

Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2012

by

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Abstract

This article has two objectives. First, it presents the most important developments of Polish antitrust legislation of 2012. These include recent amendments to legal

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provisions on judicial antitrust proceedings contained in the Code of Civil Procedure, and some novel issues in the area of non-binding guidelines of the Polish NCA, the UOKiK President. Second, the article introduces key developments in Polish competition law jurisprudence of 2012. It characterises selected rulings delivered by the Polish Supreme Court, the Court of Appeals in Warsaw and the Court of Competition and Consumer Protection. Judgments are divided according to their subject matter.

Résumé

Cet article a deux objectifs. Premièrement, il présente les développements les plus importants de la législation antitrust polonaise de 2012. Il s'agit notamment de récentes modifications apportées à des dispositions juridiques en matière de procédure antitrust judiciaires qui se trouve dans le Code de procédure civile, et quelques nouvelles questions dans le domaine des lignes directrices non-contraignantes de l'Autorité nationale du contrôle polonaise, le président de l'Organe pour la protection de la concurrence et des consommateurs (UOKiK). Deuxièmement, l'article présente les développements principaux en matière de jurisprudence de 2012 relative à la loi polonaise de la concurrence. Il caractérise des jugements sélectionnés prononcés par la Cour suprême polonaise, la Cour d'appel de Varsovie et la Cour de la concurrence et de la protection des consommateurs. Les jugements sont présentés selon les sujets qu'ils concernent.

Classifications and key words: antitrust legislation; judicial antitrust proceedings; guidelines; antitrust jurisprudence; anticompetitive agreements; abuse of a dominant position; concentrations; fines.

I. Antitrust legislation

1. General remarks

The currently applicable Act of 2007 on Competition and Consumer Protection (hereafter, the Competition Act)¹ underwent its last amendment in 2011, making 2012 a relatively quiet year for Polish antitrust legislation. At the same time, no new relevant regulations were issued by the Council of Ministers, nor existing ones amended. In light of the above, this review focuses on changes introduced in 2012 to Poland's legislation on judicial antitrust

¹ Journal of Laws 2007 No. 50, item 331, as amended.

proceedings contained in the Code of Civil Procedure². Also covered will be some novel issues in the area of legally non-binding guidelines of the UOKiK President.

Without any actual changes to the Competition Act, the UOKiK President presented in May 2012 draft assumptions for the Government's draft Competition and Consumer Protection Amendment Act (hereafter, Draft Amendment Act) which was submitted for public consultation. After several months of public discussion regarding the need for an antitrust reform and its scope, the UOKiK President ultimately published in November 2012 a Draft Amendment Act³. It is worth noting that the original draft assumptions were the basis for the Draft Explanatory Notes accompanying the Draft Amendment Act. The most important legislative changes proposed by the UOKiK President relate to the introduction into the Polish legal system of the following concepts:

- (1) the leniency plus programme, a kind of supplement or addition to the ordinary leniency programme;
- (2) behavioural and structural remedies optionally applied by the UOKiK President when cease-and-desist orders are issued⁴;
- (3) two-stage proceedings in concentration control;
- (4) settlements in cases relating to practices restricting competition and
- (5) personal administrative (financial) liability of managers for some anticompetitive agreements.

The last proposal in particular (that is, to extend antitrust sanctions to managers), attracted strong opposition from organisations of undertakings. According to the NCA, the proposed changes, if incorporated into the Competition Act of 2007, would eliminate a number of problems inherent in the current system. If the Draft Amendment Act is enacted by the Polish Parliament – which may happen in 2014 – the resulting Amendment Act will certainly be the main antitrust development in Poland of 2014.

² Act of 17 November 1964 (Journal of Laws 1964 No.43, item 296, as amended); hereafter, Code.

³ The Draft Act was adopted by the Council of Ministers in July 2013 and sent to the Parliament in August 2013. The lower house of the Polish Parliament (in Polish: *Sejm*) commenced work on the Draft Act in September 2013 and forwarded it to the Parliamentary Committee of Economy. In October 2013, the Committee appointed an extraordinary subcommittee which holds its meetings regularly once in two weeks starting from 23 October 2013. The Draft Act is currently being processed by the subcommittee which has been given a mandate to carry out a full review of the Draft Act.

⁴ The proposal is modelled on Article 9 of 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; hereafter, Regulation 1/2003.

2. Amendments to legal provisions regarding judicial antitrust proceedings

Judicial antitrust proceedings regarding appeals from the decisions and resolutions issued by the UOKiK President are governed by Polish rules on civil procedure. A number of significant changes were introduced, as of 3 May 2012, into those rules by the Code of Civil Procedure Amendment Act dated 16 September 2011 (hereafter, CCP Amendment Act)⁵. This legal development also influenced judicial antitrust proceedings.

Until 3 May 2012, Section IVa introduced in 1989 into Part I ('Case examination') Book I ('Contentious proceedings') Title VII ('Specific types of proceedings') of the CCP – contained rules on judicial proceedings to review economic cases (commercial proceedings). The second chapter in this Section (Articles 479²⁸–479³⁵) dealt with judicial antitrust proceedings. Issues regarding judicial antitrust proceedings not regulated by the second chapter were subject to the first chapter of this Section (Articles 479¹–479²⁷), that is, general provisions on commercial proceedings. Article 1(46) of the CCP Amendment Act repealed the first chapter in Section IVa. At the same time, according to Article 1(45) of the CCP Amendment Act, Section IVa was re-titled into 'Proceedings to review cases relating to competition protection'. All specific elements of commercial proceedings as compared to ordinary civil cases, resulting from general provisions on commercial proceedings, were therefore abolished. They shall thus no longer be applied to cases relating to competition protection and other cases decided by the Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK). However, under transitional rules (Article 9(7) of the CCP Amendment Act), earlier provisions shall still be applicable to cases concerning decisions issued by the UOKiK President before 3 May 2012.

Since 3 May 2012, a number of specific legal solutions no longer apply with respect to judicial antitrust proceedings. First, the CCP Amendment Act repealed the so-called 'non-admission of evidence' principle⁶ – specific rules on the burden of proof applicable to undertakings incorporated in Articles 479¹² § 1 and 479¹⁴ § 1–2 CCP. Amended Articles 207 and 217 CCP are now applicable instead with respect to evidence. They do not differentiate between commercial cases and 'ordinary' civil cases, as well as between submissions by undertakings and other procedural parties. As a rule, the presiding judge may in all cases require parties to file submissions, giving them directions on the order of submissions and their deadlines, as well as stress which

⁵ Act Amending the Civil Procedure Code and Some Other Acts (Journal of Laws 2011 No. 233, item 1381).

⁶ In Polish: *prekluzja dowodowa*.

points 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 solely contain additional evidentiary motions. Under the new approach, it is now possible for the presiding judge to disallow parties to file any submissions other than a statement of claim and the defendant's response thereto. It thus seems that statutory non-admission of evidence has now been replaced by judicial non-admission of evidence. As the non-admission of evidence principle remains part of the CCP, albeit it has taken on a different form, not much has in truth been changed for undertakings as parties to judicial antitrust proceedings⁷.

Second, Article 479⁹ § 1 CCP was repealed which used to contain an exception to the rule that in the course of proceedings documents are served by the court. A party represented by a solicitor, legal advisor, patent attorney or the General Attorney of the Treasury (professional representatives) used to be obliged to serve most documents directly to the other party irrespective of whether the latter was represented by a professional representative or not. Currently, the general rule of Article 132 § 1 CCP states that a party not represented by a professional representative receives documents from the other party served by the court.

Third, the CCP Amendment Act repealed the non-binding three-month deadline for rendering judgments (Article 479¹⁶ CCP).

Fourth, the contents of Article 479^{6a} were transferred to Article 479^{29a} CCP. However, by doing so, the scope of *amici curiae* participation in judicial proceedings has been limited because while Article 479^{6a} CCP used to relate to all economic cases including those between undertakings, Article 479^{29a} CCP concerns only those relating to competition protection reviewed by SOKiK. The intervention of the UOKiK President as *amicus curiae* in private antitrust actions is not permitted.

It is worth noting in the closing lines of this section that Article 479²⁹ § 2 CCP has not been repealed despite the fact that it has no purpose. It regards the right of 3rd parties allowed to take part in administrative proceedings before the UOKiK President (as so-called interested parties) to later become participants of proceedings before SOKiK. However, the current Competition Act of 2007, unlike its predecessor⁸, does not provide for the institution of interested parties to be participants of antitrust proceedings. Therefore, Article 479²⁹ § 2 CCP should be repealed.

⁷ See A. Piszcz, 'Still-unpopular Sanctions: The Private Antitrust Enforcement Developments in Poland after the 2008 White Paper' (2012) 5(7) *YARS* 71–72.

⁸ Act of 15 December 2000 on competition and consumer protection (consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended); hereafter: Competition Act 2000.

3. New 'soft law' of the UOKiK President

According to Article 32(4) of the Competition Act, the Official Journal of UOKiK is used for the publication of documents such as guidelines (in Polish: *wyjaśnienia*) that are of significant importance for the application of legal provisions encompassed by the scope of the activities of the NCA. In 2012, the UOKiK President published two sets of such guidelines (UOKiK Official Journal No. 1 of 1 August 2012):

- 1) Guidelines on the assessment of notified concentrations;
- 2) Guidelines for the issuance of commitment decisions in cases of competition-restricting practices and practices infringing collective consumer interests.

The Guidelines on the assessment of notified concentrations are a lengthy (42 pages) document that supplements the 2011 Guidelines on the criteria and procedure of notifying the intention to concentrate to the UOKiK President (UOKiK Official Journal No. 1). The new soft law act is divided into two sections – the first part focuses on the relevant market, while the second part deals with a concentration's influence on competition. Covered in the first part are thus topics such as product market, demand-side substitution, supply-side substitution, asymmetric substitution and geographic market. The second part examines vertical, horizontal (both non-coordinated and coordinated) and conglomerate effects of concentrations as well as contractual competition restrictions related to concentrations.

By contrast, the UOKiK President's Guidelines for the issuance of commitment decisions in cases of competition-restricting practices and practices infringing collective consumer interests are much more concise (5½ pages). They relate to decisions of the NCA covered by Articles 12 and 28 of the Polish Competition Act. They provide information on:

- (1) conditions for the adoption of commitment decisions such as rendering anticompetitive practices plausible, an undertaking's obligation to "take or discontinue certain actions aimed at preventing an infringement";
- (2) issuance of commitment decisions with reference to competition-restricting agreements;
- (3) content of commitments offered by undertakings;
- (4) elements of commitment decisions, and
- (5) failure to comply with a commitment decision.

The status of Guidelines within the Polish legal system is clear – they are not legally binding on undertakings – this fact is explicitly confirmed in the two soft-law acts themselves. Still, they provide an important source of information and advice for undertakings which reduces legal uncertainty.

II. Antitrust jurisprudence

1. General remarks

According to statistics published by the UOKiK President in the 2012 Activities Report⁹, Polish courts delivered 91 judgments in the framework of public enforcement of competition law in 2012. SOKiK, Poland's 1st instance court competent in competition matters, rendered 60 judgments in total. This number included 3 rulings annulling decisions issued by the UOKiK President and 10 judgments modifying earlier decisions of the NCA. The 2nd instance court assessing competition law cases, the Court of Appeals in Warsaw (in Polish: *Sąd Apelacyjny w Warszawie*), rendered 29 judgments in 2012. At the same time, Poland's Supreme Court ruled on two competition cases only, both concerned the abuse of dominance.

Most of the judgments related to anticompetitive agreements (50 rulings overall including 37 judgments with regard to vertical agreements); concentrations cases were least numerous (5 judgments). If the above statistics are compared with data for 2011, SOKiK was the only court to be more active in 2012, but even here the increase was only slight¹⁰.

Despite the fact that some of the judgments outlined below relate to the Competition Act of 2000, the interpretation of its legal provisions remains in most cases also relevant to the legal provisions of the Competition Act of 2007.

2. Competition restricting agreements

2.1. Types of anticompetitive agreements

The Supreme Court has not rendered even a single judgment on anticompetitive agreements in 2012. The overwhelming majority of the cases outlined below reviewed by SOKiK and the Court of Appeals regarded price fixing. Under Article 6(1)(1) of the Competition Act, agreements 'consisting of fixing, directly or indirectly, prices and other trading conditions' shall be prohibited if they have as their object or effect the elimination, restriction or any other infringement of competition in the relevant market.

In the judgment of 1 March 2012 (VI ACa 1179/11, ZAiKS and SFP), the Court of Appeals dismissed an appeal concerning a ruling delivered by SOKiK

⁹ See www.uokik.gov.pl/download.php?plik=13213 (last accessed 31 October 2013), p. 17.

¹⁰ See www.uokik.gov.pl/download.php?plik=11986 (last accessed 31 October 2013), p. 17.

on an agreement between the collective rights management organisation ZAiKS and the Polish Filmmakers Association (SFP). According to the original antitrust decision, the agreement in question was anticompetitive because its parties fixed uniform rates for the use of audiovisual works and refused to negotiate those rates individually. Part of the justification of the Court of Appeals' judgment is dedicated to the issue of the circumstances which corroborate the presence of a price-fixing agreement: 'What proves that an agreement is meant to restrict competition are the agreement's provisions fixing a uniform rate of remuneration, uniform minimum prices, uniform allocation of remuneration among authorised authors, and an introduction of allocation of responsibilities among its participants'. This case is interesting primarily because it concerns the *raison d'être* of collective rights management organisations and their core activities.

In the judgment of 27 November 2012 (XVII AmA 184/10, *Kamsoft, Faktor IBS and others*)¹¹, SOKiK considered the definition of price-fixing agreements. It stated therein that this definition comprised both direct price-fixing as well as any agreements on the build-up of prices. Any restrictions on the freedom to pursue an independent pricing policy are thus inadmissible. Moreover, the prohibition also covers agreements on those aspects of a business activity which have an impact on prices (e.g. guaranteeing terms and conditions). On the other hand, in order to establish whether an undertaking took part in a price-fixing agreement, its turnover volume is irrelevant because price-fixing agreements are prohibited regardless of the volume of the turnover (size) of its parties.

In the judgment of 25 May 2012 (XVII AmA 215/10, *Investing and others*), SOKiK stated that the practice prohibited by Article 6(1)(1) of the Competition Act might take the form of the elimination of the right to discretionary reductions of commission (up to the resignation from its collection altogether). Such an agreement threatens competition and makes transaction prices higher than those that contractors could obtain under conditions of an absolute freedom of competition between undertakings.

Article 6(1)(3) of the Competition Act speaks of market-sharing agreements in sale or purchase markets. In the judgment of 11 June 2012 (XVII AmA 197/10, *Papier-Hurt and Office Pulse*), SOKiK considered that an agreement, the subject matter of which placed on one of the parties a time-restricted

¹¹ See also A. Jurkowska-Gomułka, 'Próba uzasadnienia klauzuli cenowej przepisem art. 15 ust. 1 pkt 1 ustawy o zwalczaniu nieuczciwej konkurencji. Wyrok Sądu Ochrony Konkurencji i Konsumentów z dnia 27 listopada 2012 r., XVII AmA 184/10' ['The attempt to justify a price clause with Article 15(1)(1) of the Combating Unfair Competition Act. Judgment of the Court of Competition and Consumer Protection of 27 November 2012, XVII AmA 184/10'] (2013) 1(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 177–179.

ban concerning the targeting of offers for the sale of goods distributed by the party to some clients (on pain of burdening the other party with contractual penalties), was a market-sharing agreement.

2012 saw few SOKiK judgments in the area of tender collusions (bid-rigging). In judgments of 19 October 2012 (XVII Ama 22/11, XVII Ama 33/11, *Poczta Polska and others*), SOKiK stated that the practice prohibited by Article 6(1)(7) of the Competition Act might take the form of a conduct, during pending tenders, that involves the resignation from the conclusion of the won contract – resignation, which in turn leads to the conclusion of such a contract with an undertaking which had originally submitted a more expensive offer. It should be added that in this case the competing participants of the tender were a married couple.

2.2. Other selected issues related to anticompetitive agreements

Object and effect of an anticompetitive agreement

In a judgment of 19 December 2012 (VI ACa 752/12, *Hajduki and others*), the Court of Appeals took the view that the prohibition formulated in Article 6(1) of the Competition Act covers not only cases where the intended anticompetitive objective has indeed been achieved, but also the mere participation in a restrictive agreement. It is thus not necessary to prove that the object of the given agreement was achieved, that is, that the intended anticompetitive effect in a relevant market had been realised. In order to be caught by the prohibition, the occurrence of anticompetitive effects is no longer important once the anticompetitive object of an agreement is established. It is sufficient to prove that the object of the practice was an infringement of the principles of market competition.

Passive participation in an anticompetitive agreement

The Court of Appeals stressed in the judgment of 20 April 2012 (VI ACa 1384/11, *TIC and others*) that passive participation in an anticompetitive agreement does not exempt the inactive party from liability. Passivity also does not mean that such an undertaking had ceased to take part in the illegal agreement. Decisive here is the very fact of price-fixing rather than whether uniform prices were actually applied by undertakings operating in the market. A participant is exempt fully and completely from antitrust liability only by way of its active conduct of openly distancing itself from participation in the agreement. Such active conduct must imply, beyond any doubt, the lack of any intention to get engaged in the prohibited practice. Importantly, the

aforementioned Court of Appeals judgment does not diverge from the SOKiK ruling of 25 May 2012 (XVII AmA 215/10, *Investing and others*), which has been noted earlier. SOKiK took the view therein that neither the fact implying that an agreement has not always been implemented, nor the lack of explicit sanctions for the failure to observe it, can constitute prerequisites supporting the view that the cartel has not been implemented.

Decisions by associations of undertakings

SOKiK noted also in the same judgment (XVII AmA 215/10, *Investing and others*) that internal acts issued by corporations, including those establishing professional standards, are not equivalent to the provisions of national law and must therefore be consistent with binding legislation. Antitrust provisions that stipulate the prohibition of price-fixing agreements are binding in their nature. If the provisions of professional standards appear contradictory to antitrust prohibitions, they would be null and void by virtue of the law.

3. Abuse of a dominant position

3.1. Imposition of unfair prices or other trading conditions

Abuse of a dominant position by way of the imposition of unfair prices or other trading conditions is prohibited in Poland by Article 9(1) in conjunction with Article 9(2)(1) of the Competition Act. Courts referred to this form of abuse in a number of rulings in 2012 including the Supreme Court judgment of 13 July 2012, III SK 44/11, *Stalexport Autostrada Małopolska*. The same form of abuse was also considered in two rulings of the Court of Appeals: the judgment of 17 May 2012, VI ACa 31/12, *PKS w Elblągu*, and the judgment of 13 December 2012, VI ACa 967/12, *MPK – Łódź*.

In the *Stalexport Autostrada Małopolska* case, the Supreme Court dismissed a cassation request regarding the judgment of the Court of Appeals of 31 May 2011 (VI ACa 1028/10)¹². The original decision of the UOKiK President declared that the scrutinised undertaking (*Stalexport Autostrada Małopolska*) had abused its dominant position by way of the imposition of unfair toll prices for driving on the A4 motorway. The UOKiK President concluded that the undertaking had no right to charge full toll prices for driving on the contested road when the motorway failed to meet standards usual for this type of road due to repair works being carried out on certain of its sections.

¹² More on this judgment A. Jurkowska-Gomułka, 'Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2012' (2012) 5(7) *YARS* 205.

These maintenance works resulted in longer travel times and significant traffic obstructions including, in particular, two-way traffic on a single lane. The Supreme Court shared the standpoint of the NCA. It emphasized that an objective assessment of the equivalency of considerations of both parties is to verify whether an undertaking (which does not experience pressure from competitors or clients) achieves economic benefits from its market position which cannot be justified in a model of social market economy. When setting the level of the toll, the undertaking should have taken into account the quality of its services. Depending on the maintenance work's organization and intensity, the refurbishment of a payable motorway may make it impossible for the operator to provide users with a service that allows them to benefit from the use of a paid motorway as it is under 'normal' circumstances (the so-called reference transaction¹³). As a result, collecting a full toll price may be considered objectively unfair. In the opinion of the Supreme Court, the toll is a price in the meaning of Article 4(8) of the Competition Act.

The problem of the imposition of unfair prices and the scope of the definition of a 'price' also surfaced in the judgment of the Court of Appeals of 13 December 2012, VI ACa 967/12, *MPK – Łódź*. The Court took note therein of the fact that the fee for the participation in the maintenance costs of bus stops (which was, *de facto*, imposed on carriers for their use of these bus stops) was inconsistent with road transport provisions. *Ipsa facto*, it was an unfair price within the meaning of Article 9(2)(1) of the Competition Act. The Court pointed out that what decides whether trading conditions were imposed or not is the analysis of the agreement's content as well as the circumstances of its conclusion. It is necessary here to establish that a specific provision played a dishonest role, for instance, that it was an essential element of the agreement without which the latter would not have been concluded.

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

In 2012, the abusive practice of counteracting the formation of conditions necessary for the emergence or development of competition was the object of frequent judicial reviews. In the judgment of 23 May 2012 (VI ACa 1142/11, *NFZ*), the Court of Appeals dismissed an appeal against a SOKiK judgment that upheld a UOKiK decision. The NCA established that the National Health

¹³ For more see: E. Krajewska, 'Lack of a Price Reduction Despite a Decrease in Service Quality as an Unfair Price and Abuse of a Dominant Position. Case Comment to the Judgment of the Supreme Court of 13 July 2012, *Autostrada Malopolska* (Ref. No. III SK 44/11)' (2013) 6(8) *YARS*; K. Kohutek, 'Głosa do wyroku SN z dnia 13 lipca 2012 r., III SK 44/11' [Commentary to the judgment of the Supreme Court of 13 July 2012, III SK 44/11], *LEX/el.*, 2012.

Fund treated its previous contractors in a privileged way when determining bid evaluation criteria in healthcare services tenders, seeing as they scored extra points based on this criterion. Such practice hindered the winning of tenders by undertakings which had not cooperated with NFZ before. In the Courts' view, the scrutinised practice constituted an abuse of a dominant position held by NFZ in the market for the organisation of state-funded healthcare services. The Court of Appeals also confirmed that NFZ was seen as an undertaking under the Competition Act.

In the *City of Poznań* judgment of 15 May 2012 r. (VI ACa 1270/11), the Court of Appeals stated that the unreasonable denial of access to housing infrastructure, in order to install telecoms equipment and lay cables in the property, was a competition restricting practice. The Court stressed that even 'one-off' conduct of an undertaking holding a dominant position in a relevant market may be seen as a practice leading to the disturbance of conditions necessary for the emergence or development of competition in the meaning of Article 9(2)(5) of the Competition Act.

In the *Wodociągi* judgment of 22 February 2012 (AmA 171/11), SOKiK confirmed that water supply and sewage infrastructure management companies abuse their dominant position if they extort certain conduct in an interdependent market. In this case, they favoured undertakings using fixture/fitting types specified by the managers when connecting to the dominant company's infrastructure, thus they also indirectly favoured undertakings producing such fittings/fixtures¹⁴. The abuse took place in the interdependent contractor market for water supply and sewage network connections. When a dominant undertaking delineates the group of fixture/fittings producers that an applicant for a connection build is obliged to use, it makes applicants unable to choose freely which part manufacturers to use from among all those operating in the market. At the same time, fixture/fittings producers not selected by the dominant undertaking are made unable to compete. SOKiK continued on to define exclusionary practice as comprising conduct of a dominant undertaking which may result in the foreclosure, or full or partial obstruction, of the ability to grow of undertakings already operating in a relevant market. It may also amount to the creation of market entry barriers for new undertakings. Such practice is particularly harmful to consumers. An exclusionary practice has an anticompetitive effect since it either precludes

¹⁴ See also K. Kohutek, 'Narzucanie uciążliwych warunków umownych przez dominanta. Wyrok Sądu Ochrony Konkurencji i Konsumentów z dnia 22 lutego 2012 r., XVII Ama 66/10' ['Imposition of onerous agreement terms by a dominant undertaking. Judgment of the Court of Competition and Consumer Protection of 22 February 2012, XVII Ama 66/10'] (2012) 3(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 116–117.

or hampers development of already existing or potential competition in a relevant market.

3.3. Other practices and issues related to an abuse of a dominant position

SOKiK's *MPWiK* judgment of 30 May 2012 (XVII AmA 66/10) focused on an abuse claim by way of the imposition of onerous contractual terms prohibited by Article 9(1) in conjunction with Article 9(2)(6) of the Competition Act. The Court was of the opinion here that the water supply service provider, MPWiK, had imposed onerous terms on its contractors because it used a contract template when concluding water supply agreements. The template was prepared independently by MPWiK and was not subject to individual negotiations. The agreement was thus concluded by accepting terms and conditions established unilaterally by the water supply service provider. SOKiK explained that agreement terms are onerous if they burden one party more than commonly accepted in relevant relations. What needs to be considered when assessing if given terms are onerous, is whether the dominant undertaking would be able to negotiate such terms and conditions in a hypothetical situation of a competitive relevant market. Moreover, the assessment as to whether the terms are onerous must be carried out from the point of view of a contractor these terms are imposed upon.

Attention should be paid to the *Porty Lotnicze* judgment delivered by SOKiK on 30 March 2012 (XVII AmA 180/10). In this dispute, the dominant undertaking eliminated charter services from Terminal E of Warsaw Chopin Airport, while they were still permitted from Terminal A, because admitting such traffic would under current conditions cause serious inconvenience in passenger handling. The scrutinised practice concerned all carriers without an exception. SOKiK did not find that an abuse took place but came to the conclusion instead that the dominant undertaking's decision was rational and objectively justified by the circumstances of the case. SOKiK did not recognise Terminal E as an essential facility in the dominant undertaking's infrastructure without which it would be impossible for its clients to provide their own services at the scrutinised airport. SOKiK rejected at the same time the argument that the complainant was discriminated against. The Court confirmed that discrimination occurs when a comparison of undertakings in the same situation suggests that at least one of them is treated worse than the others or, alternatively, at least one of the companies is treated in a more privileged way than the others. Such a phenomenon did not occur in this case. SOKiK pointed out that a mere restriction of another undertaking's freedom to act by a dominant undertaking is not sufficient to claim that such practice amounts to an abuse of market power.

4. Control of concentrations

Statistics suggest that Polish courts rarely deal with concentrations of undertakings cases. This is primarily so because the UOKiK President clears the absolute majority of notified operations.

SOKiK did, however, deal with a concentration in a judgment of 14 May 2012 (XVII AmA 41/11, *PGE*) based on an appeal submitted by PGE who was originally prohibited by the UOKiK President from taking over its competitor, Energa. SOKiK upheld the take-over ban, but had at the same time the opportunity to express its opinion on two important problems. SOKiK stated first of all that undertakings were allowed to apply for a conditional clearance of a concentration pursuant to Article 19(1) of the Competition Act also before that very Court. According to SOKiK, this is so because court proceedings in the matter of an appeal against a decision of the UOKiK President are first-instance in nature. Second, SOKiK also specified that the burden of proof with respect to the efficiencies indicated in Article 20 of the Competition Act (contribute to economic development or technical progress, positive impact on the national economy) rest upon the undertaking concerned. In SOKiK's view, in order to prove these circumstances, it is not sufficient to invoke the consistency of an intended concentration with a government document defining state policy.

5. Relationships between the Competition Act and other legislation

In the judgment of 18 December 2012 (III SK 9/12, *Krajowa Stacja Chemiczno-Rolnicza*), the Supreme Court considered the relationship between the Competition Act and the Fertilizers and Fertilisation Act¹⁵. The Supreme Court annulled a judgment of the Court of Appeals (judgment of 29 March 2011, VI ACa 1087/10) sustaining SOKiK's judgement (judgment of 23 April 2010, XVII AmA 84/09) which questioned the decision delivered by the UOKiK President. The NCA originally established an abuse of a dominant position in making the issue of an opinion on a fertilisation schedule dependent upon the performance of a soil analysis in a district chemical-agricultural station or in an accredited laboratory. The Supreme Court found the Court of Appeals' interpretative assumptions wrong, which implied that Article 27(1) and (4) of the Fertilizers and Fertilisation Act exclude the application of the Competition Act. Article 27 of the Fertilizers and Fertilisation Act lists the tasks of the

¹⁵ Act of 10 July 2007 on fertilizers and fertilisation (Journal of Laws 2007 No. 147, item 1033, as amended).

plaintiff (*Krajowa Stacja Chemiczno-Rolnicza*) as encompassing, among others: the determination of a way of doing agrochemical research including a choice of research methods; and undertaking activities in the scope of participation of laboratories of district chemical-agricultural stations in the examination of accuracy of performing chemical analyses. According to the Supreme Court, the provisions of the Fertilizers and Fertilisation Act do not suggest that the legislator obliged the plaintiff to determine the principles of performing soil analyses (in order to issue opinions on fertilisation schedules) in a way which results in a limitation of the circle of subjects entitled to carry them out. These provisions do therefore not impose on the plaintiff the duty to engage in a practice which the UOKiK President qualified as a competition-restricting practice.

In the aforementioned SOKiK's judgment of 11 June 2012 (XVII AmA 197/10, *Papier-Hurt and Office Pulse*), the Court also considered the issue of the relationship between the Competition Act¹⁶ and the Combating Unfair Competition Act¹⁷. SOKiK decided therein that there is no discrepancy between the legal provisions contained in these two Acts. The relationship between the norms that can be interpreted from them should be treated as mutually reinforcing – while the Combating Unfair Competition Act protects primarily the interest of private undertakings, the Competition Act mainly protects the public interest. It means that while claiming that an act of unfair competition occurred, an undertaking cannot simultaneously bring about the removal of its effects by way of a violation of the prohibitions specified in the Competition Act (such as the prohibition of market-sharing). Hence, the intention to remove the effects of a business secrets violation does not legalise the anticompetitive character of an agreement which restricts the free choice in contractors by the clients of the parties to that agreement. The Combating Unfair Competition Act does not directly exclude the validity of the prohibitions of specified practices classified in the Competition Act.

6. Enforcement issues

Some judgments delivered in 2012 gave rise to particularly interesting issues concerning the imposition of fines. In the judgment of 17 May 2012 (VI ACa 31/12, *PKS w Elblągu*), the Court of Appeals stated that fines stipulated in the Competition Act are optional and discretionary in nature. The Court may

¹⁶ This issue was also considered in the aforementioned SOKiK's judgment of 27 November 2012 (XVII AmA 184/10, *Kamsoft, Faktor IBS and others*).

¹⁷ Act of 16 April 1993 on combating unfair competition (consolidated text: Journal of Laws 2003 No. 153, item 1503, as amended).

therefore interfere with their amount only when their size grossly deviates from what would be a fair and equitable amount for the infringement established.

In the judgment of 20 March 2012 (VI ACa 1038/11, *PKP Cargo*)¹⁸, the Court of Appeals referred to fines as an instrument strengthening the severity of the principal sanction, that is, the injunction to cease the competition restricting practices. The Court came to the conclusion that the imposition of a fine on an undertaking for the infringement of competition law is subject to an assessment in the context of all of the accumulated evidence, including the purposefulness of strengthening the principal sanction.

A few merger-related judgments were rendered in 2012 that also focused on the imposition of fines. In the judgment of 17 May 2012 (VI ACa 1428/11, *Carrefour B.V.*), the Court of Appeals dealt with the non-fulfilment of obligations (duty to dispose of rights to some assets) imposed in a conditional clearance on *Carrefour B.V.* as the acquiring company. The Court decided that liability for the infringement of obligations resulting from the Competition Act is objective in its nature. As such, the establishment of a culpable character of the violation is not a necessary prerequisite to plead a violation of its provisions. The Court found therefore that considerations on fault are irrelevant in light of the possibility to apply substantive law provisions. By contrast, the subjective element of an intentional or negligent nature of the infringement, referred to as fault, is a circumstance taken into account when determining the amount of fine.

In the judgment of 1 June 2012 (XVII AmA 82/11, *Jeronimo Martins Dystrybucja*), SOKiK annulled a decision of the UOKiK President which imposed a fine on an undertaking for the provision of incorrect data when submitting (at the NCA's request) additional information related to that undertaking's application for the clearance of a concentration. SOKiK stated that the UOKiK President's request for additional information was formulated incorrectly because the NCA failed to instruct the undertaking that submitting false information could result in a fine stipulated in Article 106(2)(1) of the Competition Act. In SOKiK's view, the aforementioned legal provision is criminal in nature and cannot be 'treated extensively'.

In the judgment of 6 December 2012 (XVII AmA 43/11, *AGD MARKET*), SOKiK modified a decision of the UOKiK President that imposed a fine for the implementation of a concentration without the NCA's prior consent. SOKiK lowered the amount of the original fine by almost 93%. It stressed that when assessing what fine would be adequate to the deed committed, one should also take into account a hypothetical decision that would most probably be made when the plaintiff notified the UOKiK President about the

¹⁸ It was annulled by the judgment of the Supreme Court of 3 October 2013 (III SK 67/12).

intention of a concentration. The conduct of an undertaking whose intention to concentrate would not be approved should be assessed differently from that of an undertaking which would certainly obtain consent. If a concentration was to be implemented without notification, the market consequences of these two different scenarios would be disproportionately distinct. SOKiK decided that failure to notify a concentration constituted an insignificant threat to the public interest if the scrutinised undertaking did not obtain any financial benefit from the violation of its duty under the Competition Act. SOKiK took into account the fact that the undertaking notified the concentration voluntarily, immediately after learning about its failure to comply with the notification duty. In SOKiK's opinion, voluntary, even if late, notifications should be rewarded in an analogous way to the workings of other existing legal institutions such as leniency or, in fact, active repentance in criminal and criminal tax law where a perpetrator may completely avoid a penalty. SOKiK decided that the conduct of an undertaking that notified a concentration after it was implemented (admitted to its failure to notify) should be rewarded by a considerable lowering of the fine.

The last issue that should be mentioned here is the application of Article 5 of Regulation 1/2003 by the UOKiK President as an NCA. In the judgment of 22 February 2012 (VI ACa 1304/11, *TP S.A.*), the Court of Appeals took the view that the UOKiK President could not decide to discontinue antitrust proceedings if it did not find an infringement of Article 101 or 102 TFEU. The aforementioned judgment was delivered after the Supreme Court decided to annul an earlier ruling of the Court of Appeals (10 July 2008, VI ACa 8/08) and referred the case back for renewed assessment¹⁹. The Supreme Court annulled the judgment of the Court of Appeals after it had received a preliminary judgment from the Court of Justice of the European Union of 3 May 2011 (C-375/09). The CJEU ruled therein that according to the second paragraph of Article 5 of Regulation No. 1/2003, where, on the basis of the information in the possession of an NCA, the conditions for prohibition are not met, the NCA may adopt a decision stating that there are no grounds for action on its part, but not a decision stating that there has been no breach of that article. The newest judgment of the Court of Appeals took this position into account.

¹⁹ See the judgment of the Supreme Court of 8 June 2011 (III SK 2/09). For the description of this judicial saga see K. Kowalik-Bańczyk, 'Ochrona konkurencji – obowiązek wydania decyzji stwierdzającej brak podstaw do działania po stronie Prezesa UOKiK w sytuacji niestwierdzenia przez Prezesa UOKiK naruszenia art. 102 TFUE. Wyrok Sądu Apelacyjnego z 22.02.2012 r. VI ACa 1304/11' [*'Competition protection – an obligation to issue a decision stating that there are no grounds for action on the part of the UOKiK President in a case where no infringement of Article 102 TFEU is found. Judgment of the Court of Appeals of 22 February 2012, VI ACa 1304/11'*] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 108–109.

The Court stated that the UOKiK President should have adopted a decision stating that there were no grounds for action which constituted a specific type of decision on the merits of the case.

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