011, VI ACa 1071/10, Miejskie Przedsiębiorstwo Zieleni w Lublinie).

Competition restricting agreements were scrutinised mainly with respect to national markets such as: a market for the wholesale of chemical construction materials (SA judgment of 20 July 2011, VI Aca 141/11, Chemik J.D. Kreisel); a market for the sale of audiovisual works on physical carriers designed for personal use and a market for collective management of copyright for audiovisual works (SOKiK judgment of 8 June 2011, XVII Ama 23/09, ZAIKS, SFP); a market for the distribution of drainpipes (SOKiK judgment of 18 January 2011, XVII Ama 25/10, Budmex); a market for the wholesale of paints and lacquers (e.g. SOKiK judgment of 27 April 2011, XVII Ama 44/09, Castorama; SOKiK judgment of 28 April 2011, XVII Ama 133/09, Hajduki); a market for the sale of children goods (SOKiK judgment of 4 April 2011, XVII Ama 100/09, AKPOL); a market for sales of hearing aids (e.g. SOKiK judgment of 18 July 2011, XVII Ama 167/09, ACS Sluchmed). Only few of the reviewed agreements related to local markets such as the market for maintenance services of municipal greeneries in Lublin (SA judgment of 8 April 2011, VI ACa 1071/10, Miejskie Przedsiębiorstwo Zieleni w Lublinie).

Two judgments were adopted as appeals against decisions issued by the UOKiK President banning a concentration but both of the prohibitive decisions were sustained. One of these concerned battery recycling (SOKiK judgment of 13 April 2011, XVII Ama 78/09, Orzel Bialy) and the other related to the production of railway infrastructure (SOKiK judgment of 5 April 2011, XVII Ama 213/09, Cogifer). Another merger-related judgment focused on the imposition of fines for the non-fulfilment of obligations (obligation to dispose of rights to some assets) imposed on the acquiring company (Carrefour) in a conditional clearance of a concentration (3 October 2011, XVII Ama 8/10, Carrefour).

2. Entities organizing public utility services and antitrust violations

In a judgement of 24 May 2011, VI Aca 1334/10, Przybysz-Kosiady, the Court of Appeals expressed the opinion that entities organizing public utility services were subject to the Competition Act if due to the nature of their activity they could be qualified as an entity participating in the market and conducting an economic activity. However, State’s imperious activity is not an economic activity and thus not subject to competition law. Distinguishing a business (entrepreneurial) activity from an activity within public imperium is justified mainly in the context of the interpretation of Article 4(1)(a) of the Competition Act (containing a legal definition of the term ‘undertaking’). According to the Court, objectives of the Competition Act do not provide for
an assessment of competition law compliance of imperious activity of entities exercising public powers. As a result, if it is the legislator that determines the prices of certain services, rather than an entity fulfilling State policy tasks (e.g. conducting a chemical soil analysis), and the latter only applies such imposed prices, its activity cannot be assessed under the Competition Act.

3. Identification of a relevant geographical market

In a judgment of 31 May 2011, VI Aca 1028/10, STALEXPORT, the Court of Appeals sustained SOKiK’s view that a relevant geographical market could be described as a market for paid access to a specific part of the Krakow-Katowice A-4 motorway. The Court noted a rule formulated by the European Commission that a relevant geographical market covers the territory where the undertakings concerned actually conduct their business. The Court of Appeals shared the jurisprudential view that a market defined in abuse proceedings could be very narrow, especially when the imposition of unfair prices for an individual product on an individual local market was alleged. The features of motorways make it so that other roads in the same area or equivalent rail connections cannot be considered as substitutes. The fact that in a concession contract other roads on the same territory were called ‘competitive’ cannot be binding as even parties admitted that in order to ensure the competitiveness of their roads with the motorway, it was necessary to increase their standard.

4. Agreements restricting competition

4.1. Circumstances (not) excluding liability for anticompetitive agreements

In a judgment of 20 July 2011, VI Aca 141/11, Chemik J.D. Kreisel, the Court of Appeals commented on arguments recalled by parties to a vertical agreement on minimal prices in order to justify their participation in a prohibited practice and to be declared ‘innocent’ of a violation of Article 6(1) of the Competition Act. The Court claimed that the sole fact of an economic dependence from a contractor was not enough to exclude the illegality of the activities of the parties to the scrutinised agreement. Accordingly, economic dependence of one party from the other can limit its freedom to act but does not eliminate it. The fact that a party was coerced to conclude an illegal agreement by another party, which used its leading market position to do so, cannot be considered as a ‘mitigating factor’ for the former because the ‘weaker’ party could have reported such a situation to the competition authority. Lack of awareness of the illegality of a practice does not eliminate
liability for competition law violations. The Court of Appeals claimed: ‘Acting in good faith and a conviction that an agreement does not infringe the law (…) is not enough to exclude the illegality of a practice’. The Court continued to say that undertakings often assume that a passive role in an illegal agreement eliminates their liability for the practice. Such circumstances can, however, only be analyzed in the context of fine setting. In the Court’s view, liability is excluded only by an active attitude of rejection of the practice (open objection to the participation in an illegal agreement, leaving no doubts as to the lack of intention to engage in an illegal practice).

4.2. Price agreements

The most important judgment of 2011 on price agreements was the ruling delivered by the Supreme Court on 23 November 2011, III SK 21/11, Röben. The Court presented therein a new approach to vertical agreements on resale price maintenance (hereafter, RPM). Such agreements used to be treated by Polish jurisprudence (and often also in Polish literature) as prohibited per se. The Supreme Court did not share this position, however, and claimed that RPM might be pro-competitive and as such, it could be subject to a legal exemption from the overall prohibition of competition restricting agreements. According to the Court, RPM may be pro-competitive if it allows a manufacturer (but not a distributor) to enter a new market, if it prevents free-riding and if it supports a short-term campaign of low prices in order to build a coherent vision of a sale network. The Röben ruling is said to be inspired by the Leegin judgment of the US Supreme Court and may be treated as an announcement of a shift in Polish jurisprudence on RPM.

However, in a judgment delivered on 20 July 2011, VI Aca 141/11, Chemik J.D. Kreisel, and thus proceedings the Röben ruling, the Court of Appeals confirmed a strictly prohibited nature of vertical agreements on minimal prices. The Court even said that such agreements are per se prohibited and there was no need to calculate the market share of their participants. The judgment could be treated as proof that the Polish juridical line on vertical price agreements is still conservative, but this opinion is not true in the context of two other judgments. First, in a judgment of 18 January 2011, XVII Ama 25/10, Budmex, SOKiK annulled a decision of the UOKiK President on a prohibited vertical price agreement because of lacking evidence for the

anticompetitive effects of the agreement. The second ruling showing a more flexible approach to vertical price agreements was delivered by the Court of Appeals on 21 September 2011, VI Aca 240/11. It was stated therein that the sole fact of signing a distribution contract could not be treated as equal to the participation in an anticompetitive agreement. An existence of a price agreement should be proven without a doubt by various evidential sources and not only by submitting a copy of the contract. The Court stipulated in its verdict that the UOKiK President failed to propose any logical reasoning that would prove the existence of an anticompetitive agreement. The justification of the antitrust decision was based mainly on the statements of the undertaking that has in fact initiated the very proceedings.

Regarding price cartels, in a judgment in the ZAIKS/SPF case, SOKiK affirmed that an imposition of rigid prices is ‘the hardest violation of competition law’ (a judgment of 8 June 2011, XVII Ama 23/09, ZAIKS, SPF).

4.3. Bid-rigging

Bid-rigging is commonly seen as vary harmful for competition but rather difficult to discover\(^4\). It is worth mentioning the criteria for assessing this type of practice as pointed out by the Court of Appeals in a judgment delivered on 8 April 2011, VI Aca 1071/10 Miejskie Przedsiębiorstwo Zieleni w Lublinie. Accordingly, the fact that in a tender organized by a municipality four undertakings submitted non-colliding offers for maintenance services for city greenery and that these offers exhausted around 98% of the tender’s budget should be regarded as proof of bid-rigging. Contents of the offers show that tender participants decided on a territorial division (each of them submitted an offer for a different part of the city) in order to avoid competing with each other and simultaneously benefit from the entire available tender budget. The participants’ arguments that their offers covered only the city district best known to them could not be approved as the same companies have submitted offers in earlier tenders for servicing multiple districts. The Court said that an offer covering only one city area is not economically sound as every rational tender participants would consider not only its knowledge of the area but also other factors such as transport costs, tender value and its overall resources. The fact that four separate offers nearly exhausted the entire tender budget confirmed that the participants were not afraid of submitting bids that would compete with others. The Court admitted, however, that all of these arguments would not have been a sufficient basis for an allegation of bid-rigging if not for

the fact that the competition authority has proven that the participants had communicated with each other very intensively before and during the tender.

5. Abuse of a dominant position

5.1. Imposition of unfair prices and trading conditions

In a judgment of 31 May 2011, VI Aca 1028/10, \textit{STALEXPORT}, the Court of Appeals ruled on an antitrust case of high importance for the Polish public opinion. The second instance Court sustained a SOKiK judgment approving a decision of the UOKiK President which found that charging the maximum price provided for in a motorway access price list during the time of that motorway’s reconstruction (which caused many traffic disturbances) constituted an abuse of a dominant position in the form of an imposition of unfair prices (a practice prohibited by Article 9(2)(1) of the Competition Act). The Court of Appeals confirmed that motorway access prices charged on the basis of a contract between a private company managing it and the Polish State cannot be treated as a ‘public burden’ (similar e.g. to taxes). Instead, it is a price that can be analysed in light of the abuse of dominance prohibition. In the Court’s view, the reconstruction and modernization of a motorway results in a decrease of that road’s overall standard which causes the motorway to lose its special features distinguishing it from other public roads. An exclusion of one lane or a speed restriction causes a motorway to fail in fulfilling its role properly and thus, it is not justified to impose upon its users access charges at the same level as in times of no disturbances. The Court of Appeals claimed that a ‘full price’ can be charged only if users benefit from ‘full equivalence’ of services\textsuperscript{42}. If a motorway operator does not provide such equivalence, it is not entitled to charge full prices, especially because there is no alternative motorway to the one under construction (the scrutinised operator is the only service-provider available so it abused its dominant position by imposing unfair prices).

Unfair prices can also take, in the meaning of Article 9(2)(1) of the Competition Act, the form of excessive prices\textsuperscript{43}. Acknowledging a certain price as ‘excessive’ does not have to be necessarily connected to profits actually gained by the dominant company. The Court of Appeals asserted that an excessive

\textsuperscript{42} On the problem of equivalence see Ł. Węgrzynowski, ‘Ekwiwalentność świadczeń w orzecznictwie antymonopolowym’ [‘Equality of subjects of contracts in antitrust jurisprudence’] (2010) 4 \textit{Głosa}.

\textsuperscript{43} See A. Brzezińska-Rawa, ‘Nadużycie pozycji dominującej w postaci stosowania ceny nadmiernie wygóranej’ [‘Abuse of a dominant position by applying excessive prices’] (2011) 1 \textit{Przegląd Prawa Publicznego}. 
nature of a price was of importance mainly for customers obliged to pay such a price (judgment of 29 April 2011, VI Aca 1171/10, ZWiK w Strzelinie). It is thus necessary to assess prices from the customers’ perspective because they compare the prices they pay with those paid by customers in neighbouring communes. In the Court’s view, if an undertaking applies very high prices and yet does not gain any profit from it, it means that the price has not been calculated properly and that the whole activity of that undertaking needs to be improved (lack of profit despite very high prices indicates an improper cost structure). The sole fact that the company at stake eliminated cross-subsidizing (which used to keep prices low) does not make it impossible to determine that the price at which the dominant undertaking arrived was in fact excessive and unfair.

5.2. Imposition of onerous agreement terms and conditions

In a judgment of 5 May 2011, III SK 36/10, ENION\textsuperscript{44}, the Supreme Court restated that in light of its settled jurisprudence, ‘unjustified profits’ in the meaning of Article 8(2)(6) of the Competition Act 2000 (currently Article 9(2)(6) of the Competition Act) are ‘profits that would have not been achieved by an undertaking on a competitive market’ (SN judgment of 16 October 2008, III SK 2/08). At the same time, an ‘onerous agreement term’ is a term that ‘constitutes for one party of an agreement a burden bigger than commonly accepted in a certain types of relationships (SN judgment of 16 October 2008, III SK 8/08). The facts of the case at hand showed that prices charged by an energy company (ENION) for providing energy for street lights in the Bochnia Commune did not cover infrastructure exploitation costs. The Supreme Court claimed that ENION did not enjoy double profits for the same service when it demanded that the Commune covers maintenance services costs as well. In the Court’s view, the Energy Law Act cannot be interpreted in a way that excludes the possibility of charging prices that reflect the costs of appliance maintenance, installation and networks used for street lighting. Simultaneously, there is no rule on a duty to cover such costs by an energy company. Even if paying such costs is burdensome for the Commune, it does not bring unjustified profits to the energy company. The Court stated that a rational undertaking, even one holding a dominant position, aims to achieve an income at least covering the costs of its functioning, including a minimal level of profits allowing for a reconstruction of assets.

In a judgment of 15 July 2011, VI Aca 1301/10, Dolnośląską Spółką Gazownictwa, the Court of Appeals confirmed a doctrinal view that a contractual

\textsuperscript{44} As a response to this judgment, the Court of Appeals in its ruling of 7 June 2011, VI Aca 415/11, changed the SOKiK judgment by stating that ENION did not violate the abuse prohibition.
condition is onerous if it places on one of the parties a burden heavier than commonly accepted in relationships of a certain kind. Accordingly, what needs to be examined is if a dominant company would be able to negotiate a similar condition in a hypothetical situation of free competition. An onerous nature of a condition should however be scrutinized in the overall context of all provisions applied to a certain contract. The Court stressed that an exploitative character of a practice should be examined with reference to the content of the ‘imposed’ contract, not its execution.

6. Control of concentration

6.1. Extraordinary consent for concentrations

SOKiK ruled on 13 April 2011, XVII Ama 78/09, Orzel Biały, on an appeal against a decision prohibiting a concentration issued by the UOKiK President. The Court expressed in this case its opinion on exceptional clearances for concentrations that can be issued in Poland on the basis of Article 20(2) of the Competition Act even if the notified operation was to result in a significant impediment of competition\(^{45}\). Accordingly, the legal provision on exceptional clearances is based on the rule of reason whereby some restraints of competition should be admissible if they bring about general economic or social benefits outweighing the operation’s anticompetitive effects. The Court affirmed: ‘The Competition Act should prevent only unreasonable restraints of market competition (also when the restraint is a result of a concentration). Such an assumption is related to the fact that the protection of competition is not the sole goal of the Competition Act [but rather] achieving certain benefits in a general socio-economic interest. If such benefits can also be achieved by restricting competition (also as a result of a concentration), activities leading to such restraints are not seen as prohibited by the Act’. All this notwithstanding, SOKiK did not approve of the benefits listed by the plaintiff in this case as reasons justifying the issue of an exceptional clearance (ecological safety of the State; interests of Polish science; improving the innovativeness of the economy; providing a workplaces for the employees of the undertakings concerned; avoiding insolvency of the recycling companies).

\(^{45}\) More on exceptional clearances of concentration in Polish antitrust law: M. Błachucki, R. Stankiewicz, ‘Decyzja zezwalająca na dokonanie koncentracji z naruszeniem testu istotnego ograniczenia konkurencji (art. 20 ust. 2 ustawy antymonopolowej)’ ['Decision of the competition authority clearing a merger which substantially impedes competition (Art. 20(2) of the Polish antimonopoly act)'] (2010) 6 Przegląd Ustawodawstwa Gospodarczego.
6.2. Non-fulfilment of conditions imposed in a conditional merger clearance

In a judgment of 3 October 2011, XVII Ama 8/10, Carrefour, SOKiK assessed the justification given by Carrefour for its failure to fulfil the obligations imposed upon it in a conditional merger clearance. Carrefour was obliged to dispose of its rights (ownership rights, renting rights, usufruct, etc.) to a number of super- or hypermarkets in locations indicated by the UOKiK President. Carrefour’s failure to fulfil these obligations in the specified timeframe resulted in a fine imposed by the UOKiK President. The Court sustained the decision of the antitrust authority claiming that the plaintiff did not prove that the fulfilment of the conditions was impossible if the company was to act with proper care. The Court even suggested that the company could have, if need be, disposed of its rights gratuitously. SOKiK stated that while accepting the obligations imposed in the conditional clearance, the company should have known that it would not find a buyer willing to pay a price that would satisfy Carrefour. As such, it must have considered the possibility that it would have to dispose of the specified rights even on a gratuitous basis. The Court claimed that before all the legal activities concerning the concentration were completed, the plaintiff has had the possibility to scrutinize the financial effects of the fulfilment of the conditions, and especially if the concentration would still be profitable if difficulties occurred in disposing the contested rights. According to SOKiK, the company should have anticipated circumstances such as falling attractiveness of the real estate on sale (resulting from the appearance of competitive buildings) or a general collapse of demand. As a result, such circumstances could not justify the failure to fulfil the said obligations. SOKiK refused also the argument that general knowledge (mainly by competitors) of the content of the decision acted as a barrier in fulfilling Carrefour’s obligations especially in light of the fact that Carrefour did not apply for secrecy of the decision. Even if, however, secrecy was requested, it would have been justified only in light of very important reasons because – in SOKiK’s view – transparency is a key idea of the Competition Act.

7. Fines

In a judgment of 21 April 2011, VI Aca 996/10 PZPN/Canal+, the Court of Appeals criticized SOKiK’s positions on two facts which, according to the first instance court, should have been seen by the UOKiK President as mitigating factors in calculating the amount of fines imposed for an antitrust infringement. The first mitigating factor under consideration was the fact that

46 More on this judgement see a case comment by T. Bagdziński in the current volume of YARS.
the infringer fulfils public tasks and that worsening of its financial situation (because of the duty to pay the antitrust fine) would have influenced the accomplishment of these tasks. The Court of Appeals claimed that even if Article 104 of the Competition Act 2000 contained an open list of factors that should be considered while determining the fine amount, fulfilling public tasks cannot be treated as a mitigating factor. Approving such view would lead to unacceptable privileges being granted to entities fulfilling public tasks even if they violate competition rules within their economic activities. The Court of Appeals criticised also SOKiK’s use of the infringer’s bad financial situation as a mitigating factor in calculating its fine. According to the Court, seeing a bad financial situation as a mitigating factor for the imposition of antitrust fines would mean attributing an unjustifiable competitive advantage to undertakings that are worse adapted to market conditions.

The Court of Appeals ruled once again on the possibility to decrease the amount of a fine imposed by the UOKiK President in a judgment of 21 July 2011, VI Aca 1303/10, RPWiK w Tychach. It stated therein that a fine of 0.1% of the undertaking’s annual income was adequate to the gravity of the infringement committed by a municipal supplier of water and sewage collector since the latter was a professional market participant with considerable business experience that concludes contracts mainly with consumers (weakest market players), so it should have acted with special care in order not to violate the law and infringe customer interests. The Court of Appeals shared SOKiK’s view, despite the fact that their opinion can be considered rather controversial, that a fine could be relatively small because the scrutinised practice appeared only locally and had a limited territorial scope. Moreover, the UOKiK President did not receive any customer complaints and the undertaking did not create any barriers for the antitrust proceeding.

8. Status of files of antitrust proceedings (administrative proceeding) before a competition court

In a judgment of 8 April 2011, VI Aca 1071/10 Miejskie Przedsiębiorstwo Zieleni w Lublinie, the Court of Appeals referred to a claim that an earlier SOKiK judgment had been based on facts established in antitrust proceedings even if the Polish Code of Civil Procedure does not provide for evidence such as files accumulated in administrative proceedings. The second instance court stated that court proceedings before SOKiK are contradictory in nature where evidence collected in the earlier administrative proceedings is regarded as proofs (the Court of Appeals referred to an SN judgment of 20 September 2005, III SZP 2/05). Even if SOKiK acts as a first instance court, the fact that
it scrutinizes appeals against antitrust decisions causes the necessity to control the activities of the competition authority in its administrative proceeding. Therefore, all files accumulated in the antitrust procedure are to act as the basis for SOKiK’s activity in competition law cases. If SOKiK was not to examine the entire content of these files, this could be considered as failure to analyse the case.

9. Assessment of the UOKiK President’ activities by administrative courts

In order to get a full overview of Polish jurisprudence in antitrust cases, rulings of administrative courts, mainly regional ones cannot be overlooked. The Regional Administrative Court in Warsaw (in Polish: Wojewódzki Sąd Administracyjny; hereafter, WSA) issued in 2011 a number of orders rejecting complaints about the activities as well as non-activity of the UOKiK President. The rejected claims concerned: 1) an order issued by the UOKiK President refusing to grant the status of a procedural party to a non-governmental organization (VI SA-WA 1867/09); 2) lack of information on the result of explanatory proceedings initiated in response to a complaint on an alleged competition law infringement submitted to the UOKiK President (VI SA Wa 1131/11)47; 3) a letter from the UOKiK President stating that the authority, after completing explanatory proceedings, does not intend to initiate a full antitrust procedure (e.g. WSA order of 9 March 2011, VII SA/WA47/11; WSA in Warsaw order of 3 June 2011, VII SA/WA9/11). The Court stated in all those cases that administrative courts are not competent to deal with issues regulated by the Competition Act, mainly because of the features of antitrust proceedings being a ‘special’ administrative procedure (whereby SOKiK rules on complaints and appeals from the decisions of the UOKiK President). Regarding the letters from the UOKiK President, the Court claimed that they are no more than a piece of information on how the authority dealt with a given case (issue) and thus, they are not subject to (administrative) judicial review48.

47 A cassation from this order was rejected by the Supreme Administrative Court by order of 12 July 2011, II GSK 1035/11.
48 The problem of the division of competences between civil and administrative courts is scrutinized by M. Błachucki, ‘Właściwość sądów administracyjnych i sądów powszechnych w sprawach antymonopolowych’ ['Jurisdiction of administrative courts and civil courts in antitrust cases'] in: M. Błachucki, T. Górzyńska (eds.), Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych [Current problems of delimitating jurisdiction of administrative and civil courts], Naczelný Sąd Administracyjny, Warszawa 2011, pp. 130–158.
10. Application of Article 5 of Regulation 1/2003 by a national competition authority

In a judgment of 8 June 2011, III SK 2/09, the Supreme Court annulled a judgement of the Court of Appeals (judgment of 10 July 2008, VI ACa 8/08) sustaining a SOKiK ruling which questioned a decision delivered by the UOKiK President on the discontinuation of antitrust proceedings concerning an infringement of Article 102 TFEU (previously Article 82 TEC) in relation to Article 5 of Regulation 1/2003. On the issue of a violation of the abuse prohibition on the basis of domestic law, the UOKiK President adopted a decision that no violation of the prohibition took place. Even if the final result of the decision based on EU law and the decision based on domestic law was the same (the undertaking was not declared to have abused its dominant position) the legal basis for the two decisions was different. The UOKiK President decided that a national competition authority (hereafter, NCA) had no power to adopt – on the basis of Article 5 Regulation 1/2003 – a decision declaring that a given practice did not violate the prohibition contained in Article 102 TFEU. In order to rule on the appeal against the resulting judgment of the Court of Appeals, the Supreme Court submitted preliminary questions to the Court of Justice about the competences of NCAs in this respects. Following the judgment of the Court of Justice of 3 May 2011, C-375/09, the Polish Supreme Court ruled that the UOKiK President did not have the competence to declare that a given undertaking had not committed an Article102 TFEU infringement. Still, the Court did not agree with the entirety of the NCA’s reasoning. It claimed that the key of this situation was not the lack of merit of the given proceedings, but the fact that issuing a decision on the non-violation of the Article 102 TFEU prohibition belonged to the exclusive competences of the Commission, even if the actual proceedings were conducted by an NCA. Article 5 tiret 3 of Regulation 1/2003 should be applied directly, so if an NCA determines that the conditions of Article 102 TFEU are not met, it should decide that it has no grounds to act.

Literature


Błachucki M., R. Stankiewicz, ‘Decyzja zezwalająca na dokonanie koncentracji z naruśeniem testu istotnego ograniczenia konkurencji (art. 20 ust. 2 ustawy antymonopolowej)’ ['Decision of the competition authority clearing a merger which substantially impedes competition (Art. 20(2) of the Polish antimonopoly act)'] (2010) 6 Przegląd Ustawodawstwa Gospodarczego.


I. Legislation

The Telecommunications Law Act1 (in Polish: Prawo Telekomunikacyjne, hereafter: PT) was subject to a number of amendments in 2011 introduced by the Amendment Act of 14 April 2011 and the Amendment Act of 16 September 2011 as well as by the separate Act of 30 June 2011 on the implementation of digital terrestrial television.

In response to the reservations expressed by the European Commission regarding the compatibility of the way in which regulatory obligations concerning the setting of wholesale prices are imposed in Poland, the Amendment Act of 14 April 2011 changed Articles 39 and 40 PT2. The direct reason for this amendment was set out in a reasoned opinion prepared by the Commission in October 2010 under Article 258 TFEU3. It was stated therein that Polish rules regarding the establishment of wholesale prices may give rise to legal uncertainty and may be discriminatory towards certain telecoms operators.

Allegations concerning the lack of legal certainty and predictability arose because the Telecommunications Law Act permitted the imposition of regulatory obligations with respect to the setting of wholesale prices within the scope of dispute resolution procedures between individual operators.

* Kamil Kosmala, attorney at law.
3 See: Commission requests Poland to comply with telecoms wholesale price rules, EC press release, 28 October 2010, IP/10/1408.
A decision taken in this framework was not generally applicable, and did not, therefore, apply to all inter-operator relations at the wholesale level with respect to which the contested obligation(s) was imposed. The allegation of possible discrimination concerned situations where wholesale prices were subject to regulation on the basis of decisions taken by the UKE President (Polish National Regulatory Authority, hereafter: NRA) at different times and with respect to particular operators. The Commission found such activity to be potentially in conflict with Article 8 (3) (c) of the Framework Directive⁴.

The Commission questioned also the Polish mechanism for the implementation of cost obligations and the substance of such obligations. The previously applicable provisions of Article 39(4) PT allowed the UKE President to set wholesale prices to be implemented by an operator on the basis of the NRA’s own unspecified cost methodology. These rules were without prejudice of the existence of a separate requirement to implement a cost accounting system and irrespective of the positive results of audits carried out by an independent organ.

Such provisions were in breach of basic principles of telecoms regulation which require that any regulatory obligations imposed should be specific, based on the nature of the identified problem, proportionate and justified on the basis of the objectives set out in Article 8 of the Framework Directive, in accordance with the requirements stressed in Article 8 of the Access Directive⁵ and Article 16 of the Framework Directive.⁶

When implementing cost calculation requirements with respect to the granting of telecoms access on the basis of Article 39(1) PT, the UKE President must since the aforementioned amendment demonstrate the method to be used for the establishment of fees in situations where a discrepancy emerges between the accounting presented by the operator and UKE’s verification [Article 39(1a) PT].

A similar change was made to Article 40 PT which facilitates the imposition of less restrictive obligations regarding the setting of cost-based prices for telecoms access (unlike Article 39 which concerns the taking into account of ‘justified’ costs). Likewise, and when applying Article 40, the UKE President must now demonstrate a means of verifying and setting costs for telecoms

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⁶ See reasoning for a draft of the Act, Lower Chamber Parliament’s document no. 3796.
access [Article 49(1a) PT], which will then be used in order to verify the correctness of the fees actually charged by an operator [Article 40(4) PT].

Moreover, in the case of a decision taken on the basis of Articles 39 and 40 PT, the UKE President may now establish a fee for telecoms access only in a separate and generally applicable decision, and not, as was the case prior to the amendment, by means of a decision resolving individual disputes between telecoms operators.

The Telecommunications Law Act was also subject to a change by the Amendment Act of 16 September 2011\(^7\). The amendment primarily concerned the principles for the provision of premium rate services as well as certain details regarding the conditions for the granting of radio permits (on the basis of a permission granted by the holder of spectrum rights and a temporary authorization).

Provisions of the Telecommunications Law Act on premium rate services were expanded and specified in an effort to protect end-users. It was stated first that premium rate services are publicly available telecoms services which are comprised of a telecoms service and of a separate service provided in addition thereto. This additional element, related to a telecoms service, may be undertaken by a party other than the party providing the telecoms services. In this manner, providers of content offered within the scope of premium rate services were brought within the scope of the Telecommunications Law Act.

Responsibility for the delivery of premium services to subscribers and for registration in the register of numbers used for premium rate services kept by the UKE President used to be placed on telecoms service providers. By contrast, only content providers are now required to submit such registration at least 7 days prior to the launch of their service (Article 65 PT). A broad set of obligations regarding the provision of information on premium rate services is imposed at the same time by Article 64 PT. These requirements apply both to the providers of premium rate services providing information directly to subscribers [Article 64(1) PT] as well as to anyone making information on premium rate services available to the public [Article 64(2) PT]. These obligations foresee, amongst others: (1) the provision of individual prices or information on the cost of connection as well as the identification of the entity providing the additional service; and (2) the implementation of requirements regarding the manner in which information on premium rate services is presented visually, such as requirements on the background and font size used as well as the time within which the price of the service is presented.

In the case of a repetitive premium rate service (in accordance with prior

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\(^7\) Act of 16 September 2011 on the amendment of Telecommunications Law (Journal of Laws 2011 No. 234, item 1390).
consent of the subscriber), their provider is obliged to provide its subscriber with clear and transparent information on the rules regarding the use of the service. The provider is now also obliged to enable the subscriber to cancel the service at any given time in a straightforward manner and free of charge [Article 64(4) PT].

The provisions of the Telecommunications Law Act have also been amended so as to require the blocking of a premium rate service free of charge [Article 64a PT]. Moreover, monetary thresholds regarding the accumulated amount that a subscriber can spend on such a service have also been established. The subscriber must be informed once the threshold is exceeded. Provisions were also made for the eventual blocking of the service if the threshold is met.

Article 209(1)(14a) has been amended in order to allow the UKE President to impose a financial penalty (up to 3% of annual income) on an entity which fails to fulfill, or which improperly fulfills, the requirements contained in Articles 64, 64a and 65 PT. This penalty may be imposed on telecoms undertaking as well as providers of additional services. At the same time, the more general provisions on the imposition of fines by the NRA [Article 209(2) PT] provide for the possibility of imposing a fine on the person in charge of the undertaking responsible for the failure to fulfill its obligations (of up to 300% of the relevant monthly salary). The latter applies, however, only to those in charge of telecoms undertakings and not to those directing an entity providing additional services; unless the latter also qualifies as a telecoms undertaking.

The Telecommunications Law Act was also amended by the Act of 30 June 2011 on the implementation of digital terrestrial television. A number of definitions associated with digital broadcasting was inserted first of all such as: ‘multiplex’, ‘multiplex signal’, ‘multiplex operator’, ‘operator of a broadcasting network’ and ‘digital receiver’. In this manner, the same set of definitions applies now with respect to: the Act on the implementation of digital terrestrial television, the Act on radio and television broadcasting and the Telecommunications Law Act. The most important telecoms provisions that apply to digital television refer to the responsibilities of the UKE President and concern the granting of frequency reservations to multiplex operators [Article 114(2) and (3) PT]. The powers of the NRA cover also the definition of technical parameters and standards for digital transmission as well as the conditions for throughput management and the use of capacity [Article 114(4) PT]. Inserted into the Telecommunications Law Act was a separate Chapter IVa concerning the operation of multiplexes [Article 114(2) & (3) PT]. The obligations of an operator of a multiplex include: (1) the diffusion of radio and

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television programmes of broadcasters with a concession for the distribution of programmes in a given multiplex; (2) ensuring that they have access to the multiplex under non-discriminatory conditions; (3) ensuring uninterrupted transmission of the digital multiplex signal, with the exception of cases where the interruption results from a technical issue or if the broadcaster ceases to provide a given programme [Article 131a(1) PT]. The UKE President may impose a financial penalty (of up to 3% income) on an operator of a multiplex for its failure to respect these requirements [Article 209(19a)].

The principles for the granting of access to a multiplex are set out in Article 131b-131f PT. The model adopted by the legislator contains the obligation for a multiplex operator to negotiate and finally to grant access to the multiplex. The applicable model is comparable to that used with respect to telecoms access, including the associated powers of the UKE President. On this basis, a multiplex operator must enter into negotiations regarding the conclusion of relevant agreements. The UKE President was granted the power to shorten such negotiations, and to issue a decision resolving a dispute or replacing an agreement on access to a multiplex.

Importantly, the provisions of Chapter IVa are only applicable to situations where the position of the multiplex operator is not jointly held by a group of broadcasters (which have, on the basis of Article 114(6) PT, collectively been granted a frequency reservation for the dissemination or distribution of radio or television programmes by means of digital diffusion). In such cases, the principles governing the cooperation between broadcasters acting jointly as a ‘multiplex operator’ are set out in their own agreement on that matter and in the Act on the implementation of digital terrestrial television.

In addition to issues strictly related to the implementation of digital terrestrial television, the Act of 30 June 2011 introduced also important amendments to the Telecommunications Law Act regarding the granting of radio permits. These changes not only concern broadcasting but also apply to making frequency reservations for any purpose. In accordance with the amended Article 143(4) PT, the grantee of a frequency reservation, or an entity empowered by that grantee, may request the granting of a radio permit enabling it to use the frequency resources subject to that reservation during its term. This provision creates a specific legal framework which allows a third party to benefit from individual rights granted by means of an administrative decision to another entity (such as the right to use radio frequency resources which arises out of a frequency reservation). The application of this legal solution may facilitate situations similar to spectrum sharing which, in spite of the fact that it is provided for in the 2009 review of the Framework Directives, has not yet been implemented into Polish law.
II. Jurisprudence

According to the 2011 report on the activities of the UKE President, 247 regulatory decisions were appealed in that year: 50 of which were adjudicated by the Court for Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK) while 197 were heard before an administrative court. An increase in the number of cases examined by administrative courts is noticeable in comparison with previous years (48 in 2010, 84 in 2009), while the number of appeals to SOKiK remained, in comparison, relatively small (43 in 2010, 165 in 2009).

The dual-verification model of the decisions delivered by the UKE President derives from Article 206 PT. Appealed to SOKiK may be: regulatory decisions; decisions imposing fines; post-control decisions; dispute resolution decisions (with the exception of post-tender decisions); and certain decisions taken on the basis of the Act on supporting the development of telecommunications services and networks (the so-called Broadband Act\(^{10}\)). According to the provisions of the Code of Civil Procedure, SOKiK judgments may be appealed to the Court of Appeals while its ruling may in turn be appealed to the Supreme Court. All other administrative decisions taken by the UKE President can be appealed in accordance with the general rules on administrative procedure and administrative court procedure (first, a request for the reconsideration of a case, second, appeal to the Regional Administrative Court and, final, appeal to the Supreme Administrative Court).

The most interesting judgments of 2011 would appear to be those concerning: (1) the principles for the conduct of a consolidation procedure for a draft regulatory decision having an effect on Member States trade (in accordance with Article 7(4) of the Framework Directive); (2) imposition of fines by the UKE President and; (3) making available of information qualified as a telecoms secret by telecoms undertakings as required by a court within the framework of civil proceedings.

The first of these judgments was handed down by the Supreme Court on 2 February 2011 (III SK 18/10) and concerned a decision of the UKE President on the market for broadcasting transmission services to deliver broadcast content to end users (the so-called market 18)\(^{11}\). Considering an appeal submitted by EMITEL, the Supreme Court overturned the earlier ruling of the Court of

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\(^{10}\) The Act of 7 May 2010 (Journal of Laws 2010 No. 106, item 675).

Appeals in Warsaw, thus enabling the eventual annulment of the contested regulatory decision. The Supreme Court identified a number of breaches of PT provisions relating to the carrying out of the required consolidation procedure. The violation directly concerned Article 18 PT (as it stood at the time of the issue of the decision) in conjunction with Article 7 of the Framework Directive, Article 8(4) of the Access Directive and Article 4(3) TEU. The Supreme Court held that, after amending the text of a draft decision subject to a consultation process with the European Commission, an NRA is obliged to once again consult the amended text with the Commission. This applies, in particular, to situations concerning the imposition of new regulatory requirements on the introduction of which the Commission did not have the opportunity to comment on yet. If this principle was not respected, than the consolidation process would be a mere fiction. This conclusion does not concern, however, situations where the draft is changed so as to reflect the comments or reservations already expressed by the Commission. The Supreme Court’s view is praiseworthy, and clearly indicates the material (as opposed to merely “formalistic”) nature of the requirement to consult draft regulatory decisions with the Commission.

In the aforementioned judgment, the Supreme Court also referred to the scope of the cooperation between the regulator (the UKE President) and the national competition authority (the UOKiK President). In accordance with earlier version of Article 25(2) PT, regulatory decisions were taken by the NRA ‘in agreement’ with the competition authority. In practice, the cooperation between these two organs consisted of the preparation of an official position by the UOKiK President regarding a draft regulatory decision based on the factual and material description of the case provided by the UKE President. In the opinion of the Supreme Court, the requirement that an ‘agreement’ be reached between the regulator and the competition authority required that the impact of the latter on the decision-making process of the former be greater than the mere preparation of an opinion, and that the competition authority should also be required to actually ‘accept’ the content of the regulatory decision. It is important to note that the Polish legislator has since then limited, rather than expanded, the scope of influence of the UOKiK President on the content of regulatory decisions. Following the 2009 amendments of the Telecommunications Law Act, the requirement that the UKE President takes regulatory decisions ‘in agreement’ with the UOKiK

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12 The appealed decision has been issued before the Lisbon Treaty.

13 Such a solution was criticized by Sage, E. D. in the article: Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation, YARS Vol. 2010, 3 (3), s. 145–146.

President has been replaced by the requirement that the NRA merely obtains a non-binding ‘opinion’ from the competition authority [Art. 25(1) PT].

The next judgments concerned the principles for the imposition of a fine by the UKE President, and, in particular, whether it is permissible under the Telecommunications Law Act to impose a fine without carrying out a control procedure first. In a ruling of 5 January 2011 (III SK 32/10), the Supreme Court clarified the nature of fines imposed by the NRA as well as the procedural standard to be observed in this context. In the opinion of the court, financial penalties imposed by a regulator do not constitute a criminal sanction. However, and in so far as it comes to imposing a fine on an undertaking, rules on judicial verification of the correctness of a regulatory decision should be similar to those that apply to a trial court in a criminal procedure. This key finding is based on a ruling of the European Court of Human Rights concerning the procedural guarantees laid down in Article 6 of the European Convention on Human Rights and Article 42 of the Constitution of the Republic of Poland. Procedural safeguards which arise in this regard should be respected not only in cases of a strictly criminal nature. Despite the fact that the plaintiff’s (telecoms operator) appeal was overturned in this specific case, the judgment presents the views and argumentation relied upon by the Polish Supreme Court on numerous occasions in cases regarding the imposition of fines by the UKE President.

In a judgment of 7 July 2011 (III SK 52/10), the Supreme Court considered the model to be applied to the imposition of fines on the basis of the Telecommunications Law Act. It was specified therein that the imposition of a fine does not have to be preceded by a control procedure (under Articles 199–200 PT). If, however, the UKE President commences such a procedure, the latter is already linked to the next procedural step foreseen in Article 201 PT. Accordingly, in the case of an allegation of a breach of the law, the UKE President should issue a follow-up recommendation first. The NRA is only entitled to impose a fine upon the failure by the undertaking concerned to respect the recommendation issued in this case. The Supreme Court relied in its ruling on Article 10 of the Authorization Directive16 (prior to its 2009 amendment) which required that, if an NRA declares that an undertaking has committed an infringement, the regulator must inform the undertaking concerned of this fact and grant it the opportunity to respond to the allegation(s) and to remedy the alleged breach within a reasonable timeframe. A financial sanction

15 See judgments of the Supreme Court of: 14 April 2010 (III SK 1/10, Lex 577853), 21 September 2010 (III SK 8/10, Lex 646358), 21 October 2010 (III SK 7/10, Lex 686801), 7 July 2011 (III SK 52/10, Legalis).
may only be imposed if the offender fails to remedy the alleged breach within
the appointed timeframe\textsuperscript{17}.

The last of the judgments to be considered for the purposes of this review
concerns the possibility for a court reviewing a civil law case to demand
from a telecoms operator the disclosure of information that constitutes a
telecommunications secret (e.g. the content of a communication, transmission
data, localization data, data on attempted connections).

The Court of Appeals in Bia\l{}ystok stated in a judgment of 6 April 2011
(I Acz 279/11)\textsuperscript{18} that neither the Telecommunications Law Act nor the
provisions of the Code on Civil Procedure\textsuperscript{19} constitute a basis justifying the
decision of a court in a civil case to oblige a telecoms operator to provide that
court with data constituting a telecommunications secret. This ruling followed
the refusal by a telecoms operator to provide the requesting court with
information on incoming and outgoing calls as well as SMSs from a specified
phone number. As a result of the refusal to draw up and submit the required
lists, a fine was imposed upon that operator by the requesting civil court. It
was this very fine which was appealed to the Court of Appeals in Bia\l{}ystok.
When the latter overturned the fine, it rightly pointed out that the generally
formulated principles of Article 159(4) PT do not constitute a legal basis for
a court to impose a disclosure obligation concerning information that qualifies
as a telecommunications secret. In the opinion of the Court of Appeals, this
issue concerned a decision taken on the basis of a specific competence, which
arises out of a legislative requirement and permits the use by courts of data
constituting telecommunications secrets. The provisions of the Code on Civil
Procedure concerning the extraction of documentary evidence (Articles 248
and 251 Code of Civil Procedure) do not constitute a basis in this case either.
The argumentation of the requesting court referred in particular to Article
49 of the Polish Constitution that guarantees the freedom and protection
of secrets communicated to a third party\textsuperscript{20}. The limitation of this right is
only permissible in cases referred to in the law. Legislative requirements
limiting this constitutional freedom are not satisfied by the provisions of the
PT Act including its Article 161 (which outlines the permissible scope for the
processing of data constituting a telecommunications secret) and Article 179
and 180d PT (concerning the fulfillment of obligations in the interest of State
security).

\textsuperscript{17} Judgment of the Supreme Court of 06 October 2011, III SK 9/11, Legalis.
\textsuperscript{18} Decisions of the Court of Appeal in Bia\l{}ystok from 2011, No 1, p. 36.
\textsuperscript{19} Act of 17 November 1964 - Code on Civil Procedure (Journal of Laws 1964 No. 43, item
296, as amended).
\textsuperscript{20} The Constitution of the Republic of Poland of 02 April 1997 (Journal of Laws 1997 No. 78,
item 483, as amended).
In summary, none of the abovementioned provisions of the Code on Civil Procedure or the Telecommunications Law Act may constitute the basis of a request by a civil court for the preparation and disclosure of documents containing information protected by the principle of telecommunications secrecy.
Legislative and Jurisprudential Developments in the Energy Sector in 2011

by

Filip Elżanowski*

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IV. Summary

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I. Introduction

The year 2011 brought about fundamental changes to the legal framework affecting energy markets in Poland. The most important of these changes concerned rules on obligatory public trading of electric energy (so-called, exchange obligation) and the implementation of Nuclear Facilities Projects and Obligatory Natural Gas Reserve System Projects.

This publication contains a detail review of legal amendments passed in 2011 covering:

1) The Act on the Preparation and Implementation of Nuclear Facility Investment Projects and Related Facility Projects of 29 June 2011¹ (in Polish: Ustawa o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących; hereafter, Nuclear Project Investment Act);

2) The Amendment Act to the Energy Law Act and to Some Other Acts of 19 August 2011²;


Article 1.18 of the Amendment Act to the Energy Law Act and on Amendments to Some Other Acts of 8 January 2010⁴, that came into force on 1 January 2011 (containing rules under which the Agricultural Biogas Production Support System was established), is not covered here since it had been already discussed in the 2010 Review.

Looking at the 2011 amendments to the Energy Law Act dated 10 April 1997⁵ (in Polish: Prawo Energetyczne; hereafter, PE), it is first and foremost necessary to pay attention to the Amendment Act to Energy Law Act and to Some Other Acts of 19 August 2011⁶. This Act was originally meant to

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¹ Journal of Laws 2011 No. 135, item 789.
² Journal of Laws 2011 No. 205, item 1208.
³ Journal of Laws 2011 No. 234, item 1392.
⁴ Journal of Laws 2010 No. 21, item 104.
⁵ Consolidated version: Journal of Laws 2006 No. 89, item 625, as amended.
be a mere ‘punctuation error correction amendment’ (its aim was to insert a missing comma into Article 49a(2) of the Energy Law Act the lack of which made the proper application of this provision impossible). During the preparation process, the content of the Act was, nevertheless, greatly expanded. As a result, many new solutions were introduced into the 1997 Energy Law Act by way of this Amendment Act. The Energy Law Act was also subject to other changes resulting from legal amendments or new legislative acts meant to regulate the broadly defined Energy Sector that correlated indirectly with the provisions of the Energy Law Act. Changes that occurred on their basis are presented according to the order resulting from the layout of a given enactment.

Presented in this publication also is a review of key judgments (Judgments of the Supreme Court, Appeals Court in Warsaw, and Supreme Administrative Court) passed in 2011 under the rules of the Energy Law Act.

II. Amendments to the Energy Law Act


Besides the amended Atomic Law Act, the Nuclear Projects Investment Act is the key legislative act concerning the operation of nuclear facilities in Poland. In particular, it places special emphasis on the normalization of the investment process concerning nuclear facilities and those related to them. Its main objective is to establish a clear and stable legal framework for the investment process as a whole with respect to projects related to the construction of nuclear facilities in Poland in order for effective operations to be carried out in this area.

The changes made by the Nuclear Project Investment Act to the Energy Law Act cover, first and foremost, the necessity to take account of the specific nature of the investment process related to nuclear power plant construction. This change is reflected in the Investor’s right to act upon a Nuclear Facility Construction Project Localization Decision rather than a planning permission.

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7 Journal of Laws 2012 item 264.
Moreover, the Transmission System Operator is now obliged to include nuclear safety and radiological protection requirements into the criteria for supplying power of electricity production units if they have the form of nuclear power plants.

The Nuclear Project Investment Act has amended the following provisions of the Energy Law Act: Article 1(3)(2), Article 7(8d), Article 9g(6)(5), and Article 33(1)(5).

The first amendment was meant to update the rule (e.g. Article 1(3) PE) which precludes the applicability of the Energy Law Act in matters regulated by the Atomic Law Act of 29 November 2000\(^8\); the former version of the Energy Law Act referred in this case to the already invalid Atomic Law Act of 10 April 1986\(^9\).

The Nuclear Project Investment Act affected also the requirements to be fulfilled by applications for the issue of a statement of conditions under which connection to the grid can be made (e.g. Article 7(8d) PE). Apart from existing requirements concerning the appendices to applications for such statement, an entity applying for the connection of a power source to the grid of rated voltage higher than 1kV (local plan extract or if no such plan exists, a planning permission for the real property specified in a given application) shall also submit a Nuclear Facility Construction Project Localization Decision issued according to the Nuclear Project Investment Act.

Also expanded has been the Catalogue of Requirements on the content of grid traffic and the operation manual prepared by the Transmission System Operator (e.g. Article 9g(6)(5) PE). It now includes the ‘criteria for supplying the power of electric energy production units where in a case of nuclear power plants, nuclear safety and radiological protection requirements – set forth in the Atomic Law Act of 29 November 2000 – and the criteria for administration of gas system connections or of power system connections shall be taken into account’.

Since the provisions of the Nuclear Project Investment Act have introduced a new legal institution in the form of a Nuclear Facility Construction Project Localization Decision, the requirements applicable to entities applying for a concession to the President of the Energy Regulatory Office (hereafter, URE President) have changed accordingly. Apart from current requirements set forth in Article 33(1) PE, the requirement to obtain a Nuclear Facility Construction Project Localization Decision by an applicant has been added.

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\(^8\) Consolidated text: Journal of Laws 2007 No. 42, item 276, as amended.


The most extensive changes to the Energy Law Act made in 2011 derive from the Amendment Act to Energy Law Act and to Some Other Acts dated 19 August 2011. Their aim was to insert a missing comma in the provisions concerning obligatory trading of electricity on exchange by producers that take advantage of financial assistance under the Long-Term Contract Termination Act. This apparently benign omission has raised the question whether the public trading duty can or cannot be fulfilled by way of commodity exchange or open book tendering. The URE President has acknowledged that as a result of erroneous wording of the contested provision, this duty was not fulfilled through trading of electricity on Online Trading Platforms or in a regulated market. The Amendment Act has solved the problem by replacing an undefined entity – ‘Online Trading Platform in Regulated Market’ – with trading in a market organized by an entity operating a regulated market on the territory of Poland (see page 6).

A considerable number of provisions of the Energy Law Act was changed by the Amendment Act of 19 August 2011 including: Article 3; Article 7; Article 8(1); Article 9a); Article 9l); Article 28(2); Article 32(1)(4)(b); Article 49a)(5)(3); Article 49a)(12); Article 54(1b); Article 56. New rules were added in the form of: Article 9e)(18)(4); Article 9p)(6) and (7); Article 9t)(15e); Article 23(2)(14a); Article 23(2)(19a): Article 54(1c). Finally, some provisions of the Energy Law Act were derogated such as Article 54(1a), for instance.

Redefined therewith was the term ‘ultimate customer’ (e.g. Article 3(13a) PE). The current definition is more precise and states that energy consumed by an ultimate customer as part of ‘personal use’ should not include electricity bought in order to produce, transmit or distribute electricity. This change has eliminated any doubts about whether electricity bought for the production, transmission or distribution of liquid fuels, gas or heat should, or should not, be included into the category of personal use. By excluding the electricity used only for the production, transmission or distribution of electricity from the definition of ‘an ultimate customer’, the scope of the definition was narrowed down and the number of possibilities to avoid paying a transitory charge was limited.

The term ‘agrarian biogas’ constitutes another term that has been redefined (e.g. Article 3(20a) PE). Gas produced with raw materials provided by wastewater treatment plants and by landfills has been clearly and expressively defined.
excluded from the above definition. Change in the range of possibilities to obtain certificates of origin of agricultural biogas is a clear consequence of this Amendment Act. Another shift in definitions is visible in the replacement of the phase ‘residues of agrarian and food industry’ with ‘residues from processing of agrarian origin products’. Defined as biogas can now be only gas derived from agrarian products and not than from by-products of agrarian and food processing (such as wastewater treatment by-products or fruit processing by-products). Change in the definition of the notion of ‘agrarian biogas’ makes it possible to classify plant processing residues intended for non-food purposes into the category of biogas.

The Amendment Act of 19 August 2011 defined also the notion of a market organized by an entity operating a regulated market in the territory of Poland as ‘trading of commodities regulated by the Financial Instrument Trading Act of 29 July 2005\(^{11}\), by a company operating an exchange or by a company conducting off-exchange trade, respectively’. The introduction of a new definition into the Energy Law Act results from the changes in the scope of obligatory public trading of electricity. The new definition equates electricity trading in a market organized by an entity operating a regulated market in Poland with the fulfillment of the duty of public trading of electricity.

Subject to fundamental modification were provisions on the connection to the power grid (e.g. Article 7 PE).

Through the amendment of Article 7(8c) PE, the deadline for the payment of an advance towards power grid connection charges was extended from 7 days to 14 days. With respect to rules on the information duty of power transmission companies or power distribution companies (e.g. Article 7(8l)(1) PE), the range of information to be published by the said companies has been expanded. Added was a duty to publish information on ‘the type of system’ to be connected and on ‘the value of the total available connection power’ reduced by power resulting from released and valid statement of conditions. The frequency of data publication by entities applying for power grid connection and on available connection powers required from a transmission company or from a distribution company was lengthened from ‘once a month’ to ‘once a quarter’. At the same time, the obligatory data posting on a message board at the registered office of an energy companies was replaced by the requirement to publish relevant information on a corporate homepage.

The duty imposed on a seller \textit{ex officio} to buy electricity produced by renewable energy sources connected to the distribution grid or transmission grid on the territory where such seller carries out its operations, has been expanded through the inclusion of energy produced by biogas production.

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\(^{11}\) Journal of Laws 2010 No. 211, item 1384; 2011 No. 106, item 622 and No. 131, item 763.
plants entered into the Register of Energy Producing Companies Involved in Production of Agrarian Biogas kept by the President of the Agricultural Market Agency (Article 9a(6) PE). This amendment has eliminated a manifest legislative error. As part of a promotional campaigns concerning agricultural biogases, the latter were exempt from stamp fees for official acts related to keeping the register of biogases (Article 9e)(18)(4) PE).

The most important change addressed directly by the Amendment Act of 19 August 2011 is the rewording of Article 49a) of the Energy Law Act which eliminated a legislative error which used to make public trading of electricity on Online Trading Platforms and in regulated markets impossible. At the same time, the legislator has eliminated the institution of an Online Trading Platform as one of the acceptable forms of public trading of electricity; other provisions applicable to Online Trading Platforms have been deleted including the power of the URE President to control platform access. It is worth noting that the notion of an Online Trading Platform was only introduced as a form of public trading of electricity as recently as March of 2010, under the Amendment Act the Energy Law Act and on Amendment to Some Other Acts of 8 January 2010\(^{12}\), and then was removed by The Amendment Act to the Energy Law Act and to Some Other Acts of 19 August 2011.

The possibility to trade electricity publicly in a regulated market was modified through the introduction of the institution of ‘market organized by an entity operating a regulated market on the territory of Poland’ (Article 49a)(1) and (2) PE). Moreover, the URE President was given the right to review and to demand documentation and information important to the public trading of electricity (Article 28(2) PE). The lack of powers in this area used to make effective control impossible over the fulfillment of the duty by entities such as brokerage houses and merchandise exchanges.

Another remarkable amendment to the Energy Law Act introduced by the Act of 19 August 2011 is the relinquishment – as matter of principle – of the duty to periodically verify registration and good standing (every 5 years). The duty to reexamine qualifications remains, nevertheless, which applies to those who have appropriate qualifications but have not been involved in the operation and maintenance of power facilities, systems or grids for a period of 5 years. In case of modernization or any other material change in the parameters of facilities, systems or grid, an employer of a person who is to operate them will have the possibility to apply for a verification of the employee’s qualifications. The duty to verify qualifications every 5 years was also preserved in regard to those who operate facilities, systems, and grids that provide services to consumers as well as micro-, small-, and medium-sized

\(^{12}\) Journal of Laws 2010 No. 21, item 104.
enterprises. Such recipients, should be able to carry out their operations in full trust of the qualifications and competence of those who act independently within the structure and system of energy companies; the latter being legally obliged to verify the adequacy of qualification possessed by those admitted to works related to the operation and maintenance of facilities, systems, and grids.

Amendments to the provisions on penalties imposed by the URE President (e.g. Article 56 PE) were intended to improve references in this provisions.

The aforementioned key changes brought about by the Amendment Act of 19 August 2011 caused also a number of minor modifications in the Energy Law Act (for example, rules on the concession procedure or the extent to which the URE President may settle disputes).


The Amendment Act to the Crude Oil, Oil Products, and Natural Gas Reserve Act and on the Rules of Procedure in Situations of Threat to National Energy Security and Crude Oil Market Disruptions and on Amendments to Some Other Acts passed on 16 September 2011 had a relatively small impact on the content of the Energy Law Act. It constituted, however, an extensive amendment to the Act on Crude Oil, Oil Products, and Natural Gas Reserve Act and on the Rules of Procedure in Situations of Threat to National Energy Security and Crude Oil Market Disruptions of 16 February 2007\(^\text{13}\) (hereafter, the Energy Security Act). The Amendment Act of 16 September 2011 modifies the system of obligatory reserves of natural gas in order to facilitate the entry onto the Polish market by new entities, which are interested in conducting business operations in the area of natural gas trading at an international scale and importation of natural gas, and to facilitate small scale operations carried out by existing market players. It was meant to create favorable conditions facilitating an increased number of business entities carrying out operations in the Polish natural gas market and by doing so, to increase competitiveness and improve consumer welfare through expected price cuts\(^\text{14}\).

\(^{13}\) Journal of Laws 2007 No. 52, item 343, as amended.

The Amendment Act to the Energy Security Act changed the content of a number of provisions of the Energy Law Act: Article 33(1a); Article 35; Article 41(2a) and Article 43. All of these changes relate to the requirements that are to be satisfied by entrepreneurs who apply to the URE President for concessions required to trade natural gas internationally. The content of Article 33(1a) PE was made more precise, for instance, in stating the requirements to be met by those who apply for such concessions. Accordingly, the URE President is now competent to grant concessions for natural gas trading at international scale to an applicant who:

1) is in possession of its own storage facilities, or
2) has concluded a preliminary agreement for obligatory natural gas reserve storage services as referred to in Article 24(1) of the Energy Security Act of 16 February 2007, in an amount determined according to Article 25(2) thereof Act, or
3) has been exempted from the duty to keep obligatory reserves of natural gas referred to in Article 24(1) of the Energy Security Act.

Requirements related to the content of the application for a concession required to trade natural gas internationally were also changed. Apart from the general requirements listed in Article 35(1) of the Energy Law Act, an application for such concession should specify the forecasted amount of natural gas to be imported and the method employed to keep obligatory gas reserves on the territory of Poland, EU Member State or any EFTA Member State – parties to the EEA Agreement, according to the Energy Security Act. If applicable, such application should contain information on decisions issued by the Minister of Economy which exempt the applicant from the duty to keep obligatory gas reserves. A copy of such duty exemption decision must be enclosed (Article 35(1a) PE).

An applicant, starting its business operations exclusively in the area of natural gas exportation, is exempt from the duty to attach a notification of the Minister’s of Economy decision exempting it from the duty to keep obligatory natural gas reserves if it is normally to be enclosed to the application for concession for trade on an international scale.

By force of the Amendment Act of 19 September 2011, a new obligation was enacted concerning the conditions of withdrawal of an international natural gas trading concession. According to Article 41(2a) of the Energy Law Act, the URE President shall withdraw such concession also in situations when an energy company involved in import of natural gas for resale to customers does not keep obligatory natural gas reserves or fails to provide accessibility of natural gas according to Article 24(1) and (2), Article 24a), Article 25(2) or (5) of the Energy Security Act.

Affected was also the legal institution of a promise issued by the URE President to grant a concession for international trading of natural gas.
According to the new version of Article 43(6) of the Energy Law Act, the application for a promise of such concession should state the forecasted amount of natural gas to be imported and the method employed to keep obligatory reserves of natural gas on the territory of Poland, EU Member State or any EFTA Member State – parties to the EEA Agreement. Alternatively it should contain a statement that the given undertaking intends to apply to the Minister of Economy for an exemption decision from the duty to keep obligatory natural gas reserves.

It should be mentioned also that URE President’s new powers and new responsibilities related to changes in the obligatory reserve system that are imposed, for example, on the Gas Transmission System Operator or on the Combined Gas Systems Operator, have not been included into the Energy Law Act. Instead, they have been incorporated into the amended Energy Security Act. They include, for instance, the duty to assess technical capabilities required to deliver all obligatory reserves to the gas system for a period of up to 40 days depending on the localization of such reserves.

III. Jurisprudence

This Section is dedicated to the overview of the most significant judgments delivered in 2011 by the Polish Supreme Court, Court of Appeals in Warsaw, and the Supreme Administrative Court concerning provisions of the Energy Law Act.

1. Judgment of the Supreme Court of 6 October 2011 (Ref. No. III SK 18/11)

The Supreme Court adjudicated in this ruling that a duty resulting from a concession in the meaning provided by Article 56(1)(12) of the Energy Law Act (sanction imposed for failure to fulfill duties arising from the concession) represents a duty stated in a given decision on the issue of a concession when such duty specifies operations to be carried out by an individual concessionaire under a given concession. The description in such decision must be more detailed and a more specific than it is required by relevant current legislation enforceable in a given field.

According to the linguistic interpretation of Article 56(1)(12) of the Energy Law Act, the behavior of an energy company consisting of the failure to fulfill duties resulting from its concession is an act punishable by a fine. The word ‘resulting’ means that something comes out as a conclusion of something else.
Therefore, if failure to fulfill such duties resulting from a concession is the basis for the imposition of a fine under Article 56(1)(12) of the Energy Law Act, then the decision granting the concession must represent the autonomous source of the duties concerned.

A duty resulting directly from existing legislation that defines such duty in a way that makes its direct fulfillment possible, unless it is made more specific by a given concession, may not be treated as a duty resulting from the concession. Such duty does not result directly from the decision itself; instead, it results from an enactment (from a legislative act or from secondary legislation) governing the way in which operations covered by a given concession are to be carried out.

Seen as a duty resulting from a concession under Article 56(1)(12) of the Energy Law Act may be, however, a duty contained in a given concession if that decision specifies operations to be carried out by an individual concessionaire under a relevant concession, in more detail and in a more specific manner than it is required by relevant current legislation.

According to the views of the Supreme Court, Article 56(1)(12) of the Energy Law Act should be interpreted restrictively as referring merely to a breach by an energy company of special conditions under which it carries out its operations covered by its concession under Article 37(1)(5) of the Energy Law Act.

2. Judgment of the Supreme Court of 30 September 2011 (Ref. No. III SK 10/11)

The Supreme Court referred once again here to the issue of imposing fines on energy companies by the URE President. The Court stated that a strict liability nature must be associated with liability for the failure to fulfill duties resulting from the Energy Law Act sanctioned by a fine imposed by the URE President under Article 56(1). Therefore, the intentional or unintentional nature of misconduct does not have to be proven.

Nevertheless, this does not mean that there is no way to limit or even exclude liability. If a decision – taken by a regulator to impose a fine for the failure to fulfill duties resulting from the Energy Law Act or from a decision – is subject to an appeal, a higher level of judicial protection is provided to entrepreneurs for their rights. This rule makes it possible to modify the strict liability normally borne by energy companies.

The Supreme Court emphasized also that where a fine is imposed, the rules governing judicial verification of the accuracy of a penalty adjudicated by a public body should satisfy requirements corresponding to those to be met by a court that passes judgments in criminal cases. Therefore, a case, in which
the URE President has decided to impose a fine on an energy company but the latter appealed such a decision, should be examined according to standards applicable to those charged in criminal proceedings.

An energy company may avoid a penalty if it manages to prove that the objective circumstances of a given case make it impossible to charge it with a breach of the Act because the energy company has taken appropriate preventive actions such as trading with a renowned supplier and acted according to parameters that conform to current standards (confirmed by an appropriate certificate).

(Ref. No. VI Aca 139/11)

The issue of imposing fines by the URE President on energy companies under Article 56(1) of the Energy Law Act was also assessed by the Court of Appeals in Warsaw. The Court stated that the extent to which a given act had an adverse impact on the environment did not constitute, by itself, a normative prerequisite for the imposition of a penalty under Article 56(6). According to this provision, the URE President takes, *inter alia*, the extent of environmental harm into account when he/she sets the amount of the fine to be imposed.

There is thus no ground for an obligatory determination of the extent of a detriment to the environment resulting from a given act of an energy company. If the circumstances of a particular case so require, the extent of environmental harm caused might be, however, taken into account within the proceedings carried out by the URE President.


The Supreme Administrative Court amassed in this case the issue of rights of an energy company set forth in Article 4 (general responsibilities of power grid companies as to the extent of services rendered by them) and in Article 7 of the Energy Law Act (power grid connection). The Court stated that rights of energy companies set forth in these two rules had to be exercised within the limits of current legal provisions and might not infringe the interest of real estate owners through which an energy company passes its infrastructure in order to supply its customers with electricity.
5. Judgment of the Supreme Court of 12 April 2011 (Ref. No. III SK 42/10)

The Supreme Court considered here the settling of disputes between energy companies by the URE President (Article 8 PE). The Court was of the opinion that in regard to the powers of the regulator to settle a dispute concerning obligations (as a matter of principle, a civil law dispute) provided in Article 8 of the Energy Law Act, the said provision was an autonomous source of law even though its wording was abstract and terse. There is therefore no need to search for civil law structures (e.g. Article 64 of the Civil Code\textsuperscript{15}).

A decision issued by the URE President under Article 8 of the Energy Law Act ‘substitutes’ a statement of intent of the parties (in the operational aspects of that notion) whereas, because of the legal nature of a regulatory decision, that decision constitutes the basis for the autonomous formation of legal relationship of those bound as far as the contagious issues between the parties are concerned.

6. Judgment of the Supreme Court of 12 April 2011 (Ref. No. III SK 46/10)

The Supreme Court referred to the tremendously important issue of limits within which a regulatory body may act. The dispute at hand concerned the fulfillment of a duty to purchase ‘red’ energy (i.e. electricity produced in highly efficient cogeneration) by energy companies (Article 9a)(8) PE). The scrutinized energy company failed to fulfill that duty properly and, as a result, was fined by the URE President. The energy company found, however, the fine to be disproportionately high.

The Supreme Court stated that a regulator was not allowed to impose such duties on companies subjected to regulation that they would lead to a situation where the company would be unable to avoid carrying out its operations at a loss. The Court emphasized also that liability for failure to fulfill duties resulting from the Energy Law Act is of the strict liability nature and a statement of intentional default is not necessary to impose a fine.

7. Judgment of the Court of Appeals in Warsaw of 17 March 2011 (Ref. No. VI ACa 1027/10)

The Court of Appeals in Warsaw ruled here on the limit of an energy company’s duty to conclude an agreement for the connection to the power grid (Article 7(1) PE).

\textsuperscript{15} Journal of Laws 1964 No. 16, item 93.
The Court of Appeals clarified that Article 7(1) of the Energy Law Act clearly provided that an energy company involved in the transmission or distribution of electricity was obliged to conclude a power grid connection agreement with businesses applying for such connection (with each of the entities applying for connection individually, not only with a customer). The duty of energy companies resulting from Article 7(1) applicable to entities applying for a power grid connection is not limited to customers but is also imposable on the producers of electricity.

IV. Summary

The review of legislative and juridical developments in the Polish Energy sector in 2011 leads to the conclusion that the aforementioned amendments and changes did not have a revolutionary nature. They exercised, nevertheless, an unquestionable impact on the shape and operation of the national energy market.

It should be kept in mind that the shape of the 2011 amendments to the existing Energy Law Act of 1997 was influenced by the need to pass a fundamentally new Act on Energy Law. Indeed, amendments to the current Act have long since taken the form of ad hoc modifications rather than long-term solutions. Works are currently under way to enact as fast as possible a ‘three-fold’ legislative package encompassing three new acts that would comprehensively regulate the Polish energy market (understood in the broadest sense of that term) – a new Energy Law Act, a new Gas Law Act, and a new Renewable Energy Source Act.
Legislative Developments in Rail Transport in 2011

by

Katarzyna Bożekowska-Zawisza*

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I. Introduction

Most amendments of the Polish rail transport law in 2011 concerned the organisation of rail transport including: improvements in timetable changing procedures; mechanisms to ensure the observance and early publication of timetables; interoperability of the rail system and; certification of train drivers. Introduced were also some changes meant to restructure the incumbent state rail operator (in Polish: Polskie Koleje Państwowe; hereafter PKP). The short, but important, amendment of the Act on Commercialization, Restructuring and Privatization of state enterprise ‘PKP’ seeks to guarantee the independence

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from railway operators of the personnel of the infrastructure manager (in Polish: PKP *Polskie Linie Kolejowe*; hereafter PKP PKL). The rail infrastructure manager’s lack of autonomy was one of the Commission’s allegations against Poland in the case C-512/10 which is yet to be decided by the Court of Justice of the European Union. The Polish case is analogues to other cases filed by the Commission concerning the incompatibility of Member States’ laws with the first EU railway package (C-473/10 Commission v. Hungary, C-483/10 Commission v. Spain, C-555/10 Commission v. Austria, C-556/10 Commission v. Germany, C-545/10 Commission v. Czech Republic, C-627/10 Commission v. Slovenia, C-625/10 Commission v. France).

II. The Act on Rail Transport

The Act on Rail Transport of 28 March 2003¹ (in Polish: *Ustawa o transporcie kolejowym*; hereafter, Rail Transport Act or TK) was subject to two major changes in 2011. They were introduced by the Amendment Act of 19 August 2011 and the Amendment Act of 16 September 2011.

1. The Amendment Act of 19 August 2011 to the Act on Rail Transport

The Amendment Act of 19 August 2011² was meant to generate practical improvements in the functioning of a number of rail transport related procedures. They included: negotiations concerning access to infrastructure agreements; preparation of transport plans and; publication and observance of timetables. Introduced were also some new means of railway passengers’ rights protection. All of those modifications were designed to visibly improve the functioning of passenger rail transport and thus to increase the competitiveness of this mode of transport.

As mentioned in the *Legislative Developments in Rail Transport in 2010* review, a number of new solutions were introduced into the Act on Rail Transport by the Act on Public Collective Transport of 16 December 2010³. The latter legislation was enacted at the end of 2010 and entered into force on 1 March 2011 (some provisions will enter into force on 1 January 2017). The Public Collective Transport Act launched a new form of access decisions – a decision on open access to infrastructure. It also set up the notion of

¹ Journal of Laws 2003 No. 86, item 789.
² Journal of Laws 2011 No. 205, item 1209.
a transport plan (a plan of well-balanced development of public collective transport) formulated by the organiser of public transport (the Minister of Infrastructure or a local government unit).

The Amendment Act of 19 August 2011 to the Act on Rail Transport completed the system established by the Public Collective Transport Act by granting, in particular, a number of new control competences to the President of the Office for Railway Transport (in Polish: Urząd Transportu Kolejowego; hereafter UTK) including: the right to give opinions on drafts of transport plans and on drafts of agreements on the provision of public services. The UTK President was also enabled to supervise the conclusion of agreements on infrastructure access and to cooperate with other institutions concerning the observance of passengers’ rights. According to the new provisions, drafts of transport plans shall be submitted to the UTK President before their issuance by the public transport organisers. The UTK President has 21 days to give his/her opinion on the accordance of the draft with the law. However, such opinions are not binding on the drafter – a negative opinion from the regulator does not block the issuance of the plan by the organiser of public transport.

Similarly, drafts of agreements on the provision of public services in the domain of rail passenger transport are submitted to the UTK President before the organiser initiates an appropriate procedure of public procurement or before it concludes the agreement. The opinion of the regulator on such draft agreements concerns their compatibility with the applicable transport plan. The opinion is not binding and it does not prevent the organiser to conclude the agreement in a given shape. However, this competence enables the UTK President (specialised regulatory body) to control whether the draft realises the postulates accepted in the applicable transport plan and to express his/her view on this matter. After the conclusion of the agreement its certified copy shall be passed on to the UTK President.

The competence to give opinions on the abovementioned issues was designed so as to enhance the UTK President’s role as a regulator on the market of passenger railway services. However, in order to respect the independence of local governments, the legislator chose to use a mechanism of non-binding opinions. By doing so, the regulator was allowed to exercise a ‘soft’ influence on the development of passenger rail transport in Poland in order to promote uniform practice in the entire country and to make it possible for one central institution to collect data on the nation-wide organisation of railway passenger transport.

The Amendment Act of 19 August 2011 changed the provisions of the Act on Rail Transport by specifying in what situations is the UTK President able to refuse to issue a decision on open access to infrastructure. The regulator is authorised to do so if the activity indicated in the motion would influence services
provided on a track on which public services are also provided (on the basis of an agreement) and which would result in either: a) an increase by more than 10% of the financial compensation resulting from the provision of public service agreement to be paid by the organiser, or b) a disturbance in the regularity of passenger carriages taking into account the density of traffic on a given line as well as passenger needs. The introduction of the second prerequisite for the refusal to issue an open access decision was meant to prevent a situation when the amount of compensation was omitted in the public service agreement and thus the denial justified by its possible increase was not possible.

Certain new provisions were added to Article 29 TK concerning the procedure of negotiating agreements on access to infrastructure. An infrastructure manager or a railway carrier may request the UTK President to fix the final date for the closing of negotiations. The regulator may (even without such request) set such end date as well as order for the negotiations to take place in his/her presence. If the agreement is not concluded within the time limit set by the regulator, the UTK President issues a decision on access to infrastructure that takes the place of the intended agreement. This competence prevents negotiations being prolonged and – contrary to the law – agreements not being concluded. It is worth noting also that the dissolution of an infrastructure access agreement requires now the approval of the regulator. In practice, the UTK President’s ability to participate in negotiation and control the dissolution of access agreements is a sign of the regulator’s increasing role. It enhances the UTK President’s competences to guarantee equal access to infrastructure for all carriers.

Another set of provisions changed by the Amendment Act of 19 August 2011 concerned timetables and passenger rights. These modifications were designed to enhance demand for passenger railway services by eliminating its most disturbing problems: poor credibility of timetables and low standard of railway services. On this basis, the infrastructure manager was obliged to publish the passenger timetable on its website and on the platforms at latest 21 days before its entry into force. The same deadline applies to the owner of railway stations or to the entity managing them – they are obliged to make the timetable available in the station building. All changes to the timetable should be communicated immediately. A limit was set up for the frequency of timetable changes caused by investments, renovations and maintenance operations – they may be introduced at most once a month. All timetable changes and violations of the abovementioned deadlines are to be communicated to the UTK President accompanied by an appropriate explanation.

A new prohibition was inserted into the Rail Transport Act in order to improve the standard of railway services. It concerns the collective interests of rail passengers protected, in particular, by the provisions of the Act of 15
November 1984 on Transport and covers: hygiene, comfort and the possibility to carry out the journey in good conditions.

Specific provisions concerning sanctions were inserted in order to guarantee that timetables and tariffs are published according to the law and in due time and that passengers are guaranteed an appropriate standard of services. In case of an infringement of these rules, the UTK President issues a decision defining the scope of the violation and the deadline for it to cease. New sanctions were added into Article 66 TK. A fine is now imposed, among others, for infringements of deadlines to apply for the assignment of railway lines, of the obligation to maintain the parameters of the railway line and the time of carriages, for non-fulfilment of statutory obligations to communicate timetables and their changes, for assigning railway lines regardless of the lack of free capacity and, for approving an occasional carriage despite non-compliance with statutory requirements. A new form of fines was introduced in Article 66(2aa) TK which can be imposed by the regulator for a delay in fulfilling the obligation to eliminate an infraction resulting from certain decisions (decisions on violations of Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations; decisions on infringements of rail transport safety provisions and; decisions on non-fulfilment of requirements on the interoperability of the rail system). This fine may also be imposed for a delay in fulfilling obligations stemming from judgments in cases concerning the issuance of decisions replacing infrastructure access agreement or decisions imposing fines. The amount of this fine was set at the equivalent of 5000 Euro for each day of the delay. In calculating the fine, the UTK President shall take into account the time and scope of the infringement, previous activities of the scrutinised entity and its financial capacity.

The majority of the provisions of the Amendment Act of 19 August 2011 entered into force at the end of October 2011. The new Article 30(5c)TK (obliging the infrastructure manager to publish the timetable on its website and on platforms and to inform the owner of railway stations or those managing them of timetable changes) will apply starting from 1 November 2012.

2. The Act of 16 September 2011 amending the Act on Rail Transport

The most awaited amendment of 2011 is important from the business point of view as it implemented a number of EU directives concerning the interoperability and safety of the rail system. Ultimately enacted in the later

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4 Consolidated text Journal of Laws 2000 No. 50, item 601.

The Amendment Act of 16 September 2011⁸ is quite lengthy and very technical. It creates the framework for using Technical Specifications for Interoperability⁹ (hereafter, TSIs) within the authorisation procedures of infrastructure elements according to the requirements set up in Directive 2008/57/EC.

Article 13(1a) TK was added granting the UTK President explicit competences to control the fulfilment of safety requirements mainly concerning train drivers’ training and documents as well as safety authorisations of infrastructure managers and railway carriers. Changed was also Article 13(2) and (3) TK specifying the competences of the UTK President in the area of interoperability of the rail system.

Presented here will only be the changes to the Act on Rail Transport brought about by the Amendment Act of 16 September 2011. Since then, Article 23 TK differentiates between the system of placing in service of those elements of railway infrastructure and railway vehicles that conform with TSIs and those that do not. It introduces the rule that vehicles used on the main railway system have to possess a European vehicle number (EVN) which is assigned when the first authorisation for placing it in service is granted. In Poland, the UTK President was obliged to assign EVN to vehicles which are placed in service for the first time on the territory of Poland and to keep a register of vehicles authorised on this territory.

Article 23b (2) TK requires that each vehicle obtains authorisation before it is placed in service. In Poland, the authorisation is awarded by the UTK

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⁵ OJ [2007] L 315/44.
⁹ Technical specifications for interoperability are the specifications covering the vehicles and the elements of railway infrastructure in order to guarantee that they meet the essential requirements concerning safety, reliability, availability, environmental protection, health, technical compatibility and controls and in order to ensure the interoperability of the rail system within the EU.
President. This provision creates two kinds of procedures followed in order to acquire an authorisation – for TSIs conforming vehicles and for non-TSI conforming vehicles. Conformity relates to all the relevant TSIs which are in force on the day when the authorisation for placing in service is issued. The second type of authorisation under Article 23b (6) TK is valid only on the Polish railway network. On the basis of Article 23c TK, authorisation is not required if a TSI conforming vehicle has been authorised by another EU Member State provided that the TSIs covering the vehicle and the network, on which the vehicle drives, are complete (meaning that the TSIs do not point out any open points\textsuperscript{10} or specific cases\textsuperscript{11}).

Article 23d(1) TK stipulates that ‘authorisation for a vehicle’ constitutes an authorisation for the given type of vehicle. Authorisation for a vehicle that conforms to a type already authorised by another Member State, is simplified. It is awarded on the basis of a declaration of the vehicle’s conformity to the given type, which is to be submitted by the applicant. Article 23d(6) TK allows the UTK President to decide that such a vehicle must acquire a new authorisation in case of a change of the relevant TSIs or the national provisions on the basis of which the given type of vehicle was authorised. Such a procedure is called a renewal of a type authorisation.

If a vehicle was modified than, as a general rule, it is necessary to obtain a new authorisation to place it in service. Article 23i(1) TK corresponds in this respect with Article 5(2) of Directive 2008/57/EC that requires all subsystems to be compatible with TSIs that are in force at the time of their ‘placing in service, upgrading or renewal’. Derogations from this rule permitted in Article 9 of Directive 2008/57/EC were implemented in Article 25f TK.

Article 25a(1) TK transposes the exemptions from the applicability of interoperability rules allowed by Article 1(3) of Directive 2008/57/EC. Following Annex II to Directive 2008/57/EC, Article 25a (2) and (3) TK transpose the division of the rail system into subsystems. Following provisions cover subsystem verification procedure of subsystems and the authorisation of placing subsystems in service.

\textsuperscript{10} Article 5(6) of Directive 2008/57/EC stipulates: ‘If certain technical aspects corresponding to the essential requirements cannot be explicitly covered in a TSI, they shall be clearly identified in an annex to the TSI as open points’.

\textsuperscript{11} According to Article 2(l) of Directive 2008/57/EC ‘specific case’ means any part of the rail system which needs special provisions in the TSIs, either temporary or definitive, because of geographical, topographical or urban environment constraints or those affecting compatibility with the existing system. This may include in particular railway lines and networks isolated from the rest of the Community, the loading gauge, the track gauge or space between the tracks and vehicles strictly intended for local, regional or historical use, as well as vehicles originating from or destined for third countries;
To complete the transposition of Directive 2008/57/EC and Directive 2009/131/EC, the Minister of Infrastructure issued on 2 May 2012 a Regulation on the interoperability of the rail system\textsuperscript{12}.

III. The Act on Commercialization, Restructuring and Privatization of the State Enterprise “PKP”

The Amendment Act of 10 July 2011 to the Act on Commercialization, Restructuring and Privatization of the State Enterprise ‘PKP’\textsuperscript{13} (hereafter, PKP Act) concerned the independence of the infrastructure manager – PKP PLK.

According to the new provisions of Article 15 of the PKP Act, members of the board of directors and supervisory board of PKP PLK, as well as all those of its employees who manage department responsible for the allocation of tracks and for the collection of charges for infrastructure use, shall not perform any functions or exercise any work in any legal form in PKP, its subsidiaries or in any other rail carrier. This limitation applies for up to 24 months after the termination of the exercise of these functions in PKP PLK. If a person has not ceased to simultaneously occupy those positions in PKP PLK and PKP, its subsidiaries or another carrier, this person’s mandate in the board of directors or in the supervisory board of PKP PLK or his/her employment contract with PKP PLK expires by virtue of this Amendment Act within 6 months of its entry into force.

The said Amendment Act contains also rules on the procedure of appointing members of the board of directors of PKP PLK – they shall be chosen by its supervisory board from among the candidates according to the provisions issued on the basis of the Act on Commercialization and Privatization of 30 August 1996.

By virtue of the Amendment Act of 10 July 2011 to the PKP Act, PKP PLK’s general assembly was obliged to change its statute accordingly and to have the Minister of Transport accept these changes within 6 months of the entry into force of the Amendment Act.

\textsuperscript{12} Journal of Laws 2012, item 492; since 1 January 2012 Journal of Laws is published only in an electronic format. There is no numbering of the Journal but only the items published in it are assigned numbers.

\textsuperscript{13} Journal of Laws 2011 No. 168, item 1002.
IV. The Act on Rail Fund

The Amending Act of 28 July 2011 to the Act on Rail Fund and the Act on Rail Transport\textsuperscript{14} concerned the collection of funds for investments in rail infrastructure by PKP PLK. On its basis, PKP PLK was also allowed to take on loans and issue bonds to finance certain investments while the Treasury was allowed to guarantee the liabilities resulting from those loans and bonds. The said Amendment Act was meant to speed up infrastructure investments and to increase the absorption of EU funds in this domain.

V. The Act of 19 August 2011 on the Transport of Dangerous Goods

The Act of 19 August 2011 on the transport of dangerous goods\textsuperscript{15} transposed Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods\textsuperscript{16}. Similarly to this Directive, it consolidated in one legislative act all Polish provisions governing the transport of dangerous goods by road, by rail and by inland waterway. In the area of rail transport, it repealed the Act of 31 March 2004 on the rail transport of dangerous goods\textsuperscript{17}. In accordance with the Directive, the new Act relates in many areas to so called RID ( Regulations concerning the International Carriage of Dangerous Goods by Rail) covered by Appendix C to the Convention concerning International Carriage by Rail (COTIF) concluded in Vilnius on 3 June 1999. According to Article 13(2(5)) TK, one of the tasks of the UTK President is now to control the transport of dangerous goods by rail.

VI. Regulations of the Minister of Infrastructure

1. Set of regulations concerning train driving licences and certificates

Several new acts were issued in 2011 in the domain of secondary legislation (regulations of the Minister of Infrastructure) concerning railway transport. Most of them related to the certification of train drivers. They completed the transposition of Directive 2007/59/EC of the European Parliament

\textsuperscript{14} Journal of Laws 2011 No. 247, item 1651.
\textsuperscript{15} Journal of Laws 2011 No. 227, item 1367.
\textsuperscript{17} Journal of Laws 2004 No. 97, item 962.
and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, the implementation of which was originally initiated by the Amendment Act of 25 June 2009 to the Act on Rail Transport. After the Commission was notified of the issue of these acts, it closed its infringement proceeding against Poland concerning the Poland’s failure to communicate national measures transposing this directive.

Directive 2007/59/EC established a rail driving system based on two types of documents: a licence, which confirms that the train driver satisfies conditions on medical requirements, basic education and general professional skills (‘train driving licence’) and complementary certificates authorising the train driver to drive certain rolling stock on a specified infrastructure (called in EU law: complementary certificates or certificates; in Polish law: train driver’s certificate).

The Regulation of the Minister of Infrastructure of 18 February 2011 on train driving licences covers key questions related to the process of issuing such licences, particularly the requirements that must be satisfied to obtain them including health conditions, professional knowledge and competence covered during training and examination. Moreover, it sets up the procedure of keeping the register of train driving licences and specifies the conditions to be met by to be listed as an entity entitled to conduct training and exams for those applying for train driving licences or certificates. Notwithstanding the latter provisions, the focus of this act is on train driving licences.

Train drivers’ certificates are subject of two new separate acts. The first is the Regulation of the Minister of Infrastructure of 18 February 2011 on train drivers’ certificates. Its scope includes professional knowledge and competence relating to whatever rolling stock and infrastructure is covered by a given certificate that must be covered during the relevant training and examination. In this respect, it transposes Annexes V and VI to Directive 2007/59/EC. The Act covers also the procedure of keeping the register of train drivers’ certificates and contains an example of a model certificate.

Train driver’s certificates are also covered by the Regulation of the Minister of Infrastructure of 15 March 2011 on examinations necessary to obtain a train driver’s certificate and maintain its validity, which sets up the physical and psychological requirements that must be fulfilled in order to receive such a certificate.

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20 Journal of Laws 2011 No. 66, item 347.
The scope of the examination required for obtaining and retaining the validity of a licence and a certificate as well as situations when examinations are obligatory are based on Annex II to Directive 2007/59/EC. However, the Polish legislator chose to impose higher standards than the minimum set up by EU law. For instance, section 3.1 of Annex II requires that periodical examinations are taken every three years before the age of 55 and every year thereafter. Both the Regulation of the Minister of Infrastructure of 18 February 2011 on train driving licences as well as the Regulation of the Minister of Infrastructure of 15 March 2011 on the examinations necessary to obtain a train driver’s certificate and to maintain its validity introduced the obligation to undergo periodical examinations at least every two years before the age of 55 and yearly thereafter.

Stricter requirements than those of Directive 2007/59/EC were also implemented as regards eyesight for both train driving licences and certificates. According to section 1.2 of Annex II, EU minimum requirements are: ‘aided or unaided distance visual acuity: 1.0; minimum of 0.5 for the worse eye, maximum corrective lenses: hypermetropia + 5/myopia –8’. Both Polish acts set the conditions at: unaided 0.8/0.8 for persons applying to obtain documents necessary to exercise the profession of a train driver for the first time and unaided 0.5/0.5 or 0.7/0.3 and aided 1.0/0.5 or 0.8/0.8 (corrective lenses ±3.0 D sph and ±2.0 D cyl) for persons that already possess such documents and are applying for retaining, extending or reinstatement of their validity.

Furthermore, in accordance with the Regulation of the Minister of Infrastructure of 15 March 2011 on the examinations necessary to obtain a train driver’s certificate and to maintain its validity (in conformity with section 3.1 of Annex II to Directive 2007/59/EC), examinations are also to be conducted if they are necessary to determine whether a given train driver fulfils the required health conditions in situations such as: after any occupational accident or any period of absence from work caused by an accident, after a period of sick leave of at least 30 days and following the return of a train driver to work after a break of more than 6 months or in case of doubts whether the given train driver still fulfils the specified health requirements.

The last act related to Directive 2007/59/EC, which applies both to licences and certificates was the Regulation of the Minister of Infrastructure of 15 March 2011 on entry onto the list of entities entitled to carry out examinations concerning medical and psychological requirements necessary to obtain a train driving licence and a train driver’s certificate. This act lists all the requirements which must be met by a medical institution in order to be enlisted and, as a consequence, to be entitled to conduct examinations of

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existing train drivers as well as of candidates for train drivers. The Act also contains a model motion for the entry onto the list.


2. Other regulations

Another act issued in 2011 refers to qualifications of rail personnel other than the professions harmonised by Directive 2007/59/EC – the Regulation of the Minister of Infrastructure of 18 February 2011 on employees occupying positions directly connected with the operation and safety of rail traffic and with driving of certain categories of railway vehicles and metro railway vehicles\footnote{Journal of Laws 2011 No. 59, item 301.}. This act established a complete professional and medical examination system the competition of which is required to obtain documents necessary to work on posts listed in Annex I and II of this act.

A new Regulation of the Minister of Infrastructure of 28 April 2011 on the authorisation for public institutions to recognise qualifications to exercise regulated professions\footnote{Journal of Laws 2011 No. 102, item 590.} established a competence of the UTK President to recognise foreign qualifications to exercise professions connected with rail transport. This competence relates to qualifications for professions listed in this act which were acquired in an EU or EFTA-EEC Member State or Switzerland.

The Regulation of the Minister of Infrastructure of 11 July 2011 on the way and scope of necessary information given by the infrastructure manager to the organiser of public collective rail transport\footnote{Journal of Laws 2011 No. 150, item 893.} is connected with transport plans introduced by the 2010 Public Collective Transport Act. The Regulation of 11 July 2011 lists the information necessary to formulate a draft transport plan.
concerning infrastructure capacity, the standard of access for a given railway line and the extent of planned infrastructure renovations and investments, which is used to set the conditions of the public services provision agreement. The infrastructure manager is obliged to transfer this information to the organiser within 30 working days from receiving the respective motion of the organiser.

The provisions of the Public Collective Transport Act of 16 December 2010 were complemented by the Regulation of the Minister of Infrastructure of 8 June 2011 on the documents and information to be enclosed to the request for the issue of an open access decision and on the amount of charges for issuing this decision.28

As mentioned in the legislative review 2009, the Amendment Act of 25 June 2009 to the Act on Rail Transport29 introduced exemptions from the application of some provisions of Regulation (EC) No 1371/2007. These exemptions expired on 30 June 2011. However, the same Act empowered the Minister of Infrastructure to once again grant exemptions permitted by Regulation No 1371/2007 for specifying passenger connections for a period not longer than until 3 December 2014. On this basis, the Minister of Infrastructure issued the Regulation of 25 May 2011 on the exemption from applying some provisions of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations30.

2011 saw also the issue of the Regulation of the Minister of Infrastructure of 28 April 2011 on the procedure, the method and the conditions for financing or co-financing the purchase or the modernization of railway vehicles for passenger carriages31. This act has already been subject to one amendment32.

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The review shows that the year 2011 was full of important amendments in the area of rail transport legislation. The most influential one was introduced by the Amendment Act of 16 September 2011 to the Act on Rail Transport that changed the placing in service system of rail infrastructure elements, including railway vehicles. On the basis of its provisions, several new acts were also issued by the Minister of Infrastructure. In the mean time, the government has started legislative procedures for two new acts amending

the Rail Transport Act. One of them concerns the interoperability of the rail
system and implements Commission Directive 2011/18/EU of 1 March 2011
amending Annexes II, V and VI to Directive 2008/57/EC of the European
Parliament and of the Council on the interoperability of the rail system within
the Community\(^\text{33}\). The second draft relates to the system of train driver
qualifications found in Commission Decision 2011/765/EU of 22 November
2011 on criteria for the recognition of training centres involved in the training
of train drivers, on criteria for the recognition of examiners of train drivers and
on criteria for the organisation of examinations in accordance with Directive
2007/59/EC of the European Parliament and of the Council\(^\text{34}\).

\(^{34}\) OJ [2011] L 314/36.
Legislative Developments in the Aviation Sector in 2011

by

Filip Czernicki*

The Polish Aviation Law Act of 3 July 2002 was amended six times in 2011. The only major change introduced in this period resulted from the Amendment Act to the Aviation Law Act of 30 June 2011, most of which entered into force 30 days after its publication1. In fact, changes introduced thereby were so widespread and crucial to the entire aviation sector that it can easily be referred to as a completely new law. Considerable effort went into the preparation of this Act – its first draft was presented as early as 2009 followed by long consultations and the ultimate introduction of a number of further changes.

Among the key changes brought to the Aviation Law Act by the Amendment Act of 30 June 2011 were new rules on air traffic charges (new appendix No 6 to the Aviation Law Act). Incidentally, air traffic charges did not, under the new rules, rise as high as it was initially proposed.

Another important amendment concerned qualifications of those, who are described by Article 94 (1) of the Aviation Law Act as entitled to lead flights. This category was expanded by the introduction of crew members mentioned in part O of the III appendix to Resolution No. 3922/91/EEC. Polish aviation law is now also less restrictive towards those convicted of a criminal offence. In the past, such candidates were precluded from get a license. This rules is now limited to those subject to a driving or flying ban.

The obligation to perform medical checkups was extended to cover cabin crew members and their candidates. The new Article 105(4) of the Aviation Law Act explicitly states also that the costs of medical examinations shall

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1 Journal of Laws 2011 No. 170, item 1015.
be covered by the employer – it was until now unclear who was supposed to cover them.

Another change affected the approach displayed towards the recognition of licenses. In principle, licenses issued by a foreign authority need now to be recognized by the President of the Polish Civil Aviation Office (in Polish: Urząd Lotnictwa Cywilnego; hereafter, ULC) There are two exceptions to this rule:

1) when a license is issued by EU Member States, the Swiss Confederation or EFTA members in accordance with Annex 1 to the Convention on International Civil Aviation of 7 December 1944 (Chicago Convention), under which operations will be carried out as non-revenue flights, single pilot, day light, VFR flights;

2) the license was issued or confirmed by the competent authority of a foreign state in accordance with international requirements established by the Joint Aviation Authorities (JAA) or EASA.

New provisions describe now also the conditions for the revocation or suspension of a license or written permit. This may happen if the flight crew member:

a) obtained a license or permit on the basis of forged documents;

b) falsified records in the license or maintenance documents;

c) incurred the loss of his/her qualifications required to perform certain flight activities;

d) in his/her pursuit of flying activities for which he/she is qualified, endangers the safety of air traffic);

e) has performed air operations under the influence of alcohol or drugs.

A pilot may be requested to withdraw or suspend his/her license. Such applications need to be reviewed by the ULC President.

The Act specified further that the conduct of training for aviation personnel in order to obtain a certificate of qualification of a flight crew member is a regulated activity. As a result, it is subject to registration in the register of instructors run by the ULC President. An entry into this register requires a written request to be submitted to the regulator.

Introduced were also new provisions relating to working hours for aircraft crew in air transportation using helicopters and emergency medical service helicopters. The Aviation Law Act provides now a 1900 hours limit in a calendar year whereby working time is seen as not only the time spent in the air but also during other activities required by the employer. The Act specifies moreover the maximum working time for helicopter crews and helicopter rescue service per week and monthly (28 days).

A novel provision was introduced stating that airport fees must be set in a way that does not discriminate particular users and ensures fair competition.
The Amendment Act enabled an airport operator that does not provide border control in order to access the airport to perform non-commercial international flights. This is possible upon obtaining a special permit from the Chief Commander of the national Border Patrol and customs authorities. These special rules apply to the Schengen area only.

Additional responsibilities were placed on aerodrome operators such as having a safety management system and having an updated general plan.

The definition of airport charges was changed. Charges now relate to take-off, landing, parking of aircrafts, arrival and departure of passengers and cargo handling. Fees may also include additional payments that can be added in airports with environmental problems due to heavy noise. These fees do not cover services for disabled passengers and ground handling fees.

An amendment occurred with respect to rules governing the use of airstrips. In the past, their use was possible only in emergency situations such as emergency landing, saving lives or counteracting natural disasters as well as an unclear category of conditions whereby airstrips could be used in cases of ‘legitimate needs of air services’. The amendment indicates now clearly who can use airstrips (for both take-off and landing): charter flights and local transport by propeller driven aircraft with a maximum takeoff weight of 5700 kg or less than 10 passenger seats, a helicopter, aircraft or aerostat and other non-commercial flights.

It was explicitly stated furthermore that the responsibility for choosing the landing site of an airplane as a place to take-off and land lies with the pilot.

The legislature accepted the possibility of take-off and landing performed from places other than airports or airstrips in situations listed exhaustively in the new Article 93a(1) as:

a) need to land to prevent a situation posing a potential threat to the safety of an aircraft;

b) medical transportation in order to save human life or health;

c) need to save human life or health, perform search and rescue operations, prevent the effects of natural disasters, and in cases of urgent public safety threats.

Major changes were introduced to airport protection rules – supervision by the Border Patrol was substituted by private airport security forces. According to the new rules, airport authorities perform security tasks through specialised armed security units (also screeners) while Border Patrol merely oversees their work.

Minor changes have been introduced to the Polis Aviation Law Act by the Amendment Act to the Protection of Classified Information Act of 5 August 2010\(^2\), which entered into force on 2 January 2011. This Act adjusted the

\(^2\) Journal of Laws 2010 No. 182, item 1228.
wording of Article 58 of the Aviation Law Act by introducing the new name of the Act on Protection of Classified Information.

The Aviation Law Act was subject to a number of other minor changes in 2011 introduced based on:

- Article 76 of the Private International Law Act of 4 February 2011, which entered into force on 16 May 2011³,
- Article 41 of the Act on reducing administrative barriers for citizens and businesses of 25 March 2011, which entered into force on 1 July 2011⁴,
- Article 24 of the Act on registration and identification of taxpayers and other Acts of 29 July 2011, which entered into force on 1 September 2011⁵,
- Article 5 of the Act amending the law on liability for breaching discipline in public finance and some other Acts of 19 August 2011, which entered into force on 10 November 2011⁶.

³ Journal of Laws 2011 No. 80, item 432.
⁵ Journal of Laws 2011 No. 171, item 1016.
Legislative and Jurisprudential Developments in the Postal Sector in 2011

by

Monika Zielińska*

I. Legislation

Postal services in Poland are governed by the Postal Law Act of 2003 (in Polish: Prawo Pocztowe)\(^1\) which maintains the monopoly of the public operator Poczta Polska with respect of letters weighing up to 50 grams. However, Poland will have to fully liberalize its postal services market by 31 December 2012. For this reason, the Government adopted on 5 October 2010 Assumptions for the Draft Postal Law Act as proposed by the Minister of Infrastructure\(^2\). However, the Draft was not placed on the Government’s legislative agenda for 2011. Thus, the majority of legislative work will have to be completed in 2012, a fact that jeopardizes the implementation of Directive 2008/6/EC. The latter indicates 31 December 2012 as the deadline beyond which Member States must not maintain a privileged position of operators providing universal postal services\(^3\).

On 1 January 2011, the Act Amending the Goods and Services Tax Act (in Polish: Ustawa o zmianie ustawy o podatku od towarów i usług) came into force containing new VAT exemption rules applicable to the postal sector\(^4\). Prior to the amendment, the said exemption concerned services provided

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\(^{4}\) Act of 29 October 2010 Amending the Act on Goods and Services Act (Journal of Laws 2010 No. 226, item 1476).
specifically by Poczta Polska. According to the new version of Article 43(1.16), the VAT exemption extends now to ‘postal services and delivery of goods directly related to these services rendered by the operator obligated to provide universal postal services’. In practice, this means that the exemption continues to apply exclusively to Poczta Polska as the only entity legally obligated to provide universal postal services in the public interest. The exemption does not, however, cover services individually negotiated with customers. Such an interpretation of the exemption has been confirmed by the Court of Justice of the European Union\(^5\) as well as by Polish tax authorities\(^6\). Nevertheless, Poczta Polska does extend the scope of this exemption to individually negotiated services offered to businesses. Such offer is of particular interest for prospective business customers which themselves do not have the right to deduct VAT (e.g. financial institutions). By purchasing VAT-exempt services, these firms can significantly lower their operating costs. A service called ‘Agglomeration Mailing’ constitutes an example of Poczta Polska’s stretching of the statutory exemption seeing as this service does not have a universal character because it is offered to companies mailing over 5,000 letters a month only\(^7\).

After Poczta Polska introduced its new offer, independent postal operators started to lose customers and saw a drop in letters delivered (e.g. the decrease amounted to about 3% in January–February 2010 alone). Private operators claim also that the principles of fair competition are breached with respect to tenders held pursuant to the law on public procurement because they must compete with Poczta Polska, which illegally offers prices calculated on the basis of a VAT exemption. As a result, Poczta Polska enjoys an outright advantage of 23%, as private operators are obligated to apply 23% VAT to their services. Private operators stress that Poczta Polska is trying to preserve its existing market position, especially in light of the 2013 implementation deadline for market liberalization. Operators demand therefore that VAT rates should be uniform across the entire postal market.

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\(^5\) Judgment of the Court of Justice of the EU of 23 April 2009, case C-357/07 The Queen, on the application of TNT Post UK Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECR [2009] I-03025.

\(^6\) See e.g. interpretations no. IPPP1-443-844/11-2/BS and ITPP2/443-686/11/AP.

\(^7\) Poczta Polska argues that both ‘Agglomeration Mailing’ service and other services offered under the VAT exemption are not individually negotiated because according to the general rules of the provision of e.g. ‘Agglomeration Mailing’, this service is available to all customers meeting certain criteria. These conditions are not subject to individual negotiations. See: www.poczta-polska.pl.
II. Jurisprudence

Three important court rulings were delivered in 2011 regarding the postal sector. Two involved Poczta Polska (public postal operator) while the third concerned one of its largest competitors – the private operator Integer.pl SA, mostly distributing unaddressed bulk mail and other advertising materials.

At the beginning of 2011, the Polish Constitutional Tribunal delivered a ruling in favor of Poczta Polska⁸ which confirmed that the public operator had the right to limit its liability for non-delivery of postal money orders to an amount corresponding to five times the delivery fee. Such limitation is provided for in the Postal Law Act [Article 57(3) in connection with Article 59]. Accordingly, with respect to non-delivery of a postal money order, the aggrieved party may claim damages of up to five times the amount of the fee for the sending of the order (as well as the amount of the money order itself). This rule is an exception to the general principles of civil law, according to which compensation should cover the actual loss.

Jolanta Z. represents one of Poczta Polska’s customers who felt the detrimental effects of this liability limitation. She sent a PLN 95 money order to the Canadian embassy for her son’s passport. However, the money order was not delivered on time, which led to a delay in the issue of the passport. Jolanta Z. was thus forced to move her departure date and rebook flight which resulted in an additional cost of PLN 2,160. She claimed such compensation from Poczta Polska but even though the operator found her demand valid, it only paid the statutory compensation of PLN 33.9 (five times the postage fee).

Jolanta Z. sued Poczta Polska in a civil court. The Regional Court in Tarnów expressed its doubts whether the privilege enjoyed by Poczta Polska was constitutional. It submitted an inquiry to the Constitutional Tribunal indicating three constitutional principles that could have been violated in this case: Article 45(1) (the right to a trial); Article 32(1) (the right to equal treatment by public authorities); and Article 64(2) and (3) (protection of ownership). As regards the equal treatment principle, the court stressed that the challenged provision of the Postal Law Act violates Article 32(1) of the Constitution as it makes the situation of customers using postal services dependent on the service provider they choose.

The Constitutional Tribunal decided that the challenged legal provisions were not in breach of any of the equality principles. First of all, Poczta Polska has a monopoly on postal money orders. There are therefore no entities to which it could be compared to in terms of compensation liability for non-performance or defective performance of a service (similarly, its customers

could not be compared to customers of other entities in terms of their right to compensation). Secondly, as far as the unequal protection of property rights of Poczta Polska and its customers is concerned, the Constitutional Tribunal concluded that the privileged position of Poczta Polska was justified by its status as a public operator. Having a statutory obligation to provide universal postal services in such a way as to make them available to everyone at an affordable price, many of these services are unprofitable. If Poczta Polska were additionally burdened by the obligation to fully compensate for the losses incurred to the improper performance of its services, it would not be able to bear the financial burden. The Tribunal stated also that the Constitution did not guarantee full compensation to anyone so legislature is largely free to define (and limit) liability.

The views presented by the Tribunal seem controversial and conservative painting a picture of Poczta Polska as an entity that provides almost ‘charitable’ services. Among the controversies surrounding this case lays the question whether money orders should at all be classified as a universal postal service. Relevant is also the fact that Poczta Polska charges a fee for all of its services and obtains state subsidies for its unprofitable activities. For these reasons, amongst others, the argument of Justice Teresa Liszcz must be supported expressed in her dissenting opinion to the ruling of the Constitutional Tribunal. Most of all, she is correct in stressing that even if some liability limitation is justified, the extent of the limitation imposed by the challenged Article 57(3) and Article 59 of the Postal Law Act is excessive because these rules sever the relation between the compensation and the actual loss caused by non-performance or defective performance of postal money order services. Thus, the right to compensation for the loss incurred of Poczta Polska’s customers is essentially illusory.

Another important case of 2011 involving Poczta Polska concerned its failure to ensure the timely delivery of domestic mail. This issue was investigated in 2008 by the President of the Office of Competition and Consumer Protection (in Polish: Prezes Urzędu Ochrony Konkurencji i Konsumentów; hereafter, UOKiK President) acting upon a report submitted by the President of the Office of Electronic Communications (in Polish: Prezes Urzędu Komunikacji Elektronicznej; hereafter, UKE President)\(^9\). The report stated that actual timeline indicators for almost all types of domestic mail fell short of the minimum requirements specified in appropriate secondary legislation (ordinance of the Minister of Infrastructure). On this basis, the UOKiK

President decided that there was a reasonable suspicion that Poczta Polska engaged in an unlawful activity violating collective consumer interests. The UOKiK President observed that a company acts against the law both in situations where it undertakes illegal actions and where it fails to fulfill a statutory obligation. The timely delivery of domestic mail obligation derives from the ordinance of the Minister of Infrastructure on the conditions of conducting universal postal services (section 43.1 and Annex no. 2). The ordinance was issued to ensure compliance with the provisions of Article 16 and 17 of Directive 97/67/EC on setting service standards for domestic universal postal services. The minister determined therein, amongst others, minimum requirements concerning the quality of universal postal services including a timeframe indicator for deliveries. The indicator reflects the proportions of letters delivered within particular time periods (calculated from the date of dispatch to the date of delivery) against the total number of letters dispatched.

The pre-report investigation conducted by the UKE President showed that the actual timeline indicators for domestic mail delivered by Poczta Polska have not only failed to meet the prescribed standards but have actually gradually and markedly deteriorated since 2006. The UOKiK President decided that failure to comply with statutory minimum quality standards resulted in sizeable financial consequences for consumers as well as some intangible effects such as loss of time, organizational problems, uncertainty as to the actual date of delivery, and a sense of unfair treatment by the company. Poczta Polska’s activities were deemed illegal and detrimental to collective consumer interests (a practice violating collective consumer interests).

The UOKiK President’s conclusions deserve full support. The intention of both EU and Polish legislators was to ensure a continuous improvement of postal service quality. It is generally agreed upon that high quality postal services are vital not only for the efficient functioning of the postal sector itself but also to some other economic sectors that depend on postal services such as banking or advertising. Still, Poczta Polska has ignored its statutory

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11 Ordinance of the Minister of Infrastructure of 09 January 2004 conditions of conducting universal postal services (Journal of Laws 2004 No. 5, item 34).
13 The investigation revealed that Poczta Polska did not meet the required time limits for: priority letters (to be delivered on the day following mailing), regular letters, regular parcels, and priority parcels. See footnote 9.
14 For more on this subject see M. Krakala-Zielińska, Prawo pocztowe Unii Europejskiej [European Union Postal Law], Toruń 2009, pp. 49–50.
obligation to conform to the minimum timeline standards for letter delivery. The quality of its services has not only failed to comply with the improvement expected by the lawmakers, but has actually gradually declined 15.

The decision of the UOKiK President was fully supported by the Court of Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK) 16. The Court pointed out that Article 16 of Directive 97/67/EC calls for ‘quality standards for national mail’ in respect of ‘routing times’ and imposes the obligation on Member States to monitor the compliance of postal services with these standards on a regular basis. Similarly, section 43(1) of the aforementioned ordinance states that mail should be delivered in compliance with the specified timeline indicator which does not prescribe a state of affairs which the operator should aim to attain in the future, but a binding obligation for the present. Poczta Polska appealed SOKiK’s judgment to the Court of Appeals in Warsaw which overturned the ruling 17. Unfortunately, the Court of Appeals has yet to provide a reasoning for its judgment.

The third case of 2011 with substantial significance for the Polish postal sector concerned Integer.pl SA, a private postal operator distributing unaddressed bulk mail and other advertising materials. Integer.pl SA appealed to SOKiK a decision issued on 12 November 2009 by the UKE President 18 whereby the company was ordered to stop collecting, transporting and delivering letters weighing below 50 grams within 14 days of the date of the delivery of the decision. Furthermore, the company was fined PLN 500,000.00 for violating Article 47(2) of the Postal Law Act that grants the public operator a legal monopoly with respect to such mail. SOKiK stated in its judgment that there were no grounds for overturning the challenged decision 19 because Poczta Polska explicitly had the exclusive right to provide postal services with respect to letters weighing up to 50 grams. Other operators can deliver such letters but only provided that they charge more than two and a half times the fee charged by the public operator for mailing letters in the fastest delivery class.

15 Also of interest are the UOKiK President’s findings on the fine. Based on explanations provided by Poczta Polska, the UOKiK President found that the minimum timeline standards stipulated in the ordinance were treated by the public operator as guidance with no legal implications. The UOKiK President took this into account alongside the fact that this practice violated collective consumer interests on the national scale and that the UOKiK President had already issued several decisions concerning Poczta Polska’s activities violating consumer interests. As a result, taking into consideration the financial possibilities of Poczta Polska, a fine amounting to PLN 6,600,000 was imposed, which seems adequate to the malpractice.

17 Judgment of the Court of Appeals in Warsaw of 5 October 2011, VI ACa 354/11.
18 Decision of the UKE President of 12 November 2009, DRP-WKP-7224-29/08(16).
of the lowest weight category under universal postal services. Contrary to the provisions of the Postal Law Act, Integer.pl SA had in fact provided postal services in the lightest weight category (up to 50 grams) charging lower fees than Poczta Polska. SOKiK confirmed therefore that the operator violated the Postal Law Act and decided against decreasing the fine originally imposed by the UKE President, as its amount was determined in accordance to the prescribed rules\textsuperscript{20}.

This case brought to a close many years of efforts of the UKE President and Poczta Polska meant to force companies controlled by Integer.pl SA to stop providing postal services at prices below the rates of the public operator, thus functioning in the grey sphere of the law. Companies controlled by Integer.pl SA would, for instance, add extra materials onto letters to reach the statutory limit of 50 grams. As attempts to force the perpetrators to refrain from such practices by legal actions turned out to be futile, the UKE President chose to take a different road and issued a tailor-made regulatory decision (which was challenged) ordering the companies to stop delivering mail at prices lower than those offered by Poczta Polska. Although the public hand has finally achieved the intended result, the success is only partial because as of 1 January 2013, the monopoly of Poczta Polska will be completely abolished and private operators will no longer have to apply higher fees than the public operator.

\textsuperscript{20} The Court indicated that the decision imposing the fine is a derivative of a previous decision of 29 October 2008, OKR-WKT-7224-3/08(17) ordering Integer.pl SA to remedy the breach of Article 47(2) of Postal Law.
Background of the case – from the UOKiK President’s decision to the Supreme Court

With a motion dated 28th of April 2005 submitted to the President of the Office of Competition and Consumer Protection (in Polish: Prezes Urzędu Ochrony Konkurencji i Konsumentów; hereafter, UOKiK President), Tele2 Polska Sp. z o.o. (currently: Netia S.A., hereafter, Applicant) requested the initiation of antitrust proceedings against Telekomunikacja Polska S.A. (hereafter, TP). The Polish incumbent, TP, was alleged to have engaged in practices restricting competition covered by Article 8(1) and 8(2)(5) of the Act on Competition and Consumer Protection of 15th December 2000 (hereafter, Competition Act 2000) and in Article 82 of the Treaty establishing European Community (hereafter, TEC), presently, Article 102 of the Treaty on the functioning of the European Union (hereafter, TFEU).

The Applicant pointed out that TP’s actions, in the form of offering to its clients the cheapest service package available among initial offers – the so called ‘social package’ – in exchange for their obligation to use only TP services (the Applicant changed the wording later on into: ‘the use of exclusivity clause for the usage of publicly available telephone services’), should be considered as practices which restrict competition. In the assessment of the Applicant, such clauses violated antitrust rules because the subscribers of the cheapest package could not use the services of other operators, which offered telephone number selection (further on modified by the Applicant to ‘access number’) and pre-selection services.

After concluding antitrust proceedings, the UOKiK President issued on 28th June 2006 a decision (DOK – 112/06) which analyzed if a breach occurred of Polish antitrust rules as well as of Article 82 TEC (now Article 102 TFEU).

In relation to Polish legislation, Article 11(1) in connection with Article 8(1) and 8(2)(5) of the Competition Act 2000 were considered. The UOKiK President concluded that TP did not engage in restrictive practices in the form of preventing the formation of conditions necessary for the creation or development of competition.
through the application of an exclusivity clause for the use of its publicly available telephone services on the domestic market of access to telephone services in the public fixed telephone network, which are provided on the basis of access number and pre-selection services.

In terms of EU competition law (Point II of the decision), the UOKiK President discontinued the above proceeding on the basis of Article 105 of the Polish Administrative Procedure Code (hereafter, KPA) in connection with Article 80 of the Competition Act 2000 and Article 5 Regulation 1/2003\(^1\) and Article 82 TEC (hereafter, Article 102 TFEU). In Point III, the UOKiK President decided on the costs\(^2\).

The Applicant, Tele2 Polska Sp. z o.o., appealed this decision to the Polish Court of Competition and Consumer Protection (in Polish: Sąd Ochrony Konkurencji i Konsumentów; hereafter, SOKiK). In a judgment dated 29\(^{th}\) October 2007, SOKiK repealed Points II and III of the decision simultaneously rejecting the appeal as to its remainder and ruled on the costs\(^3\). In SOKiK’s opinion, as long as there is no basis for concluding that the conditions for prohibition are met, the UOKiK President is entitled to issue a ‘no grounds for action’ decision. SOKiK established therefore a breach of Article 105 KPA in connection with Article 80 of the Competition Act 2000 because the proceedings were not unsubstantiated within the meaning of Article 105 KPA. The subject of the proceeding was to assess whether the contested practice of TP constituted an abuse of its dominant position or not. According to SOKiK, the authority could issue a decision on the merits (instead of discontinuing the proceeding)\(^4\).

The Defendant, in this case the UOKiK President, lodged an appeal to the Court of Appeals in Warsaw\(^5\). On 10\(^{th}\) of July 2008, the second instance court ruled to dismiss the appeal. The Court of Appeals justified its ruling by pointing out that the substantive part of the decision of the UOKiK President was legally decided. It was, therefore, valid to assent that TP did not, in fact, engage in a practice limiting competition which was the subject of the proceeding. According to the Court of Appeals’ assessment, if the UOKiK President settled the substantive matter of the original dispute – the legal compliance of TP’s actions – then SOKiK accurately recognized that there was no basis for the enlargement of the matter of the dispute by the defendant by referring to Article 5 Regulation1/2003, if this did not influence either the essence of the dispute or the essence of the final decision.

The UOKiK President submitted a cassation appeal to the ruling of the second instance court. The UOKiK President alleged a violation of: Article 3(1) Regulation

\(^{1}\) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003

\(^{2}\) Decision of the UOKiK President of 28 September 2006, DOK-112/06 (available at www.uokik.gov.pl)

\(^{3}\) Judgment of the Court of Competition and Consumer Protection of 29 October 2007 (Ref. No. XVII AmA 122/06).

\(^{4}\) From the justification of above mentioned judgment.

\(^{5}\) Judgment of the Court of Appeals in Warsaw of 10 July 2008 (Ref. No. VI ACa 8/08).
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1/2003 through its non-compliance, Article 5 Regulation 1/2003 through its misapplication and, Article 105 KPA through its misinterpretation and improper use.

As the Supreme Court stated, the essence of the problem to be solved lied in whether the national competition authority (hereafter, NCA) was entitled to – in accordance with the principle of procedural autonomy – issue a decision that the investigated practice did not constitute a forbidden practice under Article 102 TFEU (so called ‘negative decisions’)\(^6\), or whether the NCA is entitled only to issue a ‘no grounds for action’ decision using directly Article 5(3) Regulation 1/2003\(^7\).

The Supreme Court stressed in the reasoning of its judgment that there are no doubts that a decision regarding the lack of a competition law violation, issued on the basis of Article 11 of the Competition Act, is not mentioned in the catalogue of decisions listed in Article 5(2) Regulation 1/2003. What raises doubts, however, is the question whether the NCA is entitled to – taking into account the wording of Article 5(3) Regulation 1/2003 – issue such a decision on the basis of domestic legislation in the light of Article 102 TFEU\(^8\).

The Polish Supreme Court acknowledged that the wording of Article 5 Regulation 1/2003 raises interpretation doubts and constitutes the subject of divergent doctrinal interpretations where it concerns ‘deciding about no grounds for action’ from an NCA if it is found that a dominant company did not, in fact, abuse its position. Moreover, since the interpretation of Regulation 1/2003 was necessary for the Supreme Court to assess the legality of the contested judgment and the Court of Justice of the European Union (hereafter, CoJ EU) did not yet provide an interpretation of Article 5 Regulation 1/2003; the Polish Supreme Court concluded that it was necessary to seek an interpretation of the said rule directly from the CoJ EU\(^9\).

The Supreme Court submitted two questions to the CoJ EU:

1. Does Article 5 Regulation 1/2003 need to be interpreted so that an NCA is precluded from issuing a decision declaring constitutively that a given practice does not restrict competition within the meaning of Article 102 TFEU if the NCA establishes, after conducting its proceedings, that a dominant company has not infringed the prohibition of Article 102 TFEU?

2. If the answer to the first question is in affirmative, does Article 5(3) Regulation 1/2003 need to be interpreted so as to constitutes a direct legal basis for an NCA to issue a ‘no grounds for action decision’ if domestic legislation provides only for the possibility to close such proceeding (where no violation of Article 102 TFEU is found) by way of issuing a decision declaring that the scrutinized practice does not restrict competition?

\(^6\) For the purposes of this text, a “negative” decision means a decision taken on the merits where a competition authority stated that there has been no breach of Article 101 or Article 102 TFEU.

\(^7\) Resolution of the Supreme Court of 15 July 2009 (Ref. No. III SK 2/09). See: point 3 of this decision.

\(^8\) Ibidem, point 10.

\(^9\) Ibidem, point 19.
Preliminary ruling of the Court of Justice

In the judgment C-375/09 dated 3rd May 2011, the Grand Chamber of the Court of Justice (hereafter, CoJ) answered the two questions formulated by the Polish Supreme Court in the case concerning a cassation appeal lodged by the UOKiK President10. The formulation of the judgment was preceded by the opinion of Advocate General Ján Mazák presented on 7th December 201011.

Referring to the first question, the CoJ pointed out that in accordance with Article 3(1) Regulation 1/2003, where NCAs apply competition law to abusive behaviour of a dominant company that may harm EU trading conditions, they are to apply both Article 102 TFEU as well as appropriate national laws12. Article 5(1) Regulation 1/2003 describes the powers assigned to NCAs when applying Article 101 and 102 TFEU to individual cases. Accordingly, NCAs can issue substantive decisions of the following kind: decisions requiring that the infringement be brought to an end; ordering interim measures; accepting commitments; imposing fines, periodic penalty payments or any other penalty provided for in their national law13. Article 5(2) Regulation 1/2003 additionally provides that if an NCA comes, on the basis of available information, to the conclusion that the conditions of establishing a violation of Article 101 or 102 TFEU were not met, they can decide that there are no grounds for action on their part14. As the CoJ stated, Article 5(2) Regulation 1/2003 explicitly points out that in such cases, NCAs are only entitled to issue a decision of the ‘no grounds for action’ type.

In the opinion of the CoJ, interpreting the powers vested in NCAs in this way is also supported by the granting to the Commission of the right to issue decisions in cases where no infringements of Article 101 and 102 TFEU are found, which explicit enacts Article 10 Regulation 1/200315. According to the latter rule, if EU’s public

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10 Judgment of the Court (Grand Chamber) of 3 May 2011 in case C-375/09, reference for a preliminary ruling under Article 234 EC from the Sąd Najwyższy (Poland), made by decision of 15 July 2009, received by the Court on 23 September 2009, in the proceedings Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA.
11 Opinion of Advocate General Mazák delivered on 7 December 2010 in case C-375/09, Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA w Warszawie.
12 See para. 20 of the judgment.
13 Ibidem, para. 21.
14 Ibidem, para. 22.
15 As the Court noted, Recital 14 of the Regulation states that issuing by the Commission of such declarative decisions may occur in exceptional cases. According to this motive, issuing of such decisions is motivated the wish to make EU “law clearer while ensuring its uniform application in EU, particularly in relation to new types of agreements and practices, which were not mentioned in existing legislation and administrative practice.” The Advocate General highlighted also that if the main goal of the EU legislator was to facilitate a situation where NCAs may issue decisions stating that a certain practice does not limit competition (as provided by the Polish Competition Act), the EU legislator would include such decisions in the list of Article 5 Regulation 1/2003 (or at least, in any other part of this Regulation, as is the case with decision described in Article 29(2)), vide: point 27 of the opinion.
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interest relating to the application of Article 101 and 102 TFEU so requires, the Commission, acting on its own initiative, may by decision find that Article 101 TFEU is not applicable to an agreement, a decision by an association of undertakings or a concerted practice either because the conditions of Article 101(1) TFEU are not fulfilled, or because the conditions of Article 101(3) are satisfied. The Commission may likewise make such a finding with reference to Article 102 TFEU. It follows from the above that EU legislature conferred thereby on the Commission the exclusive competence to adopt “negative” decisions on the merits, that is, decisions on the inapplicability of the prohibitions contained in Article 101 and 102 TFEU.

The Court noted also the cooperation mechanism between the European Commission and NCAs, established under the framework of the general principle of loyal cooperation and ensuring consistent application of competition principles in the Member States. Thus, if NCAs were to be granted with the right to issue ‘no violation of Article 102 TFEU’ decisions, that, in itself, would undermine the mechanism of cooperation and harm the powers granted to the Commission. ‘Negative’ substantive decision could, in the CoJ’s opinion, hinder the achievement of the goal of ensuring a uniform application of Article 101 and 102 TFEU because the possibility of issuing such decisions may constitute an obstacle for a subsequent finding by the Commission that a given practice violates TFEU provisions after all.

The CoJ stated, therefore, that it derives from both the wording and the structure of Regulation 1/2003 that the issuance of ‘non-violation of Article 102 TFEU’ decisions lies in the exclusive competence of the European Commission. That is so even in cases when Article 102 TFEU is applied during proceeding conducted by a NCA.

Ipso facto, the CoJ answered the first of the Supreme Court’s questions by stating that Article 5 Regulation 1/2003 should be interpreted to exclude the possibility of issuing by a NCA of a ‘non-violation of Article 102 TFEU’ decision in cases when in order to apply that provision, an NCA investigates whether the conditions for the application of Article 102 TFEU were fulfilled and subsequently arrives at the conclusion that an existing dominant position was not abused.

Referring to the second question, the CoJ concluded that taking into account the answer provided to the first question, an NCA is not entitled to issue a decision on ‘non-violation of Article 102 TFEU’. According to Article 5(2) Regulation 1/2003, an

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16 Point 34 of the Advocate General’s opinion.
17 Ibidem, point 35.
18 The Advocate General referred here to the Otto case (ECJ judgment of 10/11/93, No C – 60/92) where it was concluded that “in principle, national authorities adapt Article 101 and 102 of TFEU in accordance with national procedural regulations. Subject to compliance with regulations [EU], in particular with its basic principles, to domestic legislation belongs defining procedural regulations suitable to guarantee interested entities the right to defend. Such guarantees may vary from those which apply in [EU] proceedings’. Point 20 of the opinion.
19 Para. 29 of the judgment.
20 Ibidem, para. 30.
21 The Advocate General pointed out that Article 5 Regulation 1/2003 is directly applicable and that a NCA may close its proceedings with a procedural decision finding that there are
NCA may however – after concluding that the premises for establishing that a practice violated the prohibition of Article 102 TFEU were not fulfilled – issue a decision on the ‘no grounds for action’ by that NCA. The CoJ recalled that an NCA may apply national legislation only when EU law does not provide any special rules on the issue at stake. However, due to the fact that Article 5 Regulation 1/2003 is directly applicable in the entire EU, domestic laws, which require the NCA to close antitrust proceedings conducted on the basis of EU law by way of a decision establishing the lack of an Article 102 infringement, are inconsistent with Article 5 Regulation 1/2003.

Case comment

According to Recital 6 Regulation 1/2003, in order to ensure effective application of EU competition rules, NCAs should be associated more closely with their enforcement. To this end, they should be empowered to apply EU law. Ensuring the uniform application of EU competition law constitutes one of the key goals of Regulation 1/2003, perceived as a milestone in the modernization process of EU competition law and most of all, in the enforcement of competition rules.

In order to achieve this, Regulation 1/2003 creates a system of parallel competences whereby NCAs can apply Articles 101 and 102 TFEU in their entirety alongside the European Commission (Article 5 Regulation 1/2003). Decentralized enforcement is further encouraged by the possibility of information exchange (Article 12) and the possibility of assistance between NCAs in their investigations (Article 22). The current enforcement system inherently involves a process of an increased Europeanization/convergence of the competition law regimes of all EU Member States.

Importantly in this context, the duty to apply EU law does not prohibit or exclude the parallel application of national laws. Although this very point was hotly contested during the negotiations over the modernization proposal, the final version of Regulation 1/2003 does not preclude NCAs from applying domestic competition law no grounds for action on its part. First, like all EU regulations, Regulation 1/2003 is directly applicable in all Member States. Second, the principle of primacy requires the referring court to refrain from applying national laws contrary to EU legislation and to apply EU law instead. A national court which is called upon, within the limits of its jurisdiction, to apply EU law instead of an obligation to apply the latter refusing, if necessary, to apply any conflicting national provisions, even if the latter was adopted after EU law. It is not necessary for the court to request or await the prior setting aside of such domestic provisions by legislative or other constitutional means. See points 56 and 59 of the opinion.

22 Para. 32 of the judgment
23 Ibidem, para. 33–34.
24 Recital 6 of Regulation 1/2003.
rules to cases assessed under EU law also, provided that the national law allows such parallel application.

However, NCAs are not allowed to rule on an agreement, decision or concerted practice in a way contrary to a decision concerning the same practice issued earlier by the Commission. In cases when multilateral practices might have an influence on trade between EU Member States – NCAs are obliged to apply EU competition law. Such interpretation constitutes an emanation of the supremacy principle of EU competition law over the competition rules of its individual Member States.

Clearly among the key issues stressed in the commented judgment is the possibility of a double ruling in the same court case – the ne bis in idem principle. In such cases, the inability to re-initiate certain proceedings should be perceived as a natural consequence of a decision issued by NCA that does not establish any kind of infringement.

As mentioned in literature, the multiplicity of increasingly active enforcers in the EU (the Commission and twenty-seven NCAs) poses the risk that firms will face cases of double jeopardy where several enforcers are seeking to prosecute and sanction the very same market conduct. In this light, there is a fundamental need for clarity as to the limits that the principle of ne bis in idem places on parallel actions by multiple enforcers. However, EU jurisprudence is yet to reflect the changes brought about by Regulation 1/2003. Going further, the wording of Regulation 1/2003 gives NCAs’ the right to only issue substantive decisions that affirm a violation (‘positive’ decisions) but not decisions that would state that an infringement did not occur (‘negative’ decisions).

It should be pointed out that a different interpretation of this issue could result in the doubling of competences between the Commission and NCAs. As a result, a double violation of the ne bis in idem principle could take place. First of all, as stressed by Advocate General Mazak, ‘negative’ decision issued by NCAs’ could prevent the Commission from a subsequent finding of a violation of Article 101 or 102 TFEU. Second, issuing a ‘negative’ decision at the level of national legislation could preclude other NCAs’ from deciding on a violation of EU competition rules.

Although Article 5 Regulation 1/2003 gave NCAs the right to apply Article 101 and 102 TFEU directly, it did not empower them to take ‘negative’ decisions (inapplicability

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29 NCAs are entitled to the parallel use of EU and national law. However, the scope of application of the latter was gradually limited with the provisions of the Regulation 1/2003.

30 F. Louis, G. Accardo, ‘Ne Bis in Idem, Part ‘Bis’ (2011) 34(2) World Competition 98. Authors add therein that case-law is still anchored in the system of ‘shared competences’ between the Commission and NCAs under the principles established in Walt Wilhelm case almost four decades ago.

31 See point 30 of the opinion

32 In the Communication from the Commission to the European Parliament and the Council Report on the functioning of Regulation 1/2003 it is said, inter alia, that: ‘Article 3(1) obliges
of the prohibition) in the context of Articles 101 and 102 TFEU. Indeed, it is of little consequence that national procedural rules allow for such negative decisions with regard to the prohibitions under domestic competition laws. The principle of procedural autonomy does not legitimize an extension of the powers that NCAs can adopt under Regulation 1/2003 regarding decision types.

Crucially, Article 5 is a very rudimentary rule. Regulation 1/2003 does not formally regulate or harmonize the procedures to be applied by NCAs aside from the content of its Article 5 and the rules it contains on cooperation. As a result, NCAs apply the same substantive rules (Article 101 and 102 TFEU) but according to divergent procedures (various national legislation) and may thus impose a variety of sanctions. In important respects, the Regulation reconciled the requirements of substantive coherence with the existing procedural diversity characterizing Member States’ competition regimes.

Unlike the more detailed provisions of Regulation 1/2003 concerning the decision-making powers of the Commission, Article 5 leaves a number of important questions unanswered. For instance, can NCAs impose behavioral as well as structural remedies? What is the maximum amount of fines and periodic penalty payments that they can impose?

Article 5 lists the powers of NCAs when applying Article 101 and 102 TFEU. These powers are expressed by a list of decisions that NCAs are entitled to take which includes: establishing an infringement; ordering interim measures; accepting commitments and; imposing fines. As it was highlighted in the Commission Staff Working Paper, the interpretation of Article 5 has given rise to certain queries during the period covered by the Report on the Functioning of Regulation 1/2003 to which it was attached. First, the question has arisen whether Article 5 is capable of direct effect, that is, if the powers listed in that provision are immediately and directly available to all NCAs even if not expressly provided for by national legislation. Absent of any jurisprudential guidance, this question is still subject to discussion. Its practical relevance has declined however insofar as NCAs gradually obtained additional powers pursuant to national laws. Second, the question has come up whether NCAs may adopt declaratory decisions in relation to past infringements. Given that Article 5 does not contain a provision equivalent to the last paragraph of Article 7(1) Regulation 1/2003, doubts remains about whether the lack of an express provision may prevent
Is the parallel competence set out in Regulation 1/2003 totally clear?

NCAs from taking a decision on the basis of Articles 101 and 102 TFEU in relation to past infringements in cases where they do not intend to impose a fine.\footnote{36 Commission Staff Working Paper..., point 197.}

Empowering NCAs to issue decisions confirming that no violation of Article 102 TFEU (“negative” decision) is taking or took place would undermine the mechanism of cooperation set out in the Regulation. In addition, it would stand in opposition to the rights granted by this very act to the Commission\footnote{37 Opinion of the Advocate General, point 27.}. This in turn would undermine the primary aim of the Regulation, which is ensuring uniform (consistent) application of EU competition law.\footnote{38 Regulation 1/2003 stated that: “[I]n order to establish a system which ensures that competition in the common market is not distorted, Articles 101 and 102 of TFEU must be applied effectively and uniformly in the [EU]. The most specific procedural tool for promoting enforcement consistency is provided by Article 10 Regulation 1/2003. On its basis, the Commission can decide on its own to commence proceedings and to adopt decisions in light of EU’s ‘public interest’”. A short explanation of this solution can be found in Recital 14 Regulation 1/2003: ‘In exceptional cases where the public interest of the [EU] so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 101 and 102 of TFEU does not apply, with a view to clarifying the law and ensuring its consistent application throughout the [EU], in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice’.}

What is worth noting is the fact that the commented judgment highlighted also another important issue concerning the relations between the Commission and NCAs or, to be more precise, between EU law and national legislation, namely the principle of procedural autonomy. The Advocate General noted that Article 5 Regulation 1/2003 limits procedural autonomy through the enumeration of the types of decisions that NCAs can issue in EU competition law cases. It should be emphasized here that it is the procedural provisions that constitute the scope of NCAs’ independence (included in the European Competition Network) in the field of EU law enforcement. \textit{Ipso facto}, the lack of the possibility to issue ‘negative’ decision should be perceived as an example of an ‘attenuation’ of the procedural autonomy of Member States.

As indicated by doctrine, the catalogue of decision types that NCAs can take in connection with Article 101 and 102 TFEU has a closed character. As a result, NCAs are not entitled to issue in this context any other kind of decisions than those listed in the Regulation, even if national legislation requires them to do so.\footnote{39 C. Banasiński, M. Bychowska, ‘Kompetencje decyzyjne Komisji Europejskiej i Prezesa UOKiK wynikające z rozporządzenia Rady UE 1/2003 w świetle zasady równoległego stosowania wspólnotowego i krajowego prawa antymonopolowego’ ['Decisional powers of the European Commission and UOKiK President resulting from the Regulation 1/2003 from the perspective of a principle of parallel application of Community and national antitrust law'] (2003) 3 \textit{Przegląd Prawa Handlowego} 6.} Speaking in favor of such interpretation, in the opinion of the Advocate General as well as doctrine, is the layout of the Regulation as such.
Accordingly, if the EU legislator was going to give NCAs the power to issue ‘negative’ substantive decision regarding practices limiting competition (that is, lack of such practices) – this type of decision would be part of the catalogue listed in Article 5(1) Regulation 1/2003. A contrario, the absence of such provision suggests that NCAs cannot take decisions which establish the inapplicability of the EU prohibitions to a given practice.

It is worth noting that NCAs and national courts which apply EU law are associated with the assumptions of a rational legislator, which combined with the principle of EU law supremacy, indicates also that Member States are bound by the principle of rationality of the EU legislator. This assumption is connected in the law enforcement practice, with the inability of a broad interpretation of the law in cases when legislation is clearly formulated and the literal interpretation of its rules is not causing any interpretational problems.

The commented judgment of the CoJ clarified also the demarcation line between the decision-making powers of the Commission and those of NCAs, explicitly pointing out the numerous decision types, the issuance of which lies in the competence of NCAs while adopting Article 101 and 102 TFEU.

Undoubtedly, the system set out by Regulation 1/2003 recognizes the special role of the European Commission and its decisions. These decisions anchor the EU competition law enforcement system by providing a basic source of stability in interpreting EU competition rules.

In this decentralized system, the Commission, acting as the guardian of the Treaties and as an institution enjoying a central position in the network, has a special role to play in the determination of EU competition policy and ensuring that Articles 101 and 102 TFEU are uniformly applied in the entire internal market. It is for that reason that it was considered necessary to provide the Commission with the legal title to issue both – ‘positive’ and ‘negative’ decisions. This competence enables the Commission to act on all grounds in order to enforce competition rules. Therefore, there are no doubts that in a ‘heliocentric’ system covering the Commission and all of the 27 EU NCAs, the Commission remains at its center. Perfect examples confirming this thesis are present in Regulation 1/2003 itself. They include Article 11(6), which states that the initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve NCAs of their competence to apply Articles 101 and 102 TFEU.

Competition law has played a central role in the integration of the European market, and the need to adapt it to new circumstances is recognized as imperative. The system chosen to achieve these goals faces, however, a major risk that could...
undermine the effectiveness of competition law throughout Europe. The devolution of authority to Member State institutions creates the potential for divergent application and interpretation of European law\textsuperscript{45}.

Aside from delivering a clear indication of the interpretation of Article 5 Regulation 1/2003, it is important to note that the commented judgment highlights also some other essential issues. First of all, the CoJ pointed out the parallel aspects of competition law’s enforcement in Europe establishing a subtle, yet unambiguous, boundary between the decision-making competences of the Commission and NCAs. Secondly, the CoJ referred to procedural autonomy and the \textit{ne bis in idem} principle and pointed out that giving NCAs the entitlement to take ‘negative’ decision would be an obvious limitation of the Commission’s powers. In cases where a decision was issued by a NCA, the Commission could as a result not conduct the proceedings in the same matter.

It should also be stated that the judgment undoubtedly highlighted the importance of the Commission in its central role in the system of parallel application of EU competition law.

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\textsuperscript{45} D. J. Gerber., P. Cassinis, ‘The ‘Modernisation’…’, p. 11.
Introduction

The ruling of the Court of Justice (hereafter, CJ) in the PTC case concerns the interpretation of Article 58 of the Treaty of Accession establishing an obligation to publish EU legal acts in the languages of Member States which accessed the EU on 1 May 2004. A controversy emerged in this context whether the said obligation also applied to European Commission Guidelines on relevant market analysis and the assessment of significant market power in the field of electronic communication (hereafter, 2002 Guidelines). In general, guidelines issued by the Commission are regarded as acts of soft law, also called innominate acts or *sui generis* acts.

Soft laws are defined in literature as acts that are not given binding force directly by the Treaties but which may create actual and legal effects nevertheless. This definition should be complemented by the realisation that soft laws are inferior to binding legislation and must be compliant with it. With reference to the body issuing the act in question, literature differentiates between: institutional soft law; Member States’ European soft law; private self-regulation and co-regulation as well as; technical

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1. Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and the adjustments to the Treaties on which the European Union is founded, OJ [2003] L 236/33.
2. European Commission, Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ [2002] C 165/6; part of the so-called EU telecoms-package.
and financial standard-setting by or with the involvement of private bodies. Soft law of EU institutions, due to its function, includes: preparatory, informative, steering, interpretative, and decisional instruments. Examples of preparatory and informative instruments include Green Papers, White Papers, Action Programmes and informative Communications. Their aim is to prepare the development and acceptance of legally binding provisions and to conduct consultations in this regard with entities to which the relevant legislation is meant to be addressed to. The function of such acts, spurring negotiations and leading to the achievement of a political consensus, is also called a ‘pre-law’ function. By contrast, steering instruments include acts meant to achieve goals of EU law, that is, closer cooperation between Member States as regards the uniform application of EU law, and even harmonization of national legislation using political and declaratory means rather than binding measures. This category of soft law fulfils the so-called ‘para-law’ function and includes Recommendations referred to in Article 288 TFEU as well as Conclusions, Declarations, Resolutions, and Guidelines passed by European institutions. The third group includes interpretative and decisional instruments which have a ‘law-plus’ function represented by Guidelines concerning how European institutions should interpret and apply EU law; Commission Communications and Notices, as well as Guidelines, Opinions, and Recommendations passed by the Commission for example in the field of competition law and state aid.

Factual and legal background

Article 58 of the 2003 Act of Accession provides that the text of legal acts issued by European institutions and the European Central Bank, adopted before the accession and drawn up by the Council, Commission or European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of their accession, be considered authentic under the same conditions as those drawn up in the 11 languages official preceding the 2004 accession. Moreover, they shall be published in the Official Journal of the European Union (hereafter, Official Journal EU) if they were so published in the earlier official languages.

7 L. Senden, ‘Soft law as a New…’, p. 82; W. Sanetra, Europeizacja polskiego prawa pracy [Europeanization of Polish labour law], Warszawa 2004, p. 45.
8 L. A. J. Senden, ‘Soft law as a New…’, p. 82;
Under the Directive establishing a common regulatory framework for electronic communications networks and services (‘Framework Directive’)\(^\text{10}\), the Commission was obliged to publish specific guidelines concerning the analysis of telecoms markets and the assessment of significant market power found therein. National Regulatory Authorities (hereafter, NRAs) were obliged at the same time to take utmost account of the Commission’s guidelines when defining relevant markets in a way appropriate to national circumstances and, in particular, of relevant geographic markets within their territory, in accordance with the principles of competition law (art. 15(3) Directive 2002/21). Under paragraphs 1 to 5 of Article 16 Directive 2002/21, NRAs must also take utmost account of these guidelines carrying out an analysis of the defined relevant telecoms markets.

In 2006, the President of the Polish Office for Electronic Communications (in Polish: \textit{Urzad Komunikacji Elektronicznej}, UKE) identified PTC (Polska Telefonia Cyfrowa – one of the main telecoms operators in Poland) as having significant market power in the market for the provision of voice call termination services. The UKE President decided to impose certain regulatory obligations on PTC. In the context of an appeal brought before the Polish Supreme Court, PTC claimed that the 2002 Guidelines, on which that decision was based, could not be relied upon against it since they had not been published in the Official Journal EU in the Polish language. The Supreme Court asked the Court of Justice whether the 2003 Act of Accession precluded the Polish NRA from referring to the 2002 Guidelines in a decision by which it had imposed certain regulatory obligations on a telecoms operator, where those guidelines had not been published in the Official Journal EU in the language of that Member State despite the fact that its language is an official language of the European Union.

\textbf{Judgment of the CJ}

The CJ pointed out that a fundamental principle of the EU legal order requires that a measure adopted by public authorities should not be enforceable against those concerned before they had an opportunity to make themselves acquainted with it. The CJ reiterated that, where the language of a new Member State was an official language of the EU, Article 58 of the 2003 Act of Accession precluded obligations laid down in EU legislation, which was not published in that language in the Official Journal EU, from being imposed on individuals in that country, even though they could have acquainted themselves with that legislation by other means. The CJ continued on to consider whether the 2002 Guidelines imposed obligations on individuals. It found, after analysing the content of the 2002 Guidelines, that their content sets out the principles to be used by NRAs in their analysis of markets and effective competition under the EU telecoms package. The CJ concluded however that the Guidelines

did not contain any obligation capable of being imposed, directly or indirectly, on individuals. The CJ ruled therefore that the fact that the relevant act had not been published in the Official Journal EU in the Polish language did not prevent the UKE President from referring to them in a decision addressed to an individual. By taking this view, the CJ effectively contradicted the existence of a general principle of EU law that confers a right on its every citizen to have a version of any EU act that might affect his/her interests drawn up in his/her language in all circumstances.

Analysis

**Role and characterization of the 2002 Guidelines**

National Regulatory Authorities play the key role in the telecoms regulation model applied in the EU. Despite the expansion of EU competences, the implementation of EU law remains in the hands of Member States or is based on the cooperation between national and EU authorities. Competences of NRAs include, for example, their powers in the scope of pro-competitive sector specific regulation. In principle, such regulation is asymmetric, that is, regulatory obligations are imposed not on all telecoms enterprises operating on a given market, but only on those with significant market power. On the basis of an analysis of the domestic telecoms field, an NRA: determines relevant markets; decides if a given market is effectively competitive; establishes which enterprise has market power, and; imposes upon the latter appropriate regulatory measures. In the fulfilment of their duties, NRAs take decisions at their own discretion. It is only after conducting a comprehensive legal and economic analysis that NRAs decide whether to impose special ex-ante obligations on undertakings with significant market power (such as to help remedy existing market problems) or indeed, decide to withdraw regulatory obligations. In order to limit the discretionary power of NRAs and to ensure coherent and uniform application of the EU telecoms package throughout Europe, the framework directive empowers the Commission to issue relevant soft laws. As a result, NRAs are obliged to define relevant markets and assess market power pursuant to, *inter alia*, the Commission 2002 Guidelines.

This particular act can be regarded as a steering soft law instrument, that is, an act meant to approximate national legislation and facilitate the uniform application of EU law, or indeed Europeanized national laws, by domestic administrative authorities and courts. This type of soft law is primarily meant to supplement and clarify binding legislation, and is thus similar to executive acts. That realisation is proven by the fact that the Commission’s power to issue the said act results directly from Article 15(2)

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of the framework directive which is a blank provision that effectively empowers the Commission to issue guidelines for market analysis and the assessment of significant market power.

The 2002 Guidelines, specifying the meaning telecommunications directives, is also meant to facilitate the proper implementation of the EU telecoms directives by Member States. In the 2009 Commission v Germany case\(^\text{12}\), the CJ ruled that the accused Member State has failed to properly implemented the EU telecoms package because Article 9a inserted into the German Telecommunications Act (TKG)\(^\text{13}\) made it possible not to regulate ‘new markets’ for a certain period of time if their creation would require considerable investments. Germany referring to, inter alia, section 32 of the 2002 Guidelines argues that from the European telecommunications regulatory framework emerges the principle of non-regulation of new markets\(^\text{14}\). In its judgment\(^\text{15}\), CJ clearly states that, this defective interpretation of the 2002 Guidelines led to the adoption of the Article 9a TKG inconsistent with the EU telecommunications directives. Therefore, despite the fact that the 2002 Guidelines formally have no legal binding effect they are the appropriate instrument for judicial dispute resolution and they can constitute a part of legal background of the case.

**Legal effects of soft law**

Article 288 TFEU (ex Article 249 TEC) stipulates that only certain EU acts may have binding force namely: Regulations, Directives, and Decisions. Pursuant to Article 288(5) TFEU, Recommendations and Opinions are not legally binding; other derivative acts such as Guidelines, for instance, should similarly be regarded as non-binding. Stipulating the legality of which type of acts can be challenged before the Court of Justice of the EU, Article 263 TFEU (ex 230 TEE) also uses the term ‘acts intended to produce legal effects vis-à-vis third parties’. Despite different terminology, literature assumes that the terms ‘legally binding’ and ‘causing legal effects’ have the same meaning. L. Senden argues that legally binding acts have a ‘capability to affect a person’s legal position and rights and obligation contained in it can be enforced or have to be complied with’\(^\text{16}\). Still, CJ jurisprudence concerning the review of the legality of EU acts\(^\text{17}\) suggests that regarded as such are not merely acts which are directly determined as legally binding by the Treaty and the legal nature of the act depends on its content rather than name and

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\(^{14}\) Case C-424/07, para. 49.

\(^{15}\) Case C-424/07, paras 67–71.

\(^{16}\) L. Senden, ‘Soft Law in European Community Law…’, p. 237.

\(^{17}\) Judgment of the Court of 31 March 1971, case 22–70, Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport (ERTA), ECR [1971], 00263 para 42.
form. The CJ adopted an umbrella concept according to which non-legally binding acts can be incidentally binding, which results from specific features of such acts (incidental legally binding force)\(^{18}\). Additionally, a legal act which cannot be ascribed binding force within a wider meaning may cause indirect legal effects. According to the CJ ruling in the Salvatore Grimaldi v Fonds des maladies professionnelles case\(^{19}\), the fact that Recommendations do not have binding force does not mean that they do not cause any legal effects. They should be taken into consideration by national courts when deciding a pending dispute. The judgment of the CJ in Grimaldi case clearly points to the hybrid nature of EU law that includes not only binding legislation but also acts of soft law that specify how to interpret EU law or ‘Europeanized’ national laws\(^{20}\). Indirect legal effects may result from a certain interpretation of a legal act or from general rules of law, mainly the rule of legal certainty and the rule of protection of legitimate expectations. Soft laws may determine the policy of administrative authorities or the means in which they act. As such, they create legitimate expectations for market players entitled to expect that administrative decisions will be taken in accordance with the content of the relevant soft laws. The nature of non-binding indirect legal effects is expressed by T. C. Hartley: ‘legal effect is not an all-or-nothing characteristic: an instrument may have some legal effects but not others – for example, an instrument may not have direct legal consequences in its own right, but may affect the interpretation of another instrument and thus have indirect legal consequences’\(^{21}\). Soft law acts may thus only indirectly determine the legal situation of natural and legal persons, for example, affecting legislative actions of Member States and indeed, the actions of public authorities applying law in a certain field.

**Legal effects of 2002 Guidelines**

Articles 15(3) and 16(1) of the Framework Directive directly stipulate that NRAs have the obligation to take into consideration to the widest extent possible the market definition and assessment Guidelines issued by the Commission. It can thus be argued that the 2002 Guidelines determine the way in which telecom laws are applied

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\(^{19}\) Judgment of the Court of 13 December 1989, case C-322/88, Salvatore Grimaldi v. Fonds des maladies professionnelles, ECR [1989] 4407: ‘However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law’.


by NRAs. Moreover, the 2002 Guidelines can be seen as instructions for Member States’ legislators also seeing as it was found in the C-424/07 judgment that their faulty interpretation may lead to an improper implementation of EU directives. Rights and obligations contained therein can thus be enforced if the Commission decides that non-compliance leads to a violation of binding EU law and lodges a complaint to that effect with the Court of Justice.

The CJ indicated in the commented judgment that the 2002 Guidelines, among others, ‘set out of the methods and criteria useful in defining the market, for assessing significant market power and for designating undertakings as having significant market power’ and ‘provide NRAs with guidance on the measures they should take following the analysis of the competitive nature of the market’. The choice of the prescribed methods, criteria and considerations taken into account and used by NRAs to analyse their domestic telecoms markets largely determine the outcomes of such assessments. As a result, the content of the 2002 Guidelines strongly affects how relevant markets are defined; which undertakings will be deemed to have significant market power therein and have regulatory obligations imposed upon them by NRAs; and even what kind of obligations can be imposed. The 2002 Guidelines largely determine therefore the outcome of national telecoms proceedings regarding the imposition of regulatory obligations. So, the statement of the CJ that this act does not indirectly affect rights and obligations of individuals cannot be concurred with.

**Publication of soft law acts**

All EU law acts are published in the Official Journal of the European Union called, until 1 February 2003, the Official Journal of the European Communities. The Official Journal has three series: L (*Legislatio*), C (*Communicatio*) and S (*Supplement*). Article 297 TFEU (ex Article 254 TEC) establishes an obligation to publish all binding EU laws: all legislative acts and non-legislative acts: Resolutions and Directives, which are addressed to all Member States, as well as Decisions without an addressee. Directives and Decisions with an addressee are notified to them. Despite the fact that the Treaty does not impose an obligation to publish soft law acts, Recommendations and Opinions are published in the L series of the Official Journal whereas the remaining acts are published in its C series.

**Publication of 2002 Guidelines in languages of new Member States**

Although the obligation to publish all EU laws applies to binding legislation only, the 2002 Guidelines were originally published in the C series of the Official Journal of the European Communities in all of its, then, official languages (11 at that time).

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23 Paras 32 & 33.
Nevertheless, they were not subsequently published therein in the languages of the Member States which joined the European Union on 1 May 2004.

From the fact that the 2002 Guidelines do not cause direct and indirect legal effects, the CJ drew further conclusions. It stated that ‘the fact that those guidelines have not been published in Polish in the Official Journal of the European Union does not prevent the NRA of the Republic of Poland from referring to them in a decision addressed to an individual’. *A contrario*, assuming that the 2002 Guidelines are binding for NRAs, they cause indirect legal effects and indirectly influence the legal situation of natural and legal persons. The principle of legal certainty suggests that they should be published in all of the languages of the new Member States. Publishing them officially, and as a result, allowing operators to become acquainted with their content strengthens the reliability of a legally established order. It improves also legal certainty of economic activity enabling individuals to anticipate that telecoms decisions will be compliant with the 2002 Guidelines. As such, individuals would be able to prepare for such decisions properly. The PTC operator was at a disadvantage compared to the operators which had their registered seat in older Member States, as they could become acquainted with the guidelines in their own languages. The lack of an official publication of the 2002 Guidelines in the Official Journal in the languages of new Member States leads thus to the discrimination of telecoms operators conducting their business activity in those countries. In the light of the above analysis it must be said therefore that the ruling of the CJ in the *PTC* case cannot be received in a positive way.

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Differentiation between entrepreneurs 
(on the basis of the public task criterion) and its legal consequences. 
Case comment to the judgment of the Court of Appeals in Warsaw of 21 April 2011 
UOKiK President v Polish Football Association and Canal+ Sp. z o.o. 
(Ref. no. VI ACa 996/10)

Introduction

The discussed judgment was rendered in relation to the dispute between the President of the Polish Competition Authority (hereafter, UOKiK President) on the one hand and the Polish Football Association and the broadcaster Canal+ on the other hand. These two undertakings were party to an agreement on exercising media rights to football games of the two highest classes of the Polish league. The core of the dispute consisted of the possibility of deeming the pre-emption right reserved for Canal+ as a contractual provision restricting competition. The Courts involved were also forced to answer the question whether performing tasks of a public service character justified a decrease in the fine imposed by the competition authority.

Findings of fact

The Polish Football Association (hereafter, PZPN), with its registered office in Warsaw, is a nation-wide sports association representing Polish football (indoor eleven, beach, men and women)\(^1\). PZPN functions on the basis of the Act on Physical Culture of 18 January 1996\(^2\), the Law on Associations of 7 April 1989\(^3\), statutes of FIFA (Fédération Internationale de Football Association) and UEFA (Union of European Football Associations) as well as the statute of PZPN itself. Its tasks include, among others, preparing for and entering the national team, as well as other teams representing Poland, into international games, organizing and conducting a nationwide system of football games and cup tournaments in all age categories with the view

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\(^1\) Article 4 of the Statute of the Polish Football Association (hereafter, Statute).
\(^3\) Act of 07 April 1989 – Law on Associations (Journal of Laws 1989 No. 79, item 855, as amended).
to establish the Champion of Poland, the Winner of the Polish Cup, Polish League Cup and Polish SuperCup as well as international and interstate competitions.

PZPN is the sole owner of all proprietary and non-proprietary rights to international and interstate games of the Polish national team in various age categories as well as to the football games organized by PZPN itself including, primarily, all broadcasting, advertising and marketing rights to its matches via all available means of audio-visual, audio, Internet and other technical transmission models existing currently or in future.

Canal+ Cyfrowy (hereafter, Canal+), registered office in Warsaw, is a subsidiary of Groupe Canal+ S.A. Its activity consists of broadcasting pay-TV channels via its satellite digital distribution platform ‘Cyfra+’ and the creation of premium movie and sports channels. In order to develop its offer, Canal+ enters into license agreements for broadcasting rights to movies, sport events and other audiovisual content. Canal+ produces also a small amount of content directly which is incorporated into its TV channels including, above all, recordings of Polish league football games, sport-oriented programmes and auto-promotion spots.

As football continues to enjoy enormous and constant popularity in Poland, the rights to broadcast league matches are of considerable financial value. They constitute a highly desirable commodity on the Polish market for broadcasting rights. PZPN exercises the exclusive right to trade in the broadcasting rights to football matches played in the tournaments it organizes. On 27 July 2000, PZPN concluded a license agreement (hereafter, Agreement) with Polska Korporacja Telewizyjna granting the latter an exclusive license for exercising media rights to football matches of the two highest match classes of the Polish league: the Polish Cup and Polish League Cup. On 28 February 2002, the rights covered by this Agreement were assigned to Canal+ Cyfrowy. It is worth noting that the rights in question were exercised by the same broadcaster, ‘Canal+’, throughout the whole term of the license.

The licensed broadcasting rights included all exclusive rights to make the course of any football match available to any audience in whole or in part, as well as exclusiveness to the so-called ‘access to information’ on all areas of exploitation (hereafter, Rights). They were granted for the period of time starting with the 2000/2001 season (league matches), 2001/2002 (Polish Cup matches) and 2002/2003 (Polish League Cup matches) and lasted until the 2004/2005 season. The Agreement contained also a specific provision on access to the Right for the 2005/2006 up to 2008/2009 seasons – Article 5 of the Agreement irrevocably assigned ‘the pre-emption right to obtain an exclusive license for exercising the Rights in the seasons 2005/2006, 2006/2007, 2007/2008, 2008/2009 to PKT (Canal+)’ (hereafter, pre-emption right).

The pre-emption right was to be exercised in the following manner: in case PZPN obtained an offer to purchase the Rights or to obtain a license for exercising these Rights within the term of the Agreement, it was obliged within 60 days at the latest but not earlier than 90 days before the expiry of the Agreement, to notify Canal+ in writing of such offer indicating its conditions. Canal+ could notify PZPN within 30 days if it would exercise its pre-emption right. PZPN was then obliged to conclude

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4 Article 14 of the Statute.
a new agreement granting an exclusive license for the period covered by the pre-
emption right on conditions identical to those of the most favorable offer made to
PZPN in good faith by another entity5. It is this very provision which constituted the
basis for the dispute touching upon the issue of competition protection.

On 15 November 2004, PZPN invited both TV broadcasters and Internet operators
to participate in a tender for the purchase of audio-visual rights to league matches
for the seasons from 2005/2006 to 2007/2008. All potential bidders for the Main
Broadcaster’s Package were informed that for contractual reasons, Canal+ enjoyed
a special right to submit offers for individual packages, that is, had the unilateral
option of purchasing rights included in the Main Broadcaster’s Package on the best
conditions offered by any other bidder.

Offers for the licenses in question were placed by the following entities: Canal+
(Main Broadcaster’s Package, Derby Match Package, Discussion Forum), Telewizja
Polsat (all packages aside from Internet and Inside Ring rights), Grupa TVN (Sunday
Shorts’ Package, Information Access Package), Grupa Multimedialna (TV Centrum –
all packages aside for Internet and Inside Ring rights), Interia.pl (Internet Packages),
Onet (Internet Packages), Agora (Internet Packages), Multikino (Inside Ring). The
public service broadcasters, TVP, refrained from the participation in the tender. After
the completion of the tender, individual packages were purchased by the highest
bidders: Canal+ (Main Broadcaster’s Package, Derby Match Package, Discussion
Forum); Grupa TVN (Sunday Shorts’ Package, Information Access Package),
Multikino (Inside Circle) and Onet, Interia.pl, Agora (Internet packages).

In the course of the competition proceedings the UOKiK President asked the
biggest Polish TV broadcasters (TVP, Polsat, TVN) how were they influenced in the
tender by the disclosure of the existence of the pre-emption right and, in particular,
as to their decision to participate in the tender or amount of the offer.

Polsat stated that finding out of the existence of the pre-emption right influenced
its participation in the tender only indirectly. The broadcaster decided to submit the
bid regardless of the fact that the pre-emption right was assigned to its competitor.
Polsat was aware that the sought rights would doubtlessly improve the attractiveness
of its offer. It saw its own bid as competitive, very attractive in relation to distribution
(broadcasting games in free-to-air as well as encoded channels) and reliability (many
years of experience in TV transmissions for key sports events) as well as finance.
Upon the closure of the tender, the broadcaster was only briefly notified that its offer
was not selected, and was provided neither with details nor reasons for the rejection.
Polsat stated that the pre-emption right differentiated the conditions of the tender
with respect to its participants because it placed Canal+ in a privileged position with
respect to similar offers in terms of programme and finance.

By contrast, TVN stated that the conditions of the tender bore no influence on
the possibility of purchasing the package it was seeking (Shorts’ Package) because
any purchaser of the Main Broadcaster’s Package was obliged to cooperate with the
purchaser of the Shorts’ Package on the same principles (Decision DOK-49/06).

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5 Decision of the UOKiK President of 29 May 2006, DOK-49/06.
In response to the charge of an anti-competitive nature of the pre-emption right, PZPN argued that the contested right granted to Canal+ in the agreement of 27 July 2000 is subject to existing Polish civil law provisions. PZPN argued that granting of pre-emption rights is permitted without any restrictions under Polish law and as such it may not be questioned as the conduct of the parties remains in accordance with Article 596 of the Polish Civil Code.

PZPN stated also that the rights covered by the tender were divided into several individual packages, a fact that should prove the Association’s deliberate attempt to diversify the offer. PZPN said to have employed this approach in order to facilitate tender participation by a wide range of potential bidders. All invited participants had the chance to place a bid on their own conditions within the exploitation purpose of the package they selected. In the opinion of PZPN, this approach was a considerable facilitation for potential bidders as they could license the package they found most attractive in light of their needs and programme policy. Leading broadcasters such as Canal+ and TVN were thus said to have made use of this possibility and purchased packages they were most interested in. Only Canal+ made an all-inclusive offer for the Main Broadcaster’s Package that corresponded fully with PZPN’S requirements set in the tender invitation.

The result of the tender would have, in PZPN’s opinion, looked similar even if Canal+ had not enjoyed the pre-emption right. According to the Association, TVP’s choice not to participate in the tender reflected its conscious decision not to take the opportunity of placing a better offer than that of Canal+. Furthermore, the pre-emption right assigned to Canal+ was not actually made use of as Canal+ outright submitted the highest bid of all.

PZPN questioned also the definition of the relevant market adopted by the UOKiK President. Resting upon the data from a consumer preference survey report commissioned by the competition authority, the Association concluded that the relevant market for transmission rights to football matches should include all and not just the matches of the Polish league.

Canal+ was of the opinion that it could not be charged with activities meant to foreclose the rights market for the broadcasting of football matches of the Polish league. Canal+, similarly to other tended participants, did not influence the ultimate choice made by PZPN, apart from doing their best to make its offer financially attractive. The broadcaster stated that it did not take any actions which, even potentially, would negatively influence the decisions of its competitors as to the participation in the tender. Referring to the pre-emption right, Canal+ stated that its absence would not have increased general interest in PZPN’s offer. The broadcaster stressed that the propositions concerning the possibility of broadcasting football matches of the Polish league made by PZPN to other entities were not received by them with any interest. The well-established market position of Canal+ was, in its own view, a factor stabilizing the relevant market – this fact should not put it in a negative light as this would lead to a situation where each of its contracts could be deemed an anti-competitive practice.

Canal+ claimed also that no infringement of the public interest (set of clearly and well-determined interests of the general public) occurred in this case. The broadcaster
Differentiation between entrepreneurs…

quoted a Supreme Court judgment of 29 May 2001\(^6\), which states that only activities touching upon the sphere of interests of a wider circle of market participants infringe competition.

According to Canal+, the existence of the pre-emption right does not result in eliminating competition but just the opposite: it makes the interested entities compete with each other with respect to the offered conditions and, above all, in relation to price. The company believes that tender participants were free to place their bids while PZPN was free to conduct negotiations in order to select the best offer (which could have exceeded the financial possibilities of Canal+) and ultimately, to select the winner.

After conducting the proceedings, the UOKiK President refuted the arguments of the two companies concerned and issued a decision that deemed the agreement in question as restricting competition (DOK-49/06). A fine was imposed upon PZPN and Canal+ in the amount of PLN 443 998.73 (app. € 111 000) and PLN 7 368 712.05 (app. € 1 842 000) respectively. Moreover, the UOKiK President obliged the parties to reimburse the costs of the proceedings in the amount of PLN 12 932 (app. € 3 200).

The UOKiK President stated that ‘As PZPN possesses a 100% market share in the market of trading in rights to broadcast Polish football league matches, each activity of this entity which may infringe the principles of free competition undertaken, above all, in agreement with the purchasers of rights constituting the object of trade, considerably influences the position of other (including potential) purchasers of such rights, i.e. television broadcasters interested in purchasing the right to broadcast other than Canal+, and indirectly – a wide circle of consumers – viewers of television channels broadcast by competing television broadcasters’. With reference to the importance of the pre-emption right, the UOKiK President stated only that ‘It remains outside the dispute that granting the pre-emption right […] puts Canal+ in a privileged position in comparison with its competitors interested in acquiring such rights. Stating that the aforementioned right is prohibited requires, however, a justification. It should therefore be considered whether the elimination, restriction or infringement of competition on the relevant market in another manner constituted the aim or the effect [Article 5(1) of the Act] of granting Canal+ the pre-emption right’.

Both companies appealed the antitrust decision to the Regional Court in Warsaw – the Court for Competition and Consumer Protection (hereafter, SOKiK) requesting for the decision to be reversed or, as a precaution if that request was refused, for the decision to be changed by lowering the fines imposed.

After an examination, SOKiK changed the contested decision in a judgment of 14 February 2007 by lowering the fine imposed on PZPN to the amount of PLN 221 999.37 (app € 56 000) (half of the original fine). The remaining part of PZPN’s appeal was dismissed as was the entirely of the appeal submitted by Canal+.

Both companies appealed and in a judgment of 4 December 2007, the Court of Appeals in Warsaw reversed SOKiK’s judgment with respect to the amount of the fine and transferred the case to be re-heard by the SOKiK in this respect. Canal+

submitted the final appeal in this case but it was dismissed by the Supreme Court in a judgment of 7 January 2009 (file No. III SK 16/08).

As a result of the renewed hearing of PZPN’s appeal from the antitrust decision of 29 May 2006 by SOKiK, PZPN’s fine was yet again set by SOKiK to PLN 221 999.37.

The renewed SOKiK judgment was appealed by the UOKiK President in its entirety. The competition authority claimed that SOKiK wrongly connected the amount of the fine with the performance by PZPN of tasks of a public character.

In a judgment 21 April 2011 (file No. VIA Ca 996/10), the Court of Appeals reversed SOKiK’s newer judgment dismissing PZPN’s appeal within the scope of the decision concerning the fine. It was stressed in the reasoning to the judgment that the performance of tasks of a public character cannot constitute a factor influencing the graduation of the fine imposed upon such entity. According to the Court of Appeals, a different interpretation would lead to the creation of a group of entrepreneurs treated by the competition authority in a more lenient way than others.

Legal analysis

Although the discussed judgment limits itself to the issue of PZPN’s fine, it would be useful to expand this commentary to two additional issues related to the correctness of the entire proceedings which ultimately ended in the judgment of the Court of Appeals.

The first issue relates to the possibility of deeming the pre-emption right to be a contractual provision restricting competition and the second relates to the opinion of the UOKiK President (supported by the courts) that the pre-emption right included in the agreement between PZPN and Canal+ constituted an infringement of the rules contained in the Polish Competition Act.

I. Pre-emption right, general remarks

Among the controversies of the discussed case is the fact that the granting of the pre-emption right was deemed by the UOKiK President to constitute a competition restricting practice7. Taking into consideration the principle expressed in Article 3531 of the Polish Civil Code, as well as the fact that pre-emption rights constitute a well established institution of the Polish legal system, the authority had to ascertain whether the contested clause contradicts the act (and if so – in what way). The UOKiK President’s analysis should have been particularly diligent here as the clause in question is regulated by the Civil Code and widely used in trade relations, among others, by entities which find themselves in situations closely resembling the case at hand.

Limiting the application of a legal institution (such as the use of pre-emption rights) in relation to a certain group of entities by way of an administrative decisions

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and its judicial review demands that the issuing authority accurately specifies the criteria considered. Such situation should constitute an exception to the general permissibility of the use of such clause – an exception that cannot be interpreted widely. In other words, the UOKiK President and the adjudicating courts should have clearly identified what exactly – in the specific economic context – the threat to competition resulting from the application of the pre-emption right consisted of. The lack of such definition could result in the elimination of the use of a legal institution that often realizes important social objectives. Even if the conclusion of this judicial review were to consist of the prohibition to use pre-emption rights in agreements concluded by a monopolistic or dominant entity, then such conclusion should have been fully explained to ensure legal certainty. Due to the frequent use of pre-emption rights in the trade in national cultural goods, for instance, which often involve a dominant undertaking (similarly to broadcasting rights), the correctness of the antitrust decision and the resulting jurisprudence must be criticized for their lack of precise interpretation guidelines of the issue at hand.

II. Pre-emption right in the Agreement

Canal+ did not actually exercise its pre-emption right because its offer emerged as the highest of the tender. Canal+’s opinion should be supported that the mere reservation of the pre-emption right in the Agreement did not exclude the possibility of another entity winning the tender, provided the latter submitted a better offer. All bidders act in their own best understood interest submitting bids which are to bring them maximum profits. If so, Canal+ would surely not exercise the pre-emption right if a competing offer exceeded its financial capabilities (rationality of the purchase taking into consideration the advertising potential of the rights). The fact that the tender procedure made it impossible to modify an offer already placed forced all participants to submit maximum bids out front. Since bidders are separate entities, they inure different costs and can expect different profits from the rights. Canal+’s advantage resulting from the pre-emption right is therefore purely theoretical. In essence, it reflects the possibility to purchase the given commodities for the highest price offered but without having to participate in a tender. According to the UOKiK President, the competition infringement manifested itself in the fact that PZPN was obliged to inform Canal+ about the conditions of competing offers. The Authority stressed in its decision: ‘PZPN’s obligation to disclose competing offers resulted in an asymmetry of information between Canal+ and other potential bidders. As a result, a potential competitor of Canal+, in order to have a chance to obtain the broadcasting right, had to make an offer attractive enough to be sure that Canal+ would be unable to pay the same amount for obtaining the license. At the same time, when placing its primary bid, [Canal+] could offer an amount even many times lower than its competitors knowing that if its bid is topped, it may increase its offer to the level set by a competitor’8.

8 Decision of the UOKiK President of 29 May 2006, DOK-49/06.
Moreover, ‘(…) according to the UOKiK President, the agreement in question resulted in a restriction of competition on the relevant market. What constituted such an effect was TVP’s resignation from participating in the tender directly caused by the awareness of the existence of the contract granting a privileged position to TVP’s competitor [that is, Canal+] in applying for the rights this broadcaster was interested in’. In the opinion of the UOKiK President, knowing about the existence of the Agreement resulted therefore in other entities resigning from the participation in the tender. This conclusion is not logical – to agree with it would mean that the sole fact of Canal+’s participation in the tender could discourage its competitors from entering because, being a large market player, Canal+ could submit a high bid. The authority’s view supports a fictional situation whereby an entrepreneur (Canal+) does not make profit-oriented commercial decisions but aims to win the tender at all costs.

The UOKiK President’s incorrect standpoint was shared by SOKiK. ‘In reference to the fines imposed, one should have taken into consideration that the fact of concluding the agreement prohibited in Article 5 [Competition Act] justified imposing fines on the parties to that agreement pursuant to Article 101(1)(1) of the Act. The advisability of the imposed fines is supported by the fact that the existence of the subjective option clause impacts market competition in such a way that it is scarcely probable that the injured entities shall make their claims. Proving it by, for example, an entity resigning from entering the market for this reason would be difficult’. A conclusion may be drawn from SOKiK’s reasoning whereby the lack of evidence of an actual market impact can justify the imposition of a fine. It should be noted that due to the repressive character of fines in antitrust proceedings, the use of principles relating to penal proceedings should be supported including, most of all, the in dubio pro reo rule. It is thus necessary to oppose the approach adopted by SOKiK because of the inability to prove that the conduct of others was in fact determined by the existence of the pre-emption right.

Clearly however, lack of evidence is not sufficient to justify the statement that the Agreement did not have anti-competitive features. The authority is obliged to protect the public interest rather than that of particular market participants. In the discussed case, the pure existence of the pre-emption right was deemed to constitute an infringement of the public interest by both the UOKiK President as well as the adjudicating courts.

According to SOKiK: ‘(…) it is not important that Canal+ did not exercise the right of option seeing as it placed the most favorable offer, because just the information that this entity has a guaranteed privileged position in a prospective tender […] resulted in the fact that potential competitors could not expect to win it [.] Canal+ has much greater possibilities of gaining profits from the acquired rights [mostly because of] its longer market presence [and the fact that it] has partly amortized its costs and possesses a well developed distribution network and a steady customer base’.

According to SOKiK, this situation had an unfavorable influence on the position of consumers. The Court stated in its reasoning that the inclusion in the Agreement

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9 Judgment of the SOKiK of 14 February 2007, XVII Ama 98/06, unreported.
of ‘the option clause [had an] anti-competitive character and as such, it also affected public interest by restricting the possibilities of competitive growth on the related market of pay-TV. Consumers were therefore deprived of the possibility of benefiting from competition (establishing an optimum price to quality ratio). Canal+, for whom this entry barrier meant that it was not forced to engage in a competitive fight, was clearly […] the beneficiary of such state of affairs’. SOKiK’s opinion clearly contradicts the submission of Canal+ that saw itself as being better prepared, more experienced and possessing superior distribution channels than others, resulting in higher consumer benefits. The opinion that the pre-emption right put Canal+ in a privileged position cannot be refuted even though it never made use of this privilege. The issue of public interest violation as far as consumer benefits are concerned was not, however, proven convincingly.

III. The fine

Lowering the amount of the fine originally imposed on PZPN, SOKiK stated that ‘It is not in the public interest for the claimant to suffer an excessive fine’ because PZPN, under the Act of 29 July 2005 on qualified sports, performs tasks of a public service character. SOKiK created thus an interesting problem here concerning the existence (or lack thereof) of the necessity to take into consideration public interest issues when imposing antitrust fines.

The Court of Appeals did not share SOKiK’s view stating that ‘adopting such a position would create an unacceptable privilege for entities performing public tasks’. It is difficult to disagree with the opinion of the Court of Appeals as it reflects the constitutional principle of equal treatment of entrepreneurs. However, the Court went much further in its deliberations. ‘Seeing a worse financial standing of a given enterprise as a mitigating condition [when imposing fines], would equal to assigning an unjustified competitive advantage to enterprises that are worse adjusted to market conditions’. Taking into consideration that the proceedings at hand concerned a vertical agreement, the Court of Appeals’ conclusion seems to be too far-fetched. An agreement between two entrepreneurs of whom one operates on a highly competitive market, whereas the other enjoys a dominant position, most often means that the financial standing of the former is worse than the situation of the latter. Concluding that the latter is worse adjusted to the market is unjustified.

The character in which PZPN operates constitutes another issue to be considered. The Court of Appeals observed that ‘within this scope, the claimant operates similarly to a royalty collection and distribution society rather than an entity realizing the tasks of a public character’. Unfortunately, the Court of Appeals did not draw any conclusions from its own observations leaving unanswered the question of what consequences does the fact have that PZPN operates similarly to a royalty collection and distribution society (so-called collecting societies).

Two questions arise here: (1) how to treat entities performing public tasks when imposing a fine and; (2) how (in the same case) to treat PZPN seeing as it was deemed to resemble a royalty collecting society?
According to the Polish Competition Act, the fine imposed by the UOKiK President shall constitute a derivative of the revenue for the year preceding the infringement\textsuperscript{10}. At the same time, the Act refers to income tax provisions a given entrepreneur is subject to as far as the definition of revenue is concerned\textsuperscript{11}. The obvious issue to be decided when answering both the first and second question is the evaluation which events cause the revenue to arise as defined by the Act on Legal Persons’ Income Tax of 15 February 1992 (hereafter, UPDOP)\textsuperscript{12}.

The provisions of this Act do not include the definition of the term ‘revenue’ albeit Article 12 UPDOP provides a catalogue of gains to which the Act assigns such character as well as a list of those which are excluded from tax revenues. Jurisprudence explains that it is the ‘definite’ character of a property increment that determines whether it is included into the revenues of a given legal person in such sense that it shall ultimately increase that entity’s assets: ‘only such values which increase property assets of the taxpayer, i.e. the ones he or she may dispose of as his or her own, are obtained monetary or pecuniary values according to Article 12(1)(1) [UPDOP]\textsuperscript{13}.

Another issue important for the interpretation of the notion of revenue is the fact that income tax of legal persons is a personal tax, that is, tax on calculable financial gains of a given person (taxpayer), and rests upon such person. The provisions of UPDOP decide in relation to whom do tax obligations arise in connection with obtaining a given gain. Without an explicit legislative provision, the same gain in the same amount may not constitute tax revenue for two taxpayers. When analyzing the case of a fiduciary to whose bank account the creditor paid interests on bonds on behalf of the entity in favor of whom the fiduciary acted, a regional Administrative Court stated that in the light of the provisions of the act on income tax of legal persons, there are no grounds to assume that the fiduciary obtaining funds on behalf of the entity in favor of whom it operates is the payer of the income tax on these amounts\textsuperscript{14}. Quoting this judgment is recommended here as the operations of a collecting society, to which the Court of Appeal equaled PZPN, are based on that very same fiduciary construction. Hence, deemed as revenue under the provisions of UPDOP is only a final and specified as to the amount (or estimated beyond doubt) change of asset

\textsuperscript{10} Article 106 of the Act of 16/02/07 on Competition and Consumer Protection (Journal of Laws 2007 No. 50, item 331, as amended), hereafter, the Competition Act.

\textsuperscript{11} Article 4 of the Competition Act.


\textsuperscript{14} ‘(…) from the point of view of settling who is the taxpayer of the income tax on the revenue resulting from the interest it does not matter to whose account the payment of such interest was executed. The fact that the payment was made as a result of the disposal of the owner of the bonds to the account of a different entity does not make the later one the taxpayer obliged to pay the tax’ – judgment of the Voivodeship Administrative Court in Warsaw of 31/08/07, III SA/Wa 629/07.
conditions whereby the taxpayer subject to the change is able to dispose of such increment as the owner.

Although the above should not raise any doubts, it is worth noting that International Accounting Standards (hereafter, IASs) are more precise in specifying the notion of revenue. IAS 18 Revenue states that ‘in case of relations resulting from an agency agreement, gross income on commercial profit includes the amounts collected on behalf of the mandator and do not result in increasing the equity of a business entity. The amounts collected on behalf of the mandator therefore do not constitute the revenue. The amounts of commission however do constitute the revenue’.

There is no room to decide whether the accounts presented by PZPN saw as revenue only items which do, in fact, constitute revenue according to Polish tax law. It is certainly in the interest of an entrepreneur to present the UOKiK President with correct documentation. When comparing PZPN to a collecting society, the Court of Appeals should have, therefore, commented on the scope of verifying the correctness of specifying the basis of the penalty because this was a completely novel issue in the proceedings.

Conclusions

SOKiK started a discussion, which the Court of Appeals failed to continue, about the consideration of public interest when setting the amount of an antitrust fine. Regardless of the fact whether it could have reached a conclusion different to the one above, it is clear that the current fine system has many faults. Failure to comment on the issue of the correctness of ascertaining the basis for the fine must therefore be criticized.

On the one hand, the Competition Act states that it is applied in the public interest, which should mean that the authority takes this very interest into consideration also when imposing a fine. Series doubts arise, on the other hand, about connecting the amount of fines with revenue without establishing a simultaneous connection with the economic results of the infringement. This is confirmed by postulates de lege ferenda formulated by part of the Polish doctrine arguing in favor of creating a closer interconnection of the amount of the fine imposed and the actual effects of the violation. This standpoint is clearly reflected in the documentation prepared within the amendment procedure of the Competition Act which is currently underway\(^\text{15}\). It was observed therein that the present system of imposing fines on the basis of revenue only results in a lack of causality between the influence (actual or potential) of the prohibited practice and the imposed fine. Granting primacy to the abstract, and largely artificial, relation between fines and turnover infringes the constitutional principle of proportionality of penalties\(^\text{16}\). The impact of the effects of violations is emphasized in the European Commission Guidelines on Fines also. Accordingly: ‘in order to set

\(^{15}\) www.uokik.gov.pl

\(^{16}\) Comments of the Competition Law Association work group to the assumptions for the bill of the Act on amending the Act on Competition and Consumer Protection, available at:
the amount of the basic fine the Commission shall take into consideration the value of sale of goods or services realised by the enterprise having a direct or indirect link with the infringement, in a given geographical sector within EEA\(^{17}\).

The Court of Appeals stated that ‘the provisions of the [Competition Act] do not provide the basis to deem that while settling the amount of the fine for an [antitrust infringement] one is to take into consideration, as an important factor, the fact that the entrepreneur is performing mandated tasks of a public character and therefore his financial situation caused by the necessity of paying the above-specified fine shall impact the realisation of those tasks’.

This opinion of the Court of Appeals is entirely correct – there are no reasons to differentiate between entrepreneurs on the basis of the public task criterion. However, the Court of Appeals failed to resolve some of the doubts expressed by SOKiK seeing as its judgment lacked a detailed analysis of the basis for the penalty (claimant’s revenue). As it was deemed that within the scope covered by the proceedings PZPN operated as a royalty collecting society, failure to verify the correctness of defining its revenue must be criticized. While the claimant, quoting its ‘specific’ status of an entity performing public service tasks, had the chance to refer to the opinion of the UOKiK President, it did not have a chance to refer to the opinion that it operates pursuant to the principles applicable to collecting societies. Comparing PZPN to such entities means that the Association is deemed (within the scope the proceedings concerned) to be acting on the basis of the fiduciary model, which leads to a number of consequences within the scope of tax law, among others, within the scope of the amounts collected on behalf of ‘members of the association’ (in this case football clubs), which should not be taken into consideration as PZPN’s revenue for the purpose of setting antitrust fines.

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http://legislacja.rcl.gov.pl/docs//1/43452/43453/43456/dokument37461.PDF?lastUpdateDay=03.08.12&lastUpdateHour=4%3A06&userLogged=false&date=Saturday%2C+4+August+2012

\(^{17}\) Guidelines concerning the principle of setting the fines imposed under Art. 23(2)(a) of the Regulation 1/2003, OJ [2006] C 210/2.
A new book from Professor Stanisław Piątek, an established authority on telecommunications law, brings the reader closer to the inner workings of broadband technology in its legal environment. The title reflects the focus of telecoms policy on access whereby the only access that matters is to the broadband network in its many variations. The subject matter itself makes the book worth reading, particularly in the absence of other major Polish works on this topic. Even if some authors regarded broadband technologies as obsolete years ago, in reality it still represents a lion's share of the telecoms business. Professor Piątek himself is well aware of the historical and transitory nature of the subject matter when he defines broadband not by association with any particular technology but as the ability of whatever technology available at any given moment to provide a certain minimum transmission speed. Thus the central notion is open to absorb technologies nonexistent as of yet. This in turn may pose serious regulatory issues as to what future industries will be subject to regulation, particularly since the distinction between content and carrier regulation is becoming increasingly blurred.

This seminal book covers telecoms policy, broadband access networks, institutional architecture of the sector, strategies for the development of broadband networks, regulation, regulatory impact on investment, next generation networks policy, public aid, local government powers in the development of broadband networks, all arranged in nine separate chapters. This short list gives merely a foretaste of the richness of pertinent legal issues examined in the book.

This is the first Polish work of this size and depth to tackle this difficult subject. The book represents a class in itself because of the Author’s profound knowledge of the telecoms sector. Reading it is a humbling experience for a telecoms student for it proves that a lawyer without a technical background, formal or not, has changed the field of interest for the better.

The first two chapters explain the key terms contained in the title, telecommunications policy and broadband technology, which positions the book among integrative,
interdisciplinary scholarly achievements. The concept of sectorial regulation adopted by the Author is a broad one. It includes the activities of public authorities directed at telecoms enterprises which are aimed at promoting competition. These are *ex ante* decisions, lacking the attributes of legislation. Such an approach puts the reader at the crossroads of telecoms law and a broader theory of law. It could be argued whether regulatory rulings and other regulatory acts (e.g. recommendations or setting up investment expectations) *vis-à-vis* telecoms really fall under the ambit of policy rather than legislating. However, the Author does not get distracted from the main course of his considerations. Instead, he provides the reader with ample and complex material as food for thought about the place of this highly technological and atypical State interference with high-tech business. The main questions tackled in the book revolve around telecoms policy. Rather than exploring various theoretical concepts, Professor Piątek describes policy by presenting its aims and external contexts. One of the concerns prominently present throughout the book is the dilemma of reconciling the need for regulatory intervention (essentially administrative) with investment incentives in new technologies (which calls for softer regulatory grip). In essence, it is a Hamletic question of whether to allow for a somewhat privileged positions of the already dominant incumbents which, nevertheless, contribute the most to network development but are posed to reap excessive benefits from their position in the future, or to rigorously apply ‘regulatory justice’ now and make the consumer worse off in the long run due to technological backlog.

Apart from its ability to overwhelm, the book explains the basic notions of broadband telecommunication including what is called in the text the institutional structure of the telecoms sector (Chapter III). It examines classical notions of competition and regulation such as: incumbent, significant market power, a dominant and alternative operator along with other types of operators and the various types of users in their special broadband context. Under a separate heading, the book discusses ‘transactional institutions’ to include telecoms access in a variety of its forms. Most terms and technicalities are explained in their historical and functional context.

Chapter IV testifies to the Author’s intention of presenting policy rather than law, thereby revealing the true interdisciplinary nature of the book. Found here are familiar notions of competition and regulation cast against their technological and demographic backdrop. Here, the reader must face the fact that the various State approaches are not so much inspired by scientific considerations as might, and should be expected. Instead, State policies represent an entanglement of administrative and judicial developments tailored to the specific level of technological development in the given country, its population density and desire to stimulate the growth of national economies. Three distinctive models are recognized in this context: the European, Asian and North-American model. The Author is quick to admit that examples of successful foreign policies cannot be mechanically replanted into the Polish telecoms environment. He also points out that regulation is only one of the three key instruments of State policy, the other two being planning and finance. Nevertheless, Professor Piątek is against a hasty withdrawal of regulatory instruments once infrastructure
moves from lesser technology to broadband on the premise of effective competition since the move might lead to an ineffective use of existing resources.

Another point which, per se, reaches far beyond telecoms policy is the financing of telecoms investment and the cushioning by public money of inherent investment risks. This includes financing through public ownership of telecoms. The book does not dwell upon the political intricacies of this process and is not expected to do so. Importantly however, public funding of supranational corporations where the public does not receive a share of the resulting benefits is subject to a sharp criticism outside the field of telecoms law.

Chapters V and VI deal with regulation as a decision-making process seen from the perspective of technology and economics. References to the canons of public law are few and far in between. Instead, regulation is analyzed by pointing to regulatory cycles which begin with the determination of the need to regulate. The criteria to be applied are: 1) existence of serious and permanent entry barriers, 2) ability to achieve effective competition within a foreseeable future at a predictable cost, demand, under given technology characteristics and 3) inability of competition law instruments in providing effective competition. Access to the local loop is examined next. It is an exercise in policy rather than subsuming the law, for a typical local loop remains in the hands of an incumbent. This brings us again to the issue of network funding by the State during a time when the incumbent was still a State-owned monopoly. The reader will find here useful explanations of basic terms pertinent to local access followed by a presentation of national regulatory policies in selected European countries.

Professor Piątek voices his criticism of Polish regulatory, legislative and policy practices on several occasions. One can even wonder if the government has any such policy at all, which the book describes as blurred, unskilled and sourced in low-profile documents. Above all, Polish telecoms policy is vested in regulatory authorities, constitutionally placed below the government, rather than somewhere within the State’s political center (p. 76–77). It is also inconsistent with the Polish model of regulation which remains limited to individual decision-making with no legislative traits. Correspondingly, the success in opening access to the local loop in Poland is modest (p. 93). Nevertheless, some discrepancies between Polish regulatory policy and that formulated by the European Commission are praiseworthy such as the status of a BSA service in the State’s regulatory policy. Still, having a different policy is not an accomplishment in and of itself. It serves as proof of healthy relations between the pan-European regulator and its national counterparts as well as of the independence of the decisions taken by the Polish NRA (the UKE President). It also confirms that, unlike the government, the Polish regulator has a clear vision of what it wants to achieve. The scope of a potential dispute could be much wider to include, among others, the necessity of regulating In Poland peering and transit markets, or defining emerging markets as in the 2007 dispute between the Commission and Germany. This part leaves one wondering just how much of regulation is simply the national style of projecting State power, and what exactly is perceived as being in a nation’s interest in the telecoms sector when it comes to investment?
The regulatory mechanism is being charged with, in Professor Piątek’s account, decreasing capital return which in turn deters investment. Such a negative effect may take place when network access is granted to competitors too soon after the investment, the latter being usually shouldered by the incumbent. Literature remains split on the benefits of regulation and the Author seems to side with the skeptics. He rightly observes that non-dominant market players tend to take it for granted that the regulator will sooner or later grant them network access. Their investment policy thus tends to focus on the development of peripheral facilities never to threaten the infrastructural position of the incumbent. As a result, they never really climb to the top of the investment ladder (an issue which in itself has been the subject of much scholarly debate). The danger of providing ‘free rides’ has thus become an inherent problem of regulatory and State policy. Taken together, the above circumstances pose regulatory risks not only to investors but also to the State itself because one of the aims of regulation is to stimulate network development, which will either not be achieved at all, or will do so but at the price of perpetuating the power of the incumbent. This may also be a crucial factor in positioning the national economy on the global economic scene where a given economy’s standing increasingly depends on the technological competitiveness of its telecoms infrastructure. Thus the book rightly asserts that market leaders should not be subjected to excessive regulatory burdens since, effectively, they are the ones to foot the bill. Regulatory restraint and caution seem to be the best policy.

An equally disquieting issue is regulatory policy towards next generation networks (NGNs) and next generation access (NGA). The difficulty here lies in arranging regulatory intervention in such a manner as to create favorable conditions for new technologies without losing the benefits of existing policy towards copper networks, and without creating yet more barriers to competition. The task of formulating a sensible regulatory policy is formidable when neither the telecoms operator nor the regulator has many clues as to future market developments. Technology, economy, information and stranded cost are among the sources of regulatory uncertainty listed in this context. While presenting pros and cons of various configurations based on broadband technology types, Professor Piątek reaches the conclusion that the stability of the regulatory environment cannot be achieved by legal means alone. It is recommended instead to enhance the exchange of information between the UKE President and the operator, the latter trading off information on its investment plans in exchange for regulatory declarations as to future access policy. That particular regulatory laissez-faireism seems justified in view of so many variables affecting the future of telecoms. The doubts outlined above are not altogether dispersed in the discussion of EU policy on NGNs/NGA. Even if the reader is not necessarily convinced of the superiority of EU policy, the book offers a concise presentation of the EU approach and, again, a detailed explanation of the consequences of diverse regulatory movements. Particularly enlightening are remarks on imposing additional costs on an investor (such as a requirement to develop multi-fiber technology) to ensure sustained competition made possible by simultaneous access to the final users by multiple operators. Other valuable observations concern investment risks.
involved in the most capital consuming networks such as FTTH and the withdrawal of regulatory measures.

The last two chapters address public aid and local government involvement in network formation. It is a mixed bag where classical issues of State aid (embodied in the Altmark case) and sector-specific considerations overlap. The reader gets a glimpse into various Europe-wide projects such as Citynet Amsterdam, where the imposition of an obligation to provide a service is accompanied by public assistance. Different models of aid are presented. Most controversial seems the aid to NGNs where justifying public assistance is increasingly couched in terms of long-range strategic plans aimed, as is the case in Finland, at securing the service to all citizens, instead of pointing to the usual calamities listed in Article 107 TFEU. Financing NGNs/NGA cannot be justified by a mere elimination of ‘a digital gap’ for NGNs/NGA is always promoted in States with most advanced networks anyway. Here, too, the Author is critical of administrative support that the Polish telecom sector receives from the State. The list of charges is long and includes, *inter alia*, not taking advantage of the funds already granted, slow decision-making process, inaccurate identification of areas in need of investment, overlapping and fragmentation of various aid programs, delays in the setting of conditions for conducting telecoms activity and the lack of powers to act.

The last chapter is devoted to local government participation in network development and it is very telling indeed. The reader may learn that the cult of superiority of private initiatives over public involvement (as practiced in Poland) is not in fact typical for the modern telecoms sector. In highly advanced economies, local governments both own and develop substantial parts of telecoms networks. In his incisive critique, Professor Piątek points out that the false paradigm of private ownership remains coupled with unclear statutory foundations. Local governments fear, therefore, the legal and material responsibility for the allocation of public funds, which are mostly of EU provenience and dwindling. There is hope for improvement for the obstacles are not intrinsically systemic, but rather a product of inadequate administrative know-how.

The conclusions offered by the Author suggest that the high position of regulation as a factor in network development is overstated. States, seemingly at odds with academic wisdom, resort frequently to non-systemic solutions such as agreements between NRAs and incumbents or direct legislative and administrative interventions. The rich mosaic of national interpretations of the very basic notions of competition and regulation as envisioned in the founding treaties of the EU as well as its secondary law leaves ample room for viewing regulation and policy as an art of governing as much as science.

Despite its reserved style the book makes passionate reading for scholars and students alike.

*Dr. hab. Waldemar Hoff*
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The Centre for Antitrust and Regulatory Studies (CARS), responsible for this yearbook, also prepares the publication of textbooks and monographs. An English-language textbook *European Audiovisual Sector: Where business meets society's needs* written by Dr. Ewelina D. Sage is one of the latest publication in this series.

I was asked to review the book so I have read it with a mixture of interest and curiosity because the sector covered and the issues raised so far have not entered the mainstream of legal publishing in Poland. In fact, Dr Sage’s book appears to fill a gap in the Polish legal literature regarding the European Audiovisual Sector. This also means that the author is far from standing on the shoulders of giants; on the contrary, she takes on the unenviable task of charting uncharted waters. This is more so for an English-language book which appears to take the concept of a narrative textbook closer to the case book model of common-law countries, such as the UK and the US.

In this context, what strikes the reader first, is that the book is thoughtfully structured, and carefully developed along three main pillars: socio-economic goals, external dimension and internal competitiveness aspects, including antitrust, mergers and State aid rules. It gives a bird’s eye view on different areas, seldom presented together. In doing so, the author uniquely mixes areas of the EU’s core competence with those where harmonisation efforts have so far been limited. The resulting book lays down in barely 230 pages of descriptive text (plus various annexes) all the key concepts, developments and tensions in the sector which affects, directly or indirectly, the lives of us all (the latest data confirms that Europeans watch – on average - some 3–4 hours of linear television broadcast a day and that, while new media and consumption methods have strongly entered our lives and living rooms, traditional TV consumption is on the increase and radio is coping well with new challenges).

To the reader, whether new to the subject or relatively experienced, the book offers an overall perspective on the current EU regulatory framework and key decisions affecting the EUR multi-billion audiovisual services industry (the audiovisual media services part of the editorial content sector generates around EUR 80 billion in turnover). It should prove itself of interest to a wide audience, from students to academics to practitioners and, possibly, also lawmakers. Readers should not be discouraged by the great level of detail and the variety of issues raised by the
author; rather, they should use this book as a comprehensive snapshot of the current patchwork of binding and non-binding, general and specific, rules and regulations. A basic knowledge of EU law is likely to be helpful, but it is not essential, as the author walks readers through basic concepts and notions before embarking on intricate issues specific to the audiovisual sector.

New readers and students are likely to particularly appreciate several elements that facilitate navigating through the EU maze, such as numerous charts, summaries and graphs. These visuals enliven what would otherwise remain a dry legal text. For didactic and, possibly, self-learning purposes, following a style typical for common law textbooks, the author also proposes short revision questions which help to absorb the key elements in each chapter.

Dr. Sage takes particular interest, and shows great acumen, in summarising key individual decisions and judgements - instruments which play an important role in developing the audiovisual sector and making it part of the internal market. Several of these developments have taken place very recently, including the second half of 2011. For example, the author timely flags important issues of principle, arising, in particular, from the Court of Justice’s ruling in the Premier League case (Joined Cases C-403/08 and C-429/08). In the coming years, academia will certainly review the ruling (and the Court of Justice’s growing jurisprudence on copyright and free movement/competition rules) in more detail while its full impact on content licensing practices becomes clearer.

When reading the book, it appears that, following the completion of the single market for goods, the free provision of services, in particular audiovisual services, could be considered a possible target for further harmonisation efforts. This is already the case with the Services Directive. However, instant, borderless and secure access to content, including satellite and online broadcasts, is key for a large number of Europeans living and working abroad, and current largely national rules do not provide such access in a manner suitable for the digital economy.

The need for further harmonisation also arises as regards music rights essential for many audiovisual services. Access to music rights is complex and their licensing, traditionally, in the hands of national collecting societies, often accused of operating in a non-transparent manner and in breach of the competition rules (see, e.g. various decisions adopted by UOKiK concerning ZAiKS and the Commission’s CISAC case). It is therefore relevant and may be further reflected in future editions of the book that, in July 2012, the Commission adopted a long-awaited proposal for a framework directive on collective rights management, aimed at improving governance and transparency of collecting societies and facilitating cross-border licensing of online music rights.

Taking into account progress in the area to date, the book is likely to serve its purpose for a while; however, even if efforts to progress towards a true European policy for audiovisual services were to gain further momentum, the book can be seen as an important reference for the state of play at the end of 2011. It should facilitate learning and understanding the audiovisual maze; it will also hopefully make readers question some well-established concepts, beyond the revision boxes. One of
such questions could be whether the audiovisual sector is indeed ‘where business meets society’s needs’ or, rather, ‘where society’s needs meet powerful businesses (or business interests)’.

In sum, I am happy to recommend Ms Sage’s book to lay and professional readers who want to understand the legal and regulatory concepts underpinning the importance of the European Audiovisual Sector. I should also praise the efforts of Dr. Sage to prepare an original, timely and attractive textbook in a language to prepare new generations that will, hopefully, also partake in the discussions about the future shape of this sector.

Krzysztof Kuik
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The book under review here is entitled *Audiovisual Media: regulatory conflict in the digitalisation era* by Katarzyna Chalubinska-Jentkiewicz. As the title suggests, I expected it to be a monograph on new regulatory problems in the increasingly digital audiovisual field. The sector itself is well known to cause competence conflicts between the as many as three different regulatory bodies overseeing it in Poland: the national telecoms regulator (the UKE President), the audiovisual media supervisory body (the KRRiT) and the competition authority (the UOKiK President). The impact of the European Commission can also not be overlooked. The book does indeed deal in great detail with what is seen as the ‘regulatory conflict’ in the audiovisual field but the approach applied therein is that of the theory of administration and administrative/constitutional law rather than that of market regulation. As a result, the analysis focuses primarily on the perceived ‘conflict’ between Poland’s interests and regulatory competences and the impact exercised by the European Union as a whole, rather than on any existing or potential internal conflicts. Key to the entire analysis is the contraposition of the notion of ‘public interest of a nation’ (State) and the ‘general interest of the EU’ whereby the special characteristics of ‘national’ public interest are associated with the notion of ‘public morality’ and also, ‘public mission’.

It is already clear from the Introduction that the Author is acutely concerned with the conflict existing at the intersection of national public interests and the EU general interest on the one hand, and that between technological and economic aims as opposed to social (content-related) objectives on the other. She is clearly right to see EU intervention as predominantly technology and economy-driven and associating a far more socially-oriented focus with national initiatives. As such, a conflict of goals is said to occur when what is determined by economic/technological objectives clashes with what is purely social in nature. This brings the analysis to the impact of the ‘primacy of EU law rule’ on the sovereignty of national authorities and to the criticism of the progressing Europeanization of public policy overall and audiovisual policy in particular considering its close proximity to national identity. The thesis is proposed therefore that in certain areas related to the realisation of national public interests such as culture (and thus audiovisual media realises culture-related objectives), the EU law primacy rule must be subject to exceptions caused by purely national considerations.
The Author argues for prioritising social considerations based on the notion of an individually defined public morality over those related to market considerations (such as competition for instance).

The conclusion is reached that neither the Polish legal system nor its administrative system nor finally the regulatory techniques used are currently adequate to deal with the complexity of the issues arising in the digital era. The Author proposes a number of possible changes that would in her opinion better serve the objectives of national public interest. In order to do so, she speaks for instance for a clear division of competences between the telecoms regulator (UKE President), which is seen as subordinate to the European Commission and subservient to EU general interests, and the audiovisual media supervisory council (KRRiT) which protects national general interest goals in the audiovisual field. The make-up, decisional practices and organisation of the latter is seen as more constitutionally sound in particular due to its, at least formal, independence not just from the Polish government, but also from the direct influence of EU institutions. Another worthwhile suggestion is made with respect to the decision-making powers of the telecoms regulator which are currently vested in a single individual, the President of UKE, whose personal preferences and actual knowledge put into question the objectivity of his/her regulatory decisions.

The book is divided into six chapters. The existence of a regulatory conflict in audiovisual media is closely associated with the notion of public interest. Chapter I, entitled ‘The notion of public interest. Duality of regulatory approach’, presents a detailed analysis of the fluid notion of public interest in light of: societal needs, interests of individuals; interests of the State; governmental preferences; aims and function of public administration. Most importantly perhaps, public interest is seen as the justification for the restriction of individuals’ rights and the source of limitation for public intervention. Presented next are the many facets of digitalisation and the legal basis of the dual regulatory environment applicable to audiovisual media. Noted on the EU side are primarily the i2010 initiative, the evolution of the Audiovisual Media Services Directive (AVMSD) and the EU Telecoms Package of 2002. Considering Polish legislation, the Author is quick to criticise the fact that the main legislative act in the audiovisual field, the Radio and Television Act, regulates both content-related and distribution issues (i.e. broadcasting concession). The chapter closes stressing the dominance of the pursuit of the EU general interest objective in the regulatory framework applicable to the digital economy.

Chapter II ‘Regulatory conflict: diversified views on public interest in audiovisual media’. The Author starts her analysis by noting the special place of audiovisual media in the public sphere. Briefly listed are Polish public interest goals defined by its Constitution, Radio and Television Act and Telecommunications Law Act including: the protection of minors, public health and morality; progress and technological neutrality; cultural diversity and medial plurality. The book continues on to introduce the place of audiovisual legislation in the context of EU law overall covering the Protocol on Public Broadcasting, discretionary exemption for ‘cultural’ State aid, the AVMSD and the Telecoms Package of 2009. The latter part focuses on the duality of audiovisual media regulation in Europe, that is, parallel application of national and
EU legislation. The Author speaks at length about the consequences of the ‘primacy of EU law’ rule in this field covering also the subsidiarity and proportionality principle. Presented next are jurisprudential developments in free movement of services cases; a number of national judgments on the relationship between EU law and national constitutional norms and finally; the jurisprudence of the European Court of Justice and its doctrinal interpretation with respect to public goals.

Chapter III ‘Regulatory conflict: public morality and public mission as determinants for differences in the understanding of public interest’. The Author analyses at length what morality and public morality are and their relationship to the State and public interests. Stressing how important this concept is for Poland, the Author quotes the special provisions attached to its Accession Treaty that state that EU Treaties cannot limit Poland’s competences to legislate on morality issues. Supported by ECJ jurisprudence, the Author argues for the need to pursue national public interests alongside the EU general interest since only individual member states can define what lies in the ambit of their public morality which determines the direction of national public interest. Considered next is the protection granted to public morality by Polish law via its constitutional rules on the freedom of speech and freedom of economic activity and content-related rules contained in the Radio and Television Act. Special emphasis is placed on the constitutional debate concerning the obligation placed on public broadcasters for their programmes to respect ‘common Christian values’.

The following part deals with the notion of ‘public mission’ which defines public interest goals in audiovisual media. Once again the analysis turns to the role of public administration in defining and realising public interest goals. Unsurprisingly, the Author speaks in favour of the public mission being defined at the national level acknowledging the EU’s support of this approach. Indeed, from the Amsterdam Protocol to numerous other EU acts, not only are member States competent to define their public mission, they are allowed to expand its scope in particular by entering the on-line domain for instance, in order to facilitate inclusiveness. The Chapter closes with interesting remarks concerning the potential need to redefine some of the public interest goals in the increasingly digital audiovisual media, the suggestion that public mission broadcasting should be shielded from governmental influences and based on a contractual relationship with an independent regulator and finally, that the pursuit of the public mission should be moved towards the public-private partnership domain.

Chapter IV ‘European regulatory directions and national public interest in the audiovisual media sector’. This Chapter focuses on telecoms regulation because rather than broadcasters, infrastructure operators are seen as likely to be the ones to shape future audiovisual markets. After presenting the historical evolution of EU telecoms intervention, noted in particular is the 2002 EU Telecoms Regulatory Package that affected the audiovisual field directly via the broadcasting transmission market (so-called market 18). The Author acknowledges here that EU initiatives foresee the regulation of transmission only (in the general interest of the EU); regulating content is associated with national public interests. A regulatory conflict could thus emerge since the interests of the stakeholders can differ.
Moving on to the assessment of the Polish regulatory sphere, the Author emphasises that it is very closely entwined with EU initiatives. She continues on to assess the justification of State intervention into telecoms markets; procedural issues (consultation and consolidation procedures) including the involvement of the Commission as well as the issue of regulatory obligations. Assessed next is the notion of concessions in general (and concession tenders) and concessions for broadcasting activities in particular. Considered here is the spill-over of telecoms regulatory solutions into audiovisual media. While, however, having telecoms regulation oriented primarily at the EU general interest is not as controversial, using the same approach to the audiovisual field is seen as unacceptable. Although administrative decisions issued by the telecoms regulator are seen as a means of realising national public interest goals defined in the constitution; the Author is wary of the fact that the regulator must prioritise EU law which would, in her opinion, exceed their competences.

Also discussed in this chapter is the fact that the development of electronic communications causes some difficulties in the content-regulation field also, such as ‘jurisdiction shopping’ which results in the avoidance to fulfil public interest goals. The most problematic issue is seen in the regulation of the content of Internet services especially where they slip between the gaps of the Press Law Act and the Radio and Television Act.

Chapter V ‘The must carry rule as a tool of public interest protection in a national perspective in the audiovisual media sector’. ‘Must carry’ is presented here as a form of restriction on individual freedoms justified by national public policy in the audiovisual field. The use of ‘must carry’ is seen as inseparably related to national public interests – facilitating the fulfilment of the public mission in broadcasting (mostly by public operators) by ensuring general availability of channels/programmes aiding the achievement of public interest goals. That realisation remains valid in the opinion of the Author also in light of the changes caused by digitalisation. The Polish system is peculiar however because rather than listing must carry channels, it imposes the order in which they are to be introduced into cable offers (effectively covering all channels on offer in a given region). However, current Polish legislation is not seen as technologically neutral – its ‘quasi’ must carry rules apply to cable operators only. The Author is critical of giving decisional powers of an equivalent effect (deciding on the inclusion into a multiplex) to the telecoms regulator with respect to digital platforms – this issue is said to be an important element of the regulatory conflict in the digital era. Speaking in favour of a continuing use of ‘must carry’ even in the era of digitalisation, the Author suggests a number of changes to the current legislative framework including the equalisation of alternative technologies and a competence shift which would see all of must carry-like obligations supervised by the KRRiT (as the organisation responsible for content-regulation).

The chapter also contains a description of the regulatory and jurisprudential (primarily ECJ judgment C-250/06) developments of ‘must carry’ in Europe, stressing that EU regulation expects must carry rules to be imposed in a proportionate and transparent manner and only when necessary for the fulfilment of public interest goals.

Chapter VI ‘Public authorities in the regulatory conflict in audiovisual media’
The last chapter focuses on the conflict between different regulators seen in light of
the challenges posed by digitalisation, convergence and ‘Europeanization’ of public administration to the traditional take on political systems, governance and public policy. The Author states here that digitalisation is causing priority being given to the EU general interest over that of national public interests and argues that the law of public administration (political system norms) must adjust to technological developments. The Author presents an interesting comparison here between the basis of the activities of the Polish telecoms regulator (UKE President) and the audiovisual media supervisory council (KRRiT) stressing once again that while the former must submit to EU general interest objectives, the latter’s constitutional nature makes it firmly set on the protection of the national public interest. In this context, she argues in favour of a regulatory shift giving the KRRiT’s current powers with respect to broadcasting concessions to the UKE President, provided, however, that the content side of audiovisual media remains firmly in the hands of the KRRiT.

The book by K. Chalubińska-Jentkiewicz presents an exhaustive analysis of the regulatory conflict existing in the audiovisual media in the digital era from the point of view of the theory of administration, constitutional values, governance and political system. The title of the book made me expect more information on the content of audiovisual media regulation in Poland focusing instead on public policy. For that reason alone I expect that this book will be of great value for those interested in administrative and constitutional law, less so for those interested in market regulation or competition protection. Indeed, it is difficult to find any specific examples of cases where a regulatory conflict arose in practice in the regulation of the Polish audiovisual field – be it between the UKE President and KRRiT or in their interaction with the competition authority (UOKiK President). Similarly, I was surprised that even the existing differences between the content of the AVMSD (expresses the general interest of the EU) and respective Polish legislation (meant to express the Polish public interest) were somewhat glossed over. From the perspective of a pro-integration reader, the Author’s main theses seem also somewhat one sided – she speaks for the superior importance of national public interests goals over the general interest of the EU and the resulting need to limit EU influences in favour of national solutions. She seems to elevate public morality above other values, overlooking the views of those that see it as an overly nationalistic and religion-based approach to public life. She is certainly not alone in this approach, however, as the Polish State is particularly protective of its competences to regulate issues surrounding ‘public morality’ even in light of its EU accession.

The Author is very thorough in presenting her thesis in the light of the theory of public administration and constitutional law and shows abundant legal and jurisprudential examples to support her thesis. Indeed, she identifies a number of important regulatory conflicts and is particularly articulate in counterpoising the national interest with that of the EU. The Author firmly argues that in the digitalisation era, and the resulting duality of goals (EU general interest vs. national public interest) and duality of regulation (EU law and national legislation), a need exists to redefine public interest goals as well as the usefulness of the regulatory tools used for the achievement of these goals. The book does well to identify the
many conflict areas existing in audiovisual media regulation as far as the theory of administration and constitution values are concerned. I see however its greatest asset as the Authors recommendations for future changes. I found especially convincing the arguments speaking in favour of a clearer division of competences between the KRRiT, which should be left to decide on all content-related matters, and the UKE President who should be left in charge of all transmission issues. I also fully endorse the need to improve the transparency, objectivity and at times even availability of juridical supervision of the decision-making processes in the Polish audiovisual field. In light of the diminishing importance of sparse resources, speaking for more policing (ensuring the operators do not violate content-related rules) seems also perfectly acceptable, as is the favouring of national regulation in content-related issues.

_Ewelina D. Sage DPhil (Oxon)_

CARS International Coordinator
CARS Activity Report 2011

1. General information

In the fifth year of its activities CARS focused on the pursuit of a number of goals set in its founding documents. It was a particularly busy year for its Publishing Programme which saw the issue of 6 separate titles: two monographs, an English-language textbook, a collective works and two volumes of the ‘Yearbook of Antitrust and Regulatory Studies’ [a special edition vol. 4(4) and the yearly vol. 4(5)]. 2011 was also a very active period for the CARS Open PhD Seminar series with four meetings taking place throughout the year. Several CARS members engaged also in the second edition of a research project dedicated to regulatory and antitrust aspects of airport activities (first phase of the project completed in 2010).

2. Open PhD Seminar

2.1. Procedural fairness in proceedings before the competition authority – identified problems

The tenth meeting of the CARS Open PhD Seminar took place on 24 January 2011 and focused on the question if procedural fairness is respected to a satisfactory degree in the proceedings held before Polish and EU competition authorities. Maciej Bernatt, a PhD candidate at the Jean Monnet Chair on European Economic Law, gave an introductory speech based on the results of his individual research concerning this field. The speaker focused on guarantees of procedural fairness including the right to be heard, right to equal participation, right of defense, right to protect business secrets and other confidential information, right to a court review and judicial control of the proceedings before the competition authority.

2.2. Patent pools and competition law

The eleventh seminar concerned antitrust assessment of patent pools and was held on 9 May 2011. An introductory speech was delivered by Dr Rafał Sikorski from the Chair of European Law at the Faculty of Law and Administration, Adam Mickiewicz University in Poznan. His presentation was commented on by Dr Dawid Miasik (researcher at the Institute of Law Studies of the Polish Academy of Sciences).
Following contributions focused on the relation between competition law and competition authorities and the costs and gains (for competition) resulting from the activities of patent pools. The discussion was accompanied by the presentation of a number of European and US case studies.

2.3. Evaluation of the competitiveness of telecoms markets for regulatory purposes

The twelfth meeting of the CARS Open PhD Seminar was held on 3 November 2011 and concerned the process of evaluating the competitiveness of telecoms markets. The speaker, Ewa Kwiatkowska, presented the key thesis of her PhD dissertation concerning this research field. In her view, despite many disparities in antitrust protection and sector-specific regulation, it is possible to identify a set of common rules in their decision making process as well as in the preceding market evaluation process. Although the instruments used for antitrust and regulatory evaluation are different, both types of proceedings consider a similar stage of evaluating competitiveness.

2.4. Exchange of information between competitors from the point of view of regulators: between pro-competitive cooperation and anti-competitive coordination

The last seminar of 2011 was held on 7 December. Antoni Bolecki, a PhD candidate from the Faculty of Management, University of Warsaw, presented here the key arguments of his PhD dissertation dedicated to antitrust aspects of horizontal information exchange. One of the problems discussed during the seminar was how elements such as: form, features or set up of information exchanged and market structure, determine the anti- or pro-competitive nature of information exchange. The speaker emphasized the interdependencies between information exchange in vertical relations and a potential impact on competition of horizontal information exchange.

3. Publications

3.1. ‘Yearbook of Antitrust and Regulatory Studies’ (YARS)

A special edition of YARS [vol. 4(4)] was published in May 2011 dedicated to antitrust problems and sector specific regulation in the energy market. The next regular volume of YARS [vol. 4(5)] was published in December 2011. YARS vol. 4(4) contains, among others: a preface by Prof. Jerzy Buzek, the President of the European Parliament, two guest articles and nine ‘ordinary’ scientific papers, two case comments to judgments of the Polish Supreme Court, a book review on national energy monopolies and a list of legislation, sectorial regulation and competition protection cases concerning energy markets between 2007-2010.

The 2011 regular volume of YARS [vol.4(5)] contains: seven scientific papers on legal and economic aspects of antitrust protection and sector specific regulation in Poland, legislation reviews concerning competition protection and sector specific
regulation in regulated sectors (telecoms, energy, rail transport, air transport, postal services), case comments to a number of important court judgments and a key decision of the UOKiK President, book reviews, conference reports and a bibliography (Polish publications of 2010 dedicated to competition and sector specific regulation).


The sixth title of the CARS Publishing Programme is a collective work edited by Prof. Tadeusz Skoczny and Filip Czernicki concerning airport services. The publication was created on the basis of a number of reports prepared by researchers from the Faculty of Management, University of Warsaw, and professionals from the ‘Polish Airports’ State Enterprise, within the second edition of a research project concerning this issue completed in 2011 (first edition completed in 2010). The resulting book consists of six chapters focusing on: assumptions and results of the project (chapter 1); current jurisprudential and case-law problems relating to the functioning of airports in the EU and Poland (chapter 2); regulatory requirements for airport services provision in the EU and Poland concerning airport infrastructure access and airports fees (chapter 3); regulatory requirements for security of airport operations (chapter 4); regulatory requirements for airport safety (chapter 5) and; comparative analysis of efficiencies of selected airports in the EU (chapter 6).

This publication is addressed to those involved in airport management, enterprises providing airport and air transport services, employees of public administration related to airport travel as well as researchers and students interested in competition protection and sector specific regulation.


The seventh title of the CARS Publishing Programme is a monograph by Prof. Stanisław Piątek dedicated to problems associated with access to broadband networks from the perspective of formulating and implementing telecoms policy. The book focuses on the influence exercised by public institutions on the development of broadband communications. The author analysis two aspects of telecoms policy within broadband networks: institutional aspect and regulatory aspect whereby the latter concern the decision-making process of public institutions as far as defining the conditions of conducting telecoms activities in cases of market failure.

3.4. ‘Procedural fairness in the proceedings before the competition authority’ (ISBN: 978-83-61276-76-0)

The eight title of the CARS Publishing Programme is a monograph by Dr Maciej Bernatt dedicated to problems surrounding the need to respect procedural fairness in proceeding before the Polish and the EU competition authority. The book tackles
the question whether existing procedural institutions are capable of guaranteeing an appropriate level of protection of key values of procedural fairness. The author examines if the identified values correspond with appropriate guarantees, that is, procedural rights of participants of antitrust proceedings and the duties of the competition authority conducting the proceedings as well as the duties of the courts reviewing the activities of that authority. Competition procedure is analyzed from the perspective of distinguished guarantees of procedural fairness covering: the right to be heard, the right to equal participation in proceedings; the right of defense; the right to protect business secrets and other confidential information and; the right to judicial review and judicial control over administrative proceedings.

3.5. ‘European Audiovisual Sector: Where business meets society’s needs’

(ISBN: 978-83-61276-77-7)

The ninth title published by the CARS Publishing Programme is also its first English-language book directed at both Polish as well as foreign readers. The textbook by Ewelina D. Sage, D.Phil., offers a comprehensive overview of the various efforts undertaken by the EU in order to facilitate an inclusive, safe, and efficient European Audiovisual Sector. The textbook is primarily addressed to international business and journalism students in line with the cross-border nature of the topic. The book covers: diverse socio-economic goals pursued by the EU in the audiovisual sector; EU actions meant to strengthen the overall economic basis of the internal market and; EU efforts undertaken in order to ensure the continuing competitiveness of its audiovisual sphere. Discussed in particular are the Audiovisual Media Services Directive and its relationship to the legislation of individual Member States as well as EU support schemes (such as the MEDIA programme) made available in this field. Also covered is the impact on the internal development of the sector and the formulation of business practices exercised by the European Commission through the individual application of state aid provisions and competition law rules.

4. Research

A group of researchers associated with CARS completed in 2011, in close co-operation with the ‘Polish Airports’ State Enterprise, a major research project entitled ‘Airports services in the European Union and Poland II – selected problems’. The project was designed as a continuation of an extensive research effort undertaken in 2009 and summed up in a collective work published in 2010 under the title ‘Airports services in the European Union and Poland – competition law and airports regulations’ (fifth title of the CARS Publishing Programme). The research team engaged in the second edition consisted once again of researchers from the Faculty of Management, University of Warsaw, and a number of professionals from the ‘Polish Airports’ State Enterprise. Representatives of the Polish Air Navigation Services Agency were also involved.
Two topics considered in the 2011 project build on the research efforts of 2009: application of EU and national competition rules to airports and regulatory conditions for providing airports services. Completely new issues covered by the 2011 research project covered: regulatory requirements for providing security of airport operations; regulatory requirements for ensuring airport safety and; a comparative analysis of efficiencies of selected European airports (Warsaw, Budapest, Prague, Copenhagen, Vienna and Zurich). The results of the project were published in a book form entitled ‘Airports services in the European Union and Poland II – selected problems’ edited by Prof. Tadeusz Skoczny and Filip Czernicki (see point 3.2. above).

Dr. Agata Jurkowska-Gomulka
CARS Scientific Secretary
Books (2011)


Bernatt M., Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji [Procedural fairness in the proceedings before the competition authority], Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2011.


Gronkiewicz-Waltz H., Wierzbowski M. (eds.), Prawo gospodarcze. Zagadnienia administra-


Matusik G., Własność urządzeń przesyłowych a prawa do gruntu [Ownership of transmitting infrastructure and a right to land], LexisNexis, Warszawa 2011.


**Essays and chapters in books (2011)**


Blachucki M., Jóźwik S., ‘Sanкции strukturalne w prawie antymonopolowym jako sankcje administracyjno-prawne’ [Structural sanctions in antitrust law as administrative sanc-


Articles (2011)


Bankiewicz I., Antonowicz U., ‘Are the rights and obligations arising from a license transferable under Article 40 of the Privatization and Commercialization Act? Case comment to the judgement of the Supreme Court of November 20, 2008 (Ref. No. III SK 13/08)’ (2011) 4(4) YARS.

Baran M., ‘Nakaz windykacji bezprawnie przyznanej pomocy a zasada powagi rzeczy osądzonej – glosa do wyroku TS z 18.07.2007 r. w sprawie C-119/05 Ministero dell’Industria, del Commercio e dell’Artigianato v. Lucchini SpA’ [‘Order to repay


Czernicki F., ‘Legislative Developments in the Aviation Sector in 2010’ (2011) 4(5) YARS.

Czyżak M., ‘Karnoadministracyjna odpowiedzialność przedsiębiorców telekomunikacyjnych za niewywiązywanie się z obowiązków informacyjnych względem Prezesa Urzędu Komunikacji Elektronicznej’ [‘Criminal and administrative liability of telecommunications enterprises for failing to fulfill information duties towards the President of the Electronic Communications Office’] (2011) 7 Radca Prawny.


Dudzik S., ‘Prywatyzacja przedsiębiorstw państwowych w świetle unijnych przepisów dotyczących pomocy państwa dla przedsiębiorstw’ [‘Privatisation of state enterprises

BIBLIOGRAPHY 2010

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Fornalczyk A., ‘Competition Protection and Philip Kotler’s Strategic Recommendations’ (2011) 4(5) YARS.
Galewska E., ‘Transpozycja postanowień dyrektywy unijnej dotyczących przyznawania operatorom prawa drogi oraz finansowania usługi powszechnej – glosa aprobująca do wyroku Trybunału Sprawiedliwości z 25.10.2005 r. w sprawie C-334/03 Komisja Europejska v. Portualgia’ [‘Transposition of the EU directive on providing operators with a right of access to a road and financing common service – favorable commentary on the rulng of the Court of Justice of 25 October 2005 in case C-334/03 Commission v Portugal’] (2011) 2 Głosa.
Gancarz Izabela, ‘Pojęcie przedsiębiorstwa w świetle relacji pomiędzy unijnym i krajowym prawem konkurencji’ [‘A notion of undertaking in the light of relationships between EU and national competition law’] (2011) 3–4 Kwartalnik Prawa Publicznego.
Grzegorczyk F., ‘Zakres podmiotowy ustawy o szczególnych uprawnieniach ministra Skarbu Państwa i ich wykonywaniu w niektórych spółkach kapitałowych, grupach kapitałowych sektora energii elektrycznej, ropy naftowej i paliw gazowych’ [‘Personal scope of Act on special rights of Minister of Treasury and their implementation in some companies, capital groups in energy, oil and gas sector’] (2011) 3–4 Palestra.
Grzejdziak Ł., ‘Mr Hoefner, Mr Elser, Please Welcome to Poland. Some Comments on the Polish Healthcare System Reform from the Perspective of State Aid Law’ (2011) 4(5) YARS.

Kalisz A., Kowalczyk E., ‘Świadczenie usług cmentarnych i pogrzebowych a uprawnienia zarządcy cementarza w świetle ustawy antymonopolowej. Studium przypadku Kościoła Rektoralnego w Lublinie’ ['Providing cemetery and funeral services and rights of cemetery’s manager from a perspective of antitrust law. Case study of one of churches in Lublin'] (2011) 2 Radca Prawny.


Kociubiński J., ‘Derogacja zasad konkurencji wobec przedsiębiorstw zobowiązanych do świadczenia usług w ogólnym interesie gospodarczym a zasada proporcjonalności’ ['Derogation of competition rules towards undertakings obliged to providing services of general interest'] (2011) 2 Studia Prawnicze.

Kociubiński J., ‘Pojęcie usług świadczonych w ogólnym interesie gospodarczym w prawie konkurencji UE’ ['The notion of services of general economic interest in EU competition policy'] (2011) 8 Europejski Przegląd Sądowy.

Kociubiński J., ‘Finansowanie usług w ogólnym interesie gospodarczym w formie rekompen saty z tytułu świadczenia usługi publicznej’ ['Financing services of general interest in the form of compensation on the grounds of providing public services'] (2011) 2/3 Kwartalnik Opolski.


Kozak M., ‘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


Materna G., ‘Uprzednie naruszenie przepisów ustawy o wymiar kar pieniężnych nakładanych przez Prezesa UOKiK’ ['Precedent violation of Act’s provisions versus fines awarded by the President of Consumers’ and Competition Protection office (UOKIK)'] (2011) 11 Przegląd Ustawodawstwa Gospodarczego.


Maziarz A., ‘Which authority is competent to decide when a power company is abusing monopolistic power: the President of the UOKiK or the President of URE ? Case comment to the judgement of the Supreme Court of 2 April, 2009 (Ref. No III SK 36/08)’ (2011) 4(4) YARS.


Nagaj R., ‘Instrumenty regulacyjne wprowadzane w trzecim pakiecie energetycznym jako narzędzia polityki państwa wobec sektora elektroenergetycznego’ ['Third legislative package adopted by the Commission as regulatory devises of a states electricity sector'] (2011) 19 Studia i Prace WNEiZ.


Pisarkiewicz A., ‘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)’ (2011) 4(5) YARS.


Skoczny T., ‘Consolidation of the Polish Electricity Sector. The Merger Law Perspective’ (2011) 4(4) YARS.


Stolarczyk A. ‘Analiza działalności wybranych operatorów pocztowych w segmencie B2X na krajowym rynku e-commerce’u’ ['An analysis of the activity of chosen postal operators


Syp Sz., ‘Intersection between the scopes of activities of two regulators – shall prior actions taken by one regulator, in particular the President of the Office of Electronic Communications, exclude the ability to intervene by the President of the Office of Competition and Consumer Protection? Case comment 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.


Szkudlarek P., ‘Państwo jako podmiot kształtujący rynk elektronicznej w Polsce’ ['The government as a formative subject of the electronic communications market in Poland'] (2011) 22 Studia i Prace WNEiZ.

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Szwedziak I., ‘Głos a wyroku Trybunału Sprawiedliwości Unii Europejskiej z dnia 11 listopada 2010 r. w sprawie C-543/08 Komisja vs Republika Portugalii’ ['Case comment to the judgment of the European Union Court of Justice dated 11th of November 2010 regarding C-543/08 Commission vs Republic of Portugal’] (2011) 7 Przegląd Ustawodawstwa Gospodarczego.


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Wiśniewska K., ‘Swoboda kształtowania treści umowy licencyjnej obejmującej prawo z patentu a zakaz porozumień ograniczających konkurencję – konflikt zasad’ ['The Freedom of Forming the Patent License Agreement and the Prohibition on Agreements, which Restrict Competition – the Conflict of Principals ’] (2011) 1 Przegląd Prawa Handlowego.


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**Interdisciplinary Journal of Economics and Law.** Editor Ruth Taplin, University of Leicester, Associate Editor Alojzy Z. Nowak, University of Warsaw, CJEAS, 2011, Issue 1 and 2.

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