

**Due Process Rights in Polish Antitrust Proceedings.**  
**Case comment to the Judgment of the Polish Supreme Court**  
**of 3 October 2013 – PKP Cargo S.A. v. President of the Office**  
**of Competition and Consumers Protection**  
**(Ref. No. III SK 67/12)**

by

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## **I. Introduction**

The Polish Supreme Court delivered on 3 October 2013 an important ruling (Ref. No. III SK 67/12) concerning the case of PKP Cargo S.A. (hereafter, PKP Cargo) against the Polish Competition Authority – the President of the Office for Competition and Consumer Protection (hereafter, UOKiK).

The reviewed judgment constitutes a crucial precedent with respect to procedural fairness (due process rights) in the enforcement of Polish competition law. It states that when examining appeals from administrative decisions issued by the UOKiK President, civil courts may also rule on violations of procedural provisions (administrative law) committed by the National Competition Authority (hereafter: NCA). Depending on the type and importance of procedural infringements indicated in the appeal, the 1<sup>st</sup> instance court revising the decisions of the UOKiK President, as well as other relevant courts of higher instances, may rule that an appeal is legitimate and quash the administrative decision of the UOKiK President on procedural grounds only (even without deciding on the infringement of competition law).

## **II. Judicial review in Polish competition law**

Polish rules on the prohibition of agreements restricting competition and on the abuse of a dominant position as well as on pre-emptive control of concentrations are contained in the Act on Competition and Consumers Protection of 16 February 2007

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(hereafter: 2007 Competition Act)<sup>1</sup>. Article 81(1) of the 2007 Competition Act sets out a unique, so-called *hybrid*, procedure for competition law proceedings<sup>2</sup>.

In brief, proceedings are divided into two main phases. The administrative proceedings phase comes first and takes place before the NCA – the UOKiK President. It is primarily governed by the provisions of the Administrative Procedure Code<sup>3</sup> (hereafter, KPA). The civil proceedings phase (the judicial review phase) comes second. It starts before a court established specifically to rule on appeals from the decisions of the UOKiK President – the Court of Competition and Consumers Protection (hereafter, SOKiK) – and continues in further civil instances. Civil procedure rules stipulated in the Code of Civil Procedure (hereafter, KPC) apply before all of these courts.

The UOKiK President is, as a central body of public administration, exclusively entitled to initiate administrative proceedings concerning infringements of competition law (violations of the prohibition of agreements restricting competition and the abuse of dominance)<sup>4</sup>. Such proceedings end with the issuance of an administrative decision which may, for example, recognize a practice as restricting competition and order the offender to refrain from pursuing it<sup>5</sup>. The issuance of such decision is the outcome of the so-called ‘antimonopoly proceedings’ conducted on the basis of administrative procedure<sup>6</sup> which follows the rules of conduct stipulated in the KPA<sup>7</sup>. However, these decisions are not final. Article 81 point 1 of the 2007 Competition Act provides a right to appeal such decisions. Despite the fact that the KPA has its own appeal procedure, the 2007 Competition Act excludes the application of general KPA provisions to competition law cases. It stipulates instead that the review of the decisions of the UOKiK President is conducted by civil courts. And so, such decisions can be appealed to a specially crafted competition law court – SOKiK (XVII department

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<sup>1</sup> The Competition Act covers also practices infringing collective consumer interests in the Article 24 of the Competition Act.

<sup>2</sup> R. Janusz, T Skoczny, ‘Postępowanie antymonopolowe jako szczególne postępowanie administracyjne’ [‘Antitrust proceeding as a special administrative proceeding’] [in:] *Institucje współczesnego prawa administracyjnego* [Institutions of modern administrative law], Kraków 2001, 261-275; Z Kmiecik, ‘Postępowanie w sprawach konkurencji’ [‘Proceedings in antitrust cases’] (2002) 4 *Państwo i Prawo* 31-47.

<sup>3</sup> Matters not governed by the Competition Act, as regards the proceedings before the UOKiK President, are subject to the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure, except matters concerning evidence (Article 84 of the Competition Act – prescribing civil procedure) and matters related to inspections (Article 105c 4 of the Competition Act – prescribing procedure).

<sup>4</sup> Proceedings concerning concentrations are instituted upon a request or on an *ex officio* basis based upon Article 49 point 2 of the Competition Act.

<sup>5</sup> Article 10 of the Competition Act.

<sup>6</sup> Article 83 of the Competition Act.

<sup>7</sup> However, because of Article 84 of the Competition Act, to matters concerning evidence in proceedings before the UOKiK President, in the scope not regulated in the Competition Act, Articles 227 to 315 of the Act of 17 November 1964 – the Code of Civil Procedure, apply accordingly.

of the Regional Court in Warsaw) – which conducts its proceedings according to the KPC<sup>8</sup>. The same rules apply before the Court of Appeals (2<sup>nd</sup> instance court handling appeals against SOKiK judgments) and the Supreme Court (the court of last resort).

Given the above, a contradictory litigation starts before the SOKiK where the UOKiK President acts as a party to the proceedings (the defendant). Because of this, the SOKiK is recognized as the court of 1<sup>st</sup> instance in Poland for competition law cases. The exclusion of administrative procedure rules concerning competition law appeals, and the switch to civil procedure instead, results in the fact that a competition case is resolved by the court on its merits (by contrast, a usual administrative court rules in administrative proceedings only on the legality of an administrative decision). To sum up, the process of antitrust proceedings is entrusted to an administrative body – the UOKiK President – and yet a civil court may rule on the merits during the appeal. It is therefore the completion of administrative proceedings which conditions litigation before civil courts<sup>9</sup>.

Due to the aforementioned relationship between administrative and civil procedures, Polish judiciary held for several years now that because of the SOKiK's 1<sup>st</sup> instance nature, it was impossible to appeal violations of procedural rules committed during the administrative stage of the proceedings before the NCA. This approach was based mainly on the conclusion that the contradictory process of litigation between the parties (i.e. an undertaking party to the administrative proceedings as the plaintiff and the UOKiK President as the defendant) *de facto* starts when an appeal is submitted. This approach has now been changed by the reviewed Supreme Court judgment of 3 October 2013.

### III. Facts

On 11 August 2006, the UOKiK President initiated explanatory proceedings against PKP Cargo based upon a notification submitted to the NCA by PKP Cargo's competitor – CTL Logistics. PKP Cargo S.A. is a joint stock company and the national incumbent railway cargo services provider. Its area of activities covers the territory of Poland and Europe. In fact, it is the third biggest provider in Europe, second biggest in the EU and the biggest in Poland.

In its notification, CTL Logistics indicated that by the introduction on 1 May 2006 of amendments to PKP Cargo's 'Rules of sale of rail cargo transport of PKP Cargo S.A.', the dominant undertaking abused its position on the market of rail cargo transport in Poland<sup>10</sup>. The competitor's main concern was that the aforementioned amendments made it possible for PKP Cargo to refuse, without any objective justification, to deal with undertakings that are its competitors.

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<sup>8</sup> Article 82 of the Competition Act.

<sup>9</sup> Judgment of the Court of Appeals in Warsaw of 8 November 2006, VI ACa 290/06.

<sup>10</sup> In particular § 5 points 6–10.

After the completion of its explanatory proceedings, the UOKiK President initiated full antimonopoly proceedings on 15 December 2006. As a result, the NCA found first of all that PKP Cargo indeed held a dominant position on the market of rail cargo transport in Poland, mainly because of its high market shares (during 2008 it held a 48,48% market share measured by the weight of cargo and 70,52% measured by transport)<sup>11</sup>. Second, the NCA recognized that PKP Cargo infringed the applicable Competition Act (Article 8(1) and (5) of the Competition Act of 15 December 2000) by abusing its dominant position by way of refusing to perform the service of railway cargo transit of goods to competitors on a specific basis. This behavior counteracted the formation of the conditions necessary for the emergence or development of competition as indicated in the CTL Logistic's notification. Finally, in decision number DOK – 3/2009 of 7 July 2009, the UOKiK President imposed a penalty on PKP Cargo in the amount of PLN 60,362,071.69 (approx. EUR 14,371,921). PKP Cargo appealed the decision to the SOKiK on procedural grounds which, however, rejected the appeal on 9 May 2011. On 20 of March 2012, the Court of Appeals rejected the subsequent appeal also. Thus, PKP Cargo appealed the case to the Supreme Court which remanded the case for re-examination.

#### IV. Key findings of the Supreme Court

The case before the Supreme Court focused on two legal aspects. Both of them concerned the grounds of the appeal from the decision in question. These aspects were: (i) the scope of cognition of the appellate courts in appeals against decisions of the UOKiK President due to infringements of provisions of the KPA by NCA, and (ii) rules of conduct during the hearing of evidence in contradictory court proceedings during appeals from the decisions of the UOKiK President.

From the time of PKP Cargo's appeal to the SOKiK, the most important part of PKP Cargo's (the claimant) arguments concerned the question if the courts, while ruling on appeals from the decisions of the UOKiK President, may verify the correctness of the NCA's conduct during the administrative stage of the proceedings. This question arose mainly because a civil court evaluates also evidence gathered and findings of correctly conducted antimonopoly proceedings.

To reach its conclusion, the Supreme Court confronted two different approaches expressed in earlier jurisprudence covering proceedings based on competition law as well as telecommunications law where a similarly *hybrid* type of procedure is applied.

The first approach discussed by the Supreme Court was originally formulated in its judgment from 19 August 2009 (ref. no. III SK 5/09). The Supreme Court had dismissed there most of the procedural objections raised by the plaintiff and stated that the proceedings before the NCA have a 1<sup>st</sup> instance character. Thus, the court passing a judgment is entitled to decide the case on its merits but it is not obliged to refer in detail to procedural objections raised in the appeal concerning the incorrectness of

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<sup>11</sup> Decision of the UOKiK President of 7 of July 2009, No. DOK – 3/2009, 35.

the antimonopoly proceedings. This judgment, being a basis for further civil rulings in competition law cases, was widely criticized by Polish competition law doctrine<sup>12</sup>.

The opposite approach discussed by the Supreme Court in the relieved Judgment traces back mainly to rulings in proceedings before the Polish Telecoms Regulatory Authority. The Supreme Court indicated in its assessment rulings where the SOKiK paid attention to the correctness of the administrative proceedings before the Telecoms Regulator: 1) judgment from 21 September 2010, ref. no. III SK 8/10, 2) judgment from 20 January 2011, ref. no. III SK 20/10, 3) judgment from 2 February 2011, ref. no. 18/10, 4) judgment from 7 June 2011, ref. no. III SK 52/10, 5) judgment from 24 January 2012, III 23/11, and 6) judgment from 12 April 2013, ref. no. III SK 26/12. Among other infringements considered in these judgments, the SOKiK has found that, for example, the decisions of the Telecoms Regulator had been issued due to circumstances resulting in their invalidity under the scope of the KPA, or that the regulatory decisions had not been issued according to relevant procedural standards.

Furthermore, the Supreme Court took into consideration a 'stable jurisprudence' of the Court of Appeals in Warsaw which indicates that the Telecoms Regulator's failure to complete consolidation proceedings or an invalid performance of proceedings which ended with the imposition of a fine, is illegal making the regulatory decision invalid. A similar approach, also mentioned by the Supreme Court, was taken into account by the SOKiK in the judgment of 15 October 2012 (file number XVII AmA 17/11), repealing the decision of the Telecoms Regulator because it failed to indicate the action for which the fine was imposed. Conclusively, the Supreme Court ruled that this jurisprudence should be taken into account while ruling on cases concerning competition law. Such approach is justified especially when the UOKiK President imposes a fine on an undertaking, a fact which should additionally increase the need to adhere to highest procedural standards. Moreover, the Supreme Court indicated that the law itself does not differentiate between material and procedural arguments indicated in appeals from decisions of the UOKiK President.

Finally, the Supreme Court stated that the UOKiK President infringed in the assessed case the rules of administrative procedure by amending its resolution on the initiation of antimonopoly proceedings by, in fact, extending the resolution's initial scope. While commenting on the infringement in question, the Supreme Court stated that explanatory proceedings should be sufficient to gather evidences necessary for the commencement of full antimonopoly proceedings within the relevant scope. In the Supreme Court's opinion, such violation is not subject to rectification before the court of last resort.

Concerning the second aspect indicated above – the hearing of evidence – the Supreme Court indicated that courts must ensure the parties' right to be heard with regard to any of the gathered evidence. This is even more important in cases concerning the impositions of fines on undertakings. However, in light of its findings

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<sup>12</sup> See also: M. Bernatt, 'The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgment of the Supreme Court of 19 August 2009 – Marquard Media Polska (Ref. No. III SK 5/09)' (2010) 3(3) *YARS*.

concerning the first aspect, the Supreme Court found that it is too early to rule on these matters.

## V. Commentary

First of all, it should be noted that the judicial approach to competition law's *hybrid* procedural structure in Poland (expressed in other rulings before the Judgment) stated that the SOKiK's role is only to decide the case on the merits<sup>13</sup> (as a 1<sup>st</sup> instance court). Thus, for many years, procedural aspects of the administrative proceedings stage before the NCA were not subject to appeals from the decisions of the UOKiK President. According to the Supreme Court's earlier views, there was no necessity to refer to procedural arguments, in particular when the appellant did not indicate that such infringements influenced the substance of the decision in question. Furthermore, the Constitutional Tribunal indicated also that there is a difference between regulatory proceedings (energy, telecommunication, railway transport) and competition proceedings because of their essence<sup>14</sup>.

To comment on this case, it is necessary to underline the criticism of the aforementioned approach as expressed by Polish competition law doctrine. The main criticism notes that Article 6 of the ECHR imposes a requirement of full judicial review of every decision issued by a non-court body<sup>15</sup>. This rule applies fully to antitrust proceedings<sup>16</sup>. Moreover, the jurisprudence of the ECtHR states that decisions issued by administrative authorities, which do not satisfy the requirements of Article 6(1) of the ECHR, have to be subject to control by a 'judicial body that has full jurisdiction' over questions of facts and law<sup>17</sup>. Therefore, the notion of 'full jurisdiction', prescribed in Article 6 of the ECHR implies, in fact, that the court has to evaluate the case not

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<sup>13</sup> Judgment of the Supreme Court of 18 September 2003, I CK 81/02; judgment of the Court of Appeals in Warsaw of 20 December 2006, VI ACa 620/06.

<sup>14</sup> M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Due process in proceedings before a competition authority*], Warszawa 2011, p. 290.

<sup>15</sup> *Ibidem*.

<sup>16</sup> M. Bernatt, *Sprawiedliwość proceduralna...*, p. 274, indicating the judgment of the ECtHR, *Menarini Diagnostics S.R.L. v Italy*, 59–60.

<sup>17</sup> See: Bernatt: 'The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgment of the Supreme Court of 19 August 2009 – Marquard Media Polska (Ref. No. III SK 5/09)' (2010) 3(3) *YARS*, indicating: *Albert and Le Compte v Belgium* of 10 February 1983, no. 7299/75, 7496/76, para. 29; *Gautrin and others v France* of 20 May 1998, no. 21257/93, para. 57; *Frankowicz v Poland* of 16 December 2008, no. 53025/99, para. 60, and specifically for judicial control over administrative bodies see judgments: *Bendenoun v France* of 24 February 2004, no. 12547/86, para. 46; *Umlauf v Austria* of 23 October 1995, no. 15527/89, para. 37–39; *Schmautzer v Austria* of 23 October 1995, no. 15523/89, para. 34; *Janosevic v Sweden* of 21 May 2003, no. 34619/97, para. 81. See also L. Drabek, 'A Fair Hearing Before EC Institutions' (2001) 4 *European Review of Private Law* 561; K. Lenaerts, J. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 *Common Market Law Review* 561–562.

only on the merits but also on the correctness of proceedings before a non-court authority – such as the UOKiK President. Doctrine indicated that previous ‘Polish model of judicial control over proceedings before the UOKiK President raises serious doubts from the point of view of the requirements of “full jurisdiction”. In particular, the court specialized in dealing with the appeals from the UOKiK President decisions – the Court of Competition and Consumers Protection, does not exercise control with respect to procedural infringements over the proceedings before and the decisions of the UOKiK President’<sup>18</sup>.

It is crucial to stress that under the hybrid system, the SOKiK generally bases its assessment on the evidence gathered by the UOKiK President during the administrative stage of the proceedings. For example, the SOKiK, and other civil courts, may not inspect the premises of an undertaking or send an information requests to other market participants – these are actions taken exclusively by the NCA. Thus, procedural infringements are impossible to remedy before civil courts if such courts would not be allowed to evaluate and to rule on procedural aspect of administrative proceedings<sup>19</sup>. As it is also correctly noted ‘the violation of the right to be heard and right to defense during administrative proceedings should be seen as a reason for annulling a decision in its entirety’<sup>20</sup>. It is also worth mentioning that European courts exercise full control over proceedings conducted before the European Commission<sup>21</sup>.

In conclusion, the commented judgment should be recognized as a positive change in Polish competition law jurisprudence especially since it strengthens due process rights in proceedings concerning antitrust infringements.

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<sup>18</sup> M. Bernatt ‘The Principal of Procedural Fairness and its Implementation in the Administrative Proceedings – perspective of the country in the democratic transition, 8<sup>th</sup> World Congress of the International Association of Constitutional Law’ (IACL) Mexico-City, 6-10 December 2010 Constitution and Principles, Paper form workshop on Constitutional principles and democratic transition, 16.

<sup>19</sup> See: Bernatt, *Sprawiedliwość...*, p 294.

<sup>20</sup> *Ibidem* at 17.

<sup>21</sup> Judgment of the CFI of 11 March 1999, T-156/94 *Siderugica Aristrain Madrid SL v Commission* [1999] ECR II-645, para. 115.