

Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference

by

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Abstract

The article discusses the effectiveness and the intensity of judicial review in the Polish competition law system. First, it studies whether the judicial review offered by the 1st instance Court of Competition and Consumer Protection in Warsaw (SOKiK) is effective in practice. Next, the article analyzes whether Polish courts tend to defer to the findings of the Polish competition authority, UOKiK. Judgments of the Supreme Court concerning relevant market definition serve as case studies. Finally, the article discusses whether proceedings before the Polish competition authority ensure sufficient due process guarantees, the impartiality of decision-makers, and the overall expert character of UOKiK's decision-making process. On this basis the article examines whether there are grounds for the reviewing courts to defer to UOKiK's findings. The article concludes that currently the review undertaken by SOKiK happens to be superficial and thus ineffective. At the same time, the Supreme Court's review of the determination of the relevant market is not deferential towards UOKiK's findings. The Supreme Court substitutes its own definition of the relevant market for that of UOKiK and that of the lower courts. However, the article shows that there are no grounds at the moment for arguing for greater judicial deference. Proceedings held before UOKiK, despite recently introduced improvements, still do not offer sufficient due process guarantees or a division between investigatory and decision-making functions. In addition, UOKiK's expertise is not sufficient for both institutional and practical reasons.

Résumé

L'article analyse l'efficacité et de l'intensité du contrôle juridique dans le droit de la concurrence en Pologne. Premièrement, il examine si le contrôle juridique mené par la cour de première instance, la Cour de la concurrence et de la protection des consommateurs à Varsovie (SOKiK), est efficace. Ensuite, l'article analyse si les tribunaux polonais ont tendance à se référer aux décisions de l'Autorité polonaise de la concurrence (UOKiK). Les arrêts de la Cour suprême concernant la définition du marché pertinent font l'objet d'études de cas. Enfin, l'article examine si les procédures devant l'Autorité polonaise de la concurrence assurent des garanties du procès équitable, l'impartialité des décideurs et le caractère expert du processus décisionnel de l'UOKiK. Par cette analyse, l'article tente à déterminer s'il existe des motifs que les tribunaux font preuve de déférence à l'égard des décisions de l'UOKiK. L'article conclut que la révision par le SOKiK est actuellement superficielle et inefficace. En même temps, la révision judiciaire de la détermination du marché pertinent par la Cour suprême ne fait pas preuve de déférence à l'égard des décisions de l'UOKiK. La Cour suprême change sa propre définition du marché pertinent par celle de l'UOKiK et des tribunaux inférieurs. Toutefois, l'article montre qu'il n'existe actuellement aucun motif de plaider pour une déférence judiciaire plus importante. Les procédures devant l'UOKiK, malgré les améliorations récemment introduites, n'offrent pas encore suffisamment de

garanties du procès équitable, ainsi que la répartition des fonctions d'enquête et des fonctions décisionnelles. De plus, l'expertise de l'UOKiK n'est pas suffisamment présente autant que pour des raisons institutionnelles tant que pour des raisons pratiques.

Key words: competition law; antitrust; judicial review; judicial deference; due process; procedure; courts; administration; EU; Central and Eastern Europe; Poland.

JEL: K21; K23; K49; L41; L42

I. Introduction

The judicial review of the decisions issued by Poland's National Competition Authority is exercised by civil courts in *de novo*, contradictory judicial proceedings. From a law in books viewpoint, such review model differs significantly from the cassatory, administrative model operating in EU competition law. The adequacy of judicial review in competition law has been widely discussed in the EU by many scholars and practitioners (Bailey, 2004; Vesterdorf, 2005; Schweitzer, 2009; Castillo de la Torre, 2009; Gerard, 2011; Forrester 2011, Van Cleynenbreugel, 2011–2012; Nazzini 2012; Wils 2014; Nagy, 2016; Bernatt, 2016b; Kalintiri, 2016). Some of them argue for a more intense judicial review (see in particular Gerard, 2011; Forrester, 2011). In Poland's neighbouring Visegrad countries – Hungary, Slovakia and the Czech Republic – the adequacy of judicial review is also discussed in different contexts (Šramelová, Šupáková, 2012; Cseres, Langer, 2009; Neruda, Barinka, 2015). From this perspective, a closer study of the Polish model of judicial review has the potential to enrich this debate. The question is whether a formally broader judicial review offers, in practice, better room for handling competition law disputes – provides the space for effective judicial review while preserving the competition authority's ability to enforce competition law.

This article focuses on the effectiveness and the intensity of judicial review of the decisions issued by Poland's National Competition Authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter: UOKiK) as well as the permissibility of judicial deference to UOKiK's findings under the current Polish enforcement framework. The article assumes that the effectiveness of judicial review and judicial deference are interrelated. This is because the concept of judicial deference is not about imposing limits on the scope of judicial review (by distinguishing the areas that are beyond judicial review) and so it should not be understood as an excuse for courts to abdicate their

role of providing effective review of administrative action¹. Only after courts exercise effective review (in particular, they check whether the law was interpreted and applied correctly by the administrative authority, and whether evidence collected supports the conclusion of the administrative authority²), may they defer to the conclusion reached by the administrative authority³. Judicial deference is about proper inter-institutional balance (founded on such rationales as separation of powers, respect for the expertise of administrative authorities and their primary responsibility for conducting a State's policy in a given field, Bernatt, 2016a, p. 279–282) and not about the courts subordination to administration. At the same time, it assumes that courts should not overstep their role of those that review administrative action (rather than decide the case). Courts reviewing administrative decisions are not primarily responsible for the enforcement of administrative laws and so they may be expected to respect (after reviewing the way in which they were reached) the findings of an administrative body that required expert knowledge. At the same time, judicial deference may be considered permissible (for the reasons of procedural fairness and appropriateness of the conclusions reached) only if certain variables are present (Bernatt, 2016a, p. 324–325). This is supported by ECHR standards and foreign experiences. First, due process guarantees have to be provided in administrative proceedings (Bernatt, 2016a, p. 325). Second, the impartiality of administrative decision-makers (the division of prosecutorial and investigative functions from decision-making ones) has to be present (Bernatt, 2016a, p. 325). Third, the administrative authority should possess an established expertise proven in the justification of its decisions (Bernatt, 2016a, p. 325). The greater the presence of these variables, the more deferential judicial review can be (Bernatt, 2016a, p. 324–325).

The article has the following structure. After analyzing the structure and competences of courts reviewing UOKiK decisions (section II), the article

¹ It is argued that an adequate model of judicial review is one preserving positive aspects of judicial deference (especially the need for expertise and flexibility in administrative decision-making) while providing sufficient safeguards against the abuse of power by administration (see Bernatt, 2016a, p. 321–322).

² The CJEU accepts the existence of the EU Commission's margin of appreciation to the European Commission's complex economic assessment only if the General Court reviews whether the evidence relied on by the Commission is factually accurate, reliable and consistent and whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it, see case C-12/03 P *Commission v Tetra Laval*, EU:C:2005:87, para. 39. Such formula was confirmed by CJEU Grand Chamber in case C-199/11 *Europese Gemeenschap v Otis and Others*, EU:C:2012:684, para. 59.

³ The ECtHR does not exclude a deferential character of judicial review as long as the individuals or firms involved are offered effective procedural protection (Bernatt, 2016a, p. 321–322).

considers whether the judicial review offered by civil courts, in particular by the 1st instance Court of Competition and Consumer Protection in Warsaw (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter: SOKiK) is effective in practice (section III). Next, the article studies whether courts tend to defer to UOKiK's findings (section IV). Judgments of the Supreme Court concerning the issue of relevant market definition serve as case studies. Finally, the article analyses whether variables of judicial deference mentioned above are present in Poland's competition law system (section V). The article ends with conclusions and suggestions of improvements for Polish competition law.

II. The Principal Characteristics of Judicial Review in Poland

At the outset, it is important to understand the rather unique structure of the judicial review system of the decisions issued by the Polish competition authority. This review is exercised by civil courts and not administrative courts (which is a rule in Poland when it comes to the review of administrative action). As the law stands, the review has a *de novo* and reformatory character in all respects (law, facts and fines), rather than being of a merely cassatory nature. Hence, it is not limited to the review of legality only (which is a rule in Poland when it comes to the review of administrative action). The Court of Competition and Consumer Protection (the XVII division of the Regional Court in Warsaw, SOKiK) acts as the 1st instance court. Under Article 479^{31a} of the Code of Civil Procedure, it is either entitled to dismiss the action brought against a UOKiK decision and uphold the contested decision, or to accept the action and rule on its merits by changing the UOKiK decision (fully or in part). The appeal against a SOKiK judgment is heard by the Court of Appeal in Warsaw (its general civil VI Division). On the basis of an extraordinary cassation complaint, the case can reach the Supreme Court (the Division of Labour, Social Securities and Public Affairs). Since antitrust and market regulatory cases often involve novel or not-yet-settled legal issues, the Supreme Court is quite open for accepting cassation complaints and issuing judgments on the merits. Thus, it often provides interpretive guidance to lower instance courts on both substantive law issues as well as procedural ones.

The nature of the review of UOKiK's decisions by SOKiK is not free from controversies. In the late 1990s and early 2000s, the question whether SOKiK is a 1st instance court or a court merely reviewing UOKiK's decisions was disputed (at that time, an appeal to the Court of Appeal in Warsaw from SOKiK's judgments was not available). In the judgment of 12 June 2002, P 13/01, the Constitutional Court clearly ruled that SOKiK should be deemed

to be a 1st instance court⁴. For this reason, an appeal from its judgment should be available. The provisions of the Civil Procedure Code that excluded such possibility were found to be unconstitutional. In addition, in the judgment of 31 January 2005, SK 27/03, the Constitutional Court ruled also that SOKiK should be entitled not only to uphold or change a UOKiK decision but also to repeal it. The provision of the Code of Civil Procedure depriving an addressee of a UOKiK decision of the right to file such submission was found to violate the Constitution.

Another related line of controversies concerned, and still concerns, the role of SOKiK in practice. Facing the problem of a superficial and rather formalistic review of UOKiK's decisions by SOKiK, the Supreme Court started insisting that SOKiK should not refrain from deciding on the merits of the reviewed cases⁵. In other words, delivering judgments on the merits (facts included) was considered to be the role of SOKiK as the 1st instance court⁶. The Supreme Court held also that a change of a UOKiK decision (judgment on the merits) rather than its annulment should be the rule when SOKiK concludes that UOKiK's findings had not been supported by evidence⁷. The Court of Appeal in Warsaw went even further by stating that SOKiK is obliged to adjudicate on the case from the beginning and that it is precluded from basing its judgments on the findings of the administrative authority⁸.

⁴ The 1st instance character of the proceedings before SOKiK was confirmed also in many Supreme Court judgments, see the judgments of: 7 April 2004, III SK 27/04; 13 May 2004, III SK 44/04; 13 May 2004, III SK 46/04; 25 May 2004, III SK 50/04; 20 September 2005, III SZP 2/05; 10 May 2007, III SK 18/06; 10 April 2008, III SK 27/07; 19 August 2009, III SK 5/09; 3 October 2013, III SK 67/12; 28 January 2015, III SK 29/14.

⁵ See the Supreme Court judgments of: 18 September 2003, I CK 81/02; 13 May 2004, III SK 44/04; 20 September 2005, III SZP 2/05. See also the Supreme Court judgment of 17 March 2010, III SK 40/09 and the judgment of the Court of Appeal in Warsaw of 20 December 2006, VI ACa 620/06. For such conclusion in market regulation cases see the judgment of the Supreme Court of 28 January 2015, III SK 29/14.

⁶ The side-effect of this line of judgments was the complete lack of review of alleged procedural violations committed by the UOKiK during administrative proceedings. See for example the judgment of the Court of Appeal in Warsaw of 9 October 2009, VI ACa 86/09, finding that SOKiK was right in denying to rule on alleged procedural violations by UOKiK. See also the judgment of the Supreme Court of 19 August 2009, III SK 5/09 and the judgment of the Court of Appeal in Warsaw of 20 March 2012, VI ACa 1038/11. See more Bernatt, 2013, p. 94–98 and Bernatt, 2016b, p. 13–14. Positive changes in this respect were brought about by the Supreme Court judgment of 3 October 2013, III SK 67/12, see more Aziewicz, 2015, p. 261. For a study of the PKP Cargo abuse of dominance case see Gac and Bernatt, 2016.

⁷ See the Supreme Court judgment of 10 April 2008, III SK 27/07. See also the Supreme Court judgment of 5 November 2015, III SK 55/14 and 5 November 2015, III SK 7/15.

⁸ The judgment of the Court of Appeal in Warsaw of 31 May 2011, VI ACa 1299/10. See also the judgment of the Court of Appeal in Warsaw of 20 March 2012, VI ACa 1038/11.

At the same time, stating that it is the primary role of SOKiK to decide the case on the merits did not limit the Supreme Court from saying that SOKiK is entitled to base its decision on evidence collected during the administrative phase of the proceedings and verified during the judicial proceedings⁹. Moreover, the Supreme Court has stressed in its newer judgments that the role of SOKiK is to verify a UOKiK decision (rather than adjudicate the case from the beginning)¹⁰. In the judgment of 12 April 2013, III SK 28/12 and in the judgment of 5 November 2015, III SK 7/15, the Supreme Court clearly held that courts reviewing a UOKiK decision are obliged to verify the facts established by UOKiK and their legal assessment as to whether the conditions for finding the anticompetitive practice have been met. If the evidence collected during administrative and judicial proceedings does not confirm that all the conditions for finding the practice are satisfied, the court should overturn the UOKiK decision or repeal it. These judgments confirm also that judicial proceedings are run within the limits of the scope of the UOKiK decision¹¹. For this reason, the reviewing courts have to assess the practice in the light of the charges formulated by UOKiK in the original resolution on the opening of the competition proceedings¹².

It is therefore possible to conclude that the role of SOKiK is to verify UOKiK decisions by providing a full review on the merits. This review concerns both legal and factual questions as well as fines. Still, this is judicial review rather than judicial decision-making completely independent from UOKiK's findings.

III. The Effectiveness of Judicial Review in the Polish Competition Law System

The previous part has shown that as the law stands SOKiK is entitled to provide full review on the merits of the decisions issued by UOKiK. This part of the article confronts law in books with reality – it presents the practice

⁹ The judgment of the Supreme Court of 19 August 2009, III SK 5/09 and of 13 July 2012, III SK 44/11. See also the judgments of the Court of Appeal in Warsaw of 9 October 2009, VI ACa 86/09 and of 17 June 2015, VI ACa 1475/14.

¹⁰ See the judgments of the Supreme Court of: 16 April 2015, III SK 7/14; 6 May 2015, III SK 33/14; 4 March 2014, III SK 35/13; 21 June 2013, III SK 36/12; 18 May 2011, III SK 37/11; and the resolutions of the Supreme Court of: 20 February 2014, III SK 60/13; 14 January 2014, III SK 29/13; 3 October 2013, III SK 9/13; 13 August 2013, III SK 64/12. See also the judgment of the Court of Appeal in Warsaw of: 8 March 2012, VI ACa 1150/11; 17 June 2015, VI ACa 1475/14.

¹¹ See also the judgment of the Court of Appeal in Warsaw of 17 May 2016, VI ACa 630/15.

¹² See more the Supreme Court judgment of 3 October 2013, III SK 67/12.

of judicial review in Poland. The main question to be answered is whether SOKiK makes use of its powers and whether it provides full review of UOKiK decisions in practice.

At the outset, statistics suggest that SOKiK tends to uphold the majority of UOKiK's decisions. This was the case with 63–64% of UOKiK's decisions in the field of anticompetitive practices in 2015 and 2014. At the same time, statistics suggest that SOKiK has, in fact, become more aggressive lately – it upheld 86%¹³ and around 80% of UOKiK's decisions in 2013 and 2012 respectively¹⁴. Still, the true question is whether UOKiK's decisions are upheld after proper, effective review by SOKiK, or is the latter providing a formalistic and superficial review only.

The question whether SOKiK provides a full review on the merits has been an issue ever since the Supreme Court and the Constitutional Court dispelled the doubts regarding the 1st instance character of the proceedings before SOKiK. In particular, SOKiK was criticised before 2004 for focussing only on formal aspects of UOKiK's decisions. In the judgment of 13 May 2004, III SK 44/04, the Supreme Court obliged SOKiK to focus on the merits of the reviewed cases. Despite the passage of time, a number of recent judgments of the Court of Appeal in Warsaw suggest that a review on the merits remains SOKiK's weak point. Several cases illustrate that.

In a RPM case concerning the pricing policy of Sphinks, a restaurant chain franchisor, the Court of Appeal in Warsaw held in 2015 that SOKiK did not examine the essence of the case and limited itself to the assessment of the course of the administrative proceedings before UOKiK¹⁵. In particular, SOKiK did not address the issue whether the agreements at stake could have been exempted from antitrust scrutiny under Article 8 of the Polish Competition Act of 2007 (a counterpart of Article 101(3) TFEU). Therefore, the Court of Appeal in Warsaw repealed the SOKiK judgment.

In another RPM case concerning a vertical agreement between the producer of paints and varnishes Polifarb Cieszyn and its distributors, the Court of Appeal in Warsaw accepted the use by SOKiK of presumptions of fact to prove the existence of the vertical agreement¹⁶. In particular, an agreement can be inferred from tacit adherence to the proposal of the other firm. Still, the Court of Appeal in Warsaw was not satisfied with SOKiK's review. It held that SOKiK did not establish how the participation of each of the firms concerned

¹³ See UOKiK Report on Activities in 2015, p. 40, available at <https://www.uokik.gov.pl/download.php?plik=18519> (17.11.2016).

¹⁴ See UOKiK Report on Activities in 2012, p. 17, available at <https://uokik.gov.pl/download.php?plik=13679> (17.11.2016).

¹⁵ The judgment of the Court of Appeal in Warsaw of 16 December 2015, VI ACa 1799/14.

¹⁶ The judgment of the Court of Appeal in Warsaw of 9 October 2009, VI ACa 86/09.

in the reaching and the realization of the agreement looked like, and so it did not check whether any evidence confirms the tacit acceptance of the pricing policy proposed by Polifarb Cieszyn. The Court of Appeal in Warsaw found that SOKiK failed to provide such analysis by dismissing parties' motions to admit evidence on the lack of their participation in a given agreement. In consequence, the limited scope of SOKiK's evidentiary proceedings and low quality of the justification of its judgment in this respect caused the Court of Appeal in Warsaw to repeal SOKiK's judgment and to send the case back for a more elaborate evidentiary hearing.

A similar conclusion was reached by the Court of Appeal in Warsaw in its first judgment in an abuse of dominance case concerning *Emitel*¹⁷. It found that SOKiK did not provide sufficient judicial review. The Court of Appeal in Warsaw found that SOKiK's disagreement with UOKiK as to its definition of the relevant market (leading to the annulment of UOKiK's decision by SOKiK) should be based on SOKiK's own analysis of the relevant market and the specific facts established by SOKiK. The latter should not have limited itself to invoking relevant legal provisions without applying them to the facts of the case¹⁸.

A similar situation can be observed in regulatory cases that are reviewed by SOKiK by means of identical procedural provisions¹⁹. In regulatory case concerning the energy sector involving Polska Grupa Energetyczna, the Court of Appeal in Warsaw found that SOKiK abstained from reviewing the facts of the case, which is an indispensable prerequisite in order to correctly apply the substantive provisions²⁰. In particular, the justification of the SOKiK judgment did not contain any factual analysis and merely reported the course of the administrative proceedings. In addition, the Court of Appeal in Warsaw criticized SOKiK for not taking its own evidentiary initiative to supplement the evidence lacking from the administrative proceedings²¹. Similarly, this time in a telecoms case, the Court of Appeal in Warsaw observed in 2011 that the justification provided in the SOKiK judgment should have contained an analysis of the facts which the court had found to be proven, an analysis of the evidence that had enabled the court to reach its conclusion and should have presented

¹⁷ The judgment of the Court of Appeal in Warsaw of 13 May 2010, VI ACa 126/10 repealing the SOKiK judgment of 19 October 2009, XVII Ama 66/08. For a more elaborate analysis of this case see section IV of this article.

¹⁸ The judgment of the Court of Appeal in Warsaw of 30 April 2015, VI ACa 904/14, is another example in the abuse of dominance field of the criticism of a SOKiK judgment for an insufficient review on the merits.

¹⁹ See section II of this article.

²⁰ The judgment of the Court of Appeal in Warsaw of 7 January 2016, VI ACa 1891/14 repealing the SOKiK judgment of 6 October 2014, XVII Ama 126/12.

²¹ The judgment of the Court of Appeal in Warsaw of 7 January 2016, VI ACa 1891/14.

the way in which substantive provisions had been applied²². The mere repetition by SOKiK of the content of the administrative decision failed to meet such requirement. A very similar assessment of a SOKiK judgment can be found in the judgment of the Court of Appeal in Warsaw in *Orange Polska*²³.

The aforementioned cases do not mean that SOKiK judgments are repealed by the Court of Appeal as a rule. This does also not mean that SOKiK always upholds UOKiK's findings on anticompetitive practices²⁴. Still, the discussed judgments show that SOKiK's review on the merits can in many instances be unsatisfactory. Parallel studies proved that SOKiK's attention is often limited to the amount of the fine imposed by UOKiK (Bernatt, 2016e, p. 147–152)²⁵. The courts take an aggressive stance towards UOKiK's fining policy and tend to significantly reduce the fines imposed (very often by 50–90%) while upholding UOKiK's findings concerning the infringement (Bernatt, 2016e, p. 147–152). Such approach may produce counter-effects. It may bring risks to the deterrence of UOKiK's fining policy while, at the same time, failing to provide effective judicial review on the merits (Bernatt, 2016d, p. 22–24; for a discussion in this respect see also: Piszcz, 2013, p. 327–328; Szydło, 2016, p. 92).

IV. Judicial Deference to UOKiK's Determination of the Relevant Market

1. Introduction

If the review of UOKiK's decisions by SOKiK is only formal and superficial, it falls short of ECHR standards²⁶. This kind of review does not give basis for judicial deference. As noted in the Introduction, judicial deference should be

²² The judgment of the Court of Appeal in Warsaw of 31 May 2011, VI ACa 1299/10.

²³ The judgment of the Court of Appeal in Warsaw of 14 July 2015, VI ACa 1171/14.

²⁴ For example, in the controversial judgment of 19 June 2015, XVII Ama 112/12, SOKiK repealed the important UOKiK decision of 23 November 2011, DOK-8/2011 where UOKiK had found a violation of competition law by Polish mobile network operators. The latter colluded on how to deal with the undertaking that in an answer to a tender offer by the President of the Office of Electronic Communications was willing to provide reception services for TV broadcasting on mobile phones via DVB-H technology. According to UOKiK, the agreement impeded the development of the wholesale DVB-H television market in Poland. See also the SOKiK judgment of 17 December 2013, XVII Ama 178/11 in case *Zakłady Tworzyw Sztucznych Gamrat S.A.*

²⁵ See also the reports by Anna Piszcz and Monika Namysłowska prepared in the framework of the University of Warsaw Centre for Antitrust and Regulatory Studies research project on the judicial review on fines in competition and consumer law, see http://www.cars.wz.uw.edu.pl/badania_gb-10.html (17.11.2016).

²⁶ See *Albert and Le Compte v. Belgium*, no. 7299/75, CE:ECHR:1983:1024JUD000729975, para. 29.

seen as permissible only after effective judicial review is put in place. Still, putting aside the weaknesses of SOKiK's review (remedied often – in lengthy proceedings – by the Court of Appeal in Warsaw and the Supreme Court), one can ask whether Poland's higher courts, and in particular the Supreme Court, tend to defer to the expert findings put forward by UOKiK. This may be illustrated by studying whether Polish courts, and in particular the Supreme Court, are ready to defer to UOKiK's determination of the relevant market. Four important abuse of dominance cases which reached the Supreme Court in the last six years are chosen for a case study analysis.

The study of whether the courts defer to UOKiK's definition of the relevant market is justified because the concept of the relevant market is an open-ended, ambiguous legal term²⁷. It is prone to different interpretations in particular factual contexts. To establish what is the relevant market, the competition authority must perform a complex fact-finding process and to assess evidence of an economic nature. This is true for both the relevant product market and the relevant geographic market. Therefore, different and at least potentially equally correct determinations of the relevant market can often be made and so the choice made by the competition authority is apt to judicial deference. The courts may be ready to defer to the determination of the relevant market made by the competition authority, even if alternative conclusions could be reached²⁸. The following analysis is going to check whether this hypothesis is true for Poland.

2. *Emitel*: UOKiK Needs to Prove Its Expertise

In 2007, UOKiK found that TP EmiTel – the owner of transmission masts broadcasting radio and television signal – had abused its dominant position by charging different rates for broadcasting radio and television signal via its terrestrial broadcasting network to the publicly owned TV/radio stations and different, lower prices to private ones²⁹. The question whether UOKiK was

²⁷ Art. 4(9) of the Polish Competition Act of 2007 provides that the term relevant market “shall mean a market of goods which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in the area in which, by reason of the nature and characteristics of such goods, the existence of market barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous”. Banasiński stresses that the determination of the relevant market involves UOKiK's discretionary assessment as the elements of the legal definition of that term provide general guidance only, see Banasiński, 2015, p. 256.

²⁸ For such situation in the US see the opinion of the U.S. Court of Appeal for 11th Circuit in *McWane* exclusive dealing case, *McWane, Inc. v. F.T.C.*, 783 F.3d 814, 831-832 (11th Cir. 2015).

²⁹ See the UOKiK decision of 25 October 2007, DOK-95/2007.

right in its determination of the relevant market defined as a national market of both radio and television terrestrial broadcasting services was a crucial issue in this case³⁰. It was addressed by all courts deciding the case: SOKiK³¹, the Court of Appeal in Warsaw³² and the Supreme Court³³.

In defining the relevant market, UOKiK included an analysis of supply-side substitutability. It observed that the providers of broadcasting services buy from Emitel access to its transmission masts in order to transmit both radio and TV channels and then use the same infrastructure for this purpose. By contrast, SOKiK found – without according deference to UOKiK’s approach – that the complete lack of demand-side substitutability of TV and radio services excludes the possibility of finding that these two services are substitutes on the supply side³⁴. In addition, SOKiK referred to the opinion of expert witness submitted during judicial proceedings to argue that costs of switching from transmitting radio signal to transmitting TV signal are high and this may require significant investments of the owner of the transmission masts. The high cost and in consequence time needed to switch from providing one service to another precludes the existence of supply substitutability. In consequence, SOKiK found that two separate relevant markets exist – one for radio broadcasting services and one for TV broadcasting services. The incorrect definition of the relevant market led SOKiK to the annulment of the UOKiK decision. The SOKiK judgment was upheld by the Court of Appeal in Warsaw in its entirety³⁵. The Court of Appeal in Warsaw agreed with UOKiK that supply substitutability can be taken into account when defining the relevant market. Still, it found that SOKiK was correct in its negative assessment of UOKiK’s analysis in this respect. When the *Emitel* case reached the Supreme Court³⁶, the latter took the opportunity to provide the lower courts with guidance on how to review UOKiK’s determination of the relevant market.

The Supreme Court in principle confirmed the lower courts assessment of the relevant market. At the same time, the Supreme Court made important observations of a general nature. After taking into account the *de novo* character of the judicial proceedings, it ruled that SOKiK is not bound by

³⁰ UOKiK found that Emitel held a clear dominant position on such market (87% market share) and that entry barriers were high.

³¹ See in particular the analysis provided in SOKiK’s second judgment in the *Emitel* case, the judgment of 18 December 2012, XVII Ama 172/08.

³² See, in particular, the analysis provided in the second judgment of the Court of Appeal in Warsaw in the *Emitel* case, the judgment of the Court of Appeal in Warsaw of 26 May 2014, VI ACa 1260/13.

³³ The Supreme Court judgment of 5 November 2015, III SK 7/15.

³⁴ The SOKiK judgment of 18 December 2012, XVII Ama 172/08.

³⁵ The judgment of the Court of Appeal in Warsaw of 26 May 2014, VI ACa 1260/13.

³⁶ The Supreme Court judgment of 5 November 2015, III SK 7/15.

UOKiK's determination of the relevant market. Still, any modification of the relevant market by the reviewing courts requires a change of the operative part of the UOKiK decisions also. On this basis, it is legitimate to argue that the Supreme Court sees SOKiK's role as a verification of the correctness of the findings made by UOKiK. This means that SOKiK cannot simply disregard UOKiK's definition of the relevant market – it needs to base its potentially different findings in the frame of the initial assessment made by UOKiK. Thus, there are no legal obstacles for the reviewing courts to accord due respect to this assessment.

The final judgment in the *Emitel* case may suggest that the Supreme Court – in a different case – would be ready to agree to some deference to UOKiK's determination of the relevant market. There are two reasons for that. First, the Supreme Court directly acknowledged that the definition of the relevant market involves a certain margin of appreciation. Thus, one could argue that the choice made by the competition authority in the frame of such margin should be entitled to judicial respect³⁷. Second, the judgment suggests that respect given to the assessment of the relevant market made by the competition authority may be conditioned with the persuasiveness of UOKiK's reasoning and, in particular, the extent to which this assessment is based on market studies. Their importance grows when the UOKiK decision addresses new markets, not yet defined in its enforcement practice. In addition, UOKiK is expected to play an active role during judicial proceedings – this may include its readiness to modify its assessment of the relevant market while defending its finding that the firm at stake holds and abuses its dominant position on such market. This may be required from UOKiK due to the *de novo*, contradictory character of the proceedings before SOKiK.

Having this reasoning in mind, the Supreme Court analysed the extent to which UOKiK's decision in the *Emitel* case was based on market studies. The activeness of UOKiK during judicial proceedings was assessed as well. The Supreme Court concluded that UOKiK failed in both respects. In particular, the Supreme Court observed that UOKiK did not provide either in the justification of its decision or in the judicial proceedings any economic proof as to the existence of supply substitutability of the offers of broadcasting radio and TV services. The competition authority did not show that reciprocal pressure from the providers of these services existed. In addition, according to the Supreme Court, UOKiK did not provide a market analysis on how the

³⁷ Still, the courts should review how UOKiK reached the stage of making the choice out of many possible definitions of the relevant market. The courts should review whether the interpretation of the law was correct, whether UOKiK assessed the collected evidence correctly and whether the facts were subsumed correctly to the established law, see the discussion in section I of this paper.

market on which Emitel acted actually operated. Instead, UOKiK presented its own narrative of how this market looked like in its opinion only.

The *Emitel* case suggests that common courts reviewing UOKiK decisions – when they eventually end up reviewing the case on its merits³⁸ – are not inclined to accord deference to UOKiK's definition of the relevant market³⁹. They are ready to rely on alternative findings of judicial expert witness⁴⁰ and to change UOKiK's assessment as a result. On the other hand, the Supreme Court's *Emitel* judgment may suggest that there is potentially some space for judicial deference to UOKiK's assessment of the relevant market. However, in order to deserve it, UOKiK needs to do its homework first – it must provide a market analysis and take initiative during the judicial proceedings.

3. *Marquard Media*: Novel Cases Should be Decided and Reviewed Carefully

Marquard Media is another case where UOKiK's determination of the relevant market was a crucial issue disputed by the parties. The case reached the Supreme Court twice; in both judgments the Supreme Court assessed the correctness of the analysis performed by the lower instance courts in their review of UOKiK's determination of the relevant market⁴¹. The case started in 2006 when UOKiK found that the investigated company's pricing policy had an anticompetitive character. The company, Marquard Media Polska, charged a very low retail price (1 PLN) for its national sports newspaper 'Przegląd Sportowy' but only in the Silesia province where its paper had a very popular competitor, the newspaper 'Sport'⁴².

The competition authority defined the relevant market in this case as a national market of daily sports newspapers. It took into account the fact that 'Przegląd Sportowy' is published nationally, while 'Sport' is published in most Polish regions. Even if 80% of the sales of 'Sport' took place in Silesia, both 'Sport' and 'Przegląd Sportowy' were present on the majority

³⁸ The first UOKiK judgment in *Emitel* (the judgment of 19 October 2009, XVII AmA 66/08) was an example of a cursory, formal review only. See more sec. 3 of the article.

³⁹ The Supreme Court judgments of 19 August 2009, III SK 5/09 and of 12 April 2013, III SK 28/12.

⁴⁰ General standards of civil procedure dictate that when complex economic questions are raised before the court, the latter can order an expert opinion *ex officio* (without the motion of parties in this respect), see the Supreme Court judgment of 27 August 2003, I CK 184/03.

⁴¹ See the Supreme Court judgments of 19 August 2009, III SK 5/09 and of 12 April 2013, III SK 28/12.

⁴² The UOKiK decision of 2 June 2006, RKT-35/2006. See more about case: Kohutek, 2010, p. 294–299; Bernatt, 2010b, p. 300–305, available at <http://ssrn.com/abstract=1874797> (17.11.2016).

of the Polish territory and consumers had access to both. There were also no barriers for 'Sport' to enter the two Polish regions where it was not yet available. In addition, UOKiK found that general national newspapers that contained parts dedicated to sports could not be seen as substitutes to national sports newspapers as the latter contain more specific, broader and up-to-date information on sports. The competition authority rejected therefore alternative determinations of the relevant market where 'Przegląd Sportowy' could not have been deemed to hold a dominant position. These would include a regional, Silesian market of daily sports newspapers or a national market of daily sports newspapers including general newspapers containing sports news.

At the review level both SOKiK and the Court of Appeal of Warsaw confirmed the UOKiK decision. They fully upheld UOKiK's determination of the relevant market. By contrast, the Supreme Court took a different view. It agreed that general daily newspapers are not substitutes to daily sports newspapers (as they meet different consumer needs). The Supreme Court held however that the lower instance courts reviewing the UOKiK decision did not offer a sufficient analysis of the competitive relations between 'Przegląd Sportowy' and 'Sport'. In particular, their analysis lacked the comparison of the subject-matter and the content of the two dailies. In the opinion of the Supreme Court, such study could potentially show that 'Sport's news are limited to Silesian sports only, a fact that could suggest – in the light of its marginal level of sales in other Polish regions – that 'Sport' is not and does not want to become the substitute of 'Przegląd Sportowy' for consumers from regions other than Silesia. Such finding could bring the lower instance courts to the conclusion that the geographic market is limited to Silesia only. The Supreme Court did not express its own opinion in this respect and sent the case back for a more elaborate analysis. At the same time, it did not suggest (directly or indirectly) that courts should attach any special importance to the way in which UOKiK determined the relevant market.

In the re-established proceedings, SOKiK in its judgment of 11 March 2011 re-confirmed UOKiK's determination of the relevant market as a national market of sports dailies. It compared the content of 'Przegląd Sportowy' and 'Sport' and found that they contained information both about Silesian and national sports. In addition, SOKiK found that no data existed suggesting that 'Sport' plans to limit its exposure to the Silesian market only. On 8 February 2012, the Court of Appeal in Warsaw upheld the SOKiK judgment. It referred to evidence collected during the proceedings before UOKiK and found that both newspapers covered sports news of the same type (national and international).

The case reached the Supreme Court once again. In the judgment of 12 April 2013, the Supreme Court underlined that UOKiK's determination of the relevant

market in complex, precedential cases involving antitrust axiology should be based on market analysis of an economic nature⁴³. The Marquard Media case had such character⁴⁴. Therefore, the Supreme Court expected from UOKiK a sensitive and prudent approach involving economic studies of the relevant market. On the other hand, the Supreme Court held also that courts should attach special attention in such cases to UOKiK's reasoning and carefully scrutinize the determinations made by the competition authority.

Assessing the judgments of SOKiK and the Court of Appeal in Warsaw, the Supreme Court found that both courts failed to apply the instructions of the earlier Supreme Court *Marquard Media* judgment. The Supreme Court found that a superficial analysis of the content of the two dailies is insufficient to substantiate the conclusion that both dailies have a national character. In particular, the lower instance courts failed to identify consumer preferences and to find out whether they considered both dailies to be substitutes. For these reasons, the lower instance courts failed to determine the relevant market correctly. In consequence, the Supreme Court repealed the judgment of the Court of Appeal in Warsaw. At the same time, it changed the SOKiK judgment by repealing the UOKiK decision. It believed that Marquard Media could not have been considered to have abused a dominant position as the relevant market was not established correctly.

Several conclusions stem from the *Marquard Media* case. The competition authority needs to base its determination of the relevant market on a market analysis of an economic character. A superficial, descriptive determination of the relevant market will not satisfy the Supreme Court. In addition, a novel and complex nature of a case is seen by the Supreme Court as an argument for special diligence and more vigilant checks at the judicial level (rather than judicial deference) when it comes to overseeing the performance of the competition authority. If judicial review by lower instance courts is found lacking, the Supreme Court is ready to intervene directly in the case by imposing its own views and interpretations on lower instance courts. When they fail to implement them, the Supreme Court may annul a UOKiK decision by itself (if it finds the decision to be unsupported by sufficient analysis). Still, questions remains open whether the Supreme Court would accept UOKiK's determination of the relevant market (determination upheld by reviewing courts) if it was supported by sufficient economic analysis even if other alternative solutions could have been reached by the Supreme Court

⁴³ The judgment of 12 April 2013, III SK 28/12.

⁴⁴ According to the Supreme Court, the *Marquard Media* case had such a character because it involved a definition of the relevant product market and concerned a practice of a nationally dominant firm limited to the part of the market on which it operated.

itself. *Marquard Media*, differently than *Emitel*, does not provide much hints in this respect.

4. *Telekomunikacja Polska*: Readiness of the Supreme Court to Substitute UOKiK's Determination of the Relevant Market with its Own

The Supreme Court judgment in the *Telekomunikacja Polska* case is yet another example of the Court's readiness to put forward its own definition of the relevant market⁴⁵.

The *Telekomunikacja Polska* case concerned the unfair pricing policy of the incumbent telecommunication company concerning the lease of its infrastructure on the market for the cable ducting system (product market). In its decision, UOKiK believed that the adoption by *Telekomunikacja Polska* (hereinafter, TP) of one uniform pricing policy on different local markets, despite their different technical, topographical and economic character, amounted to an abuse of a dominant position⁴⁶. The competition authority and the reviewing courts considered TP's cable ducting system to be an essential facility – telecom firms competing with TP could not offer their services profitably without access to that system. At the same time, neither UOKiK nor the reviewing courts precisely determined each of these local markets. In particular, the Court of Appeal in Warsaw in its judgment of 27 May 2009 described the relevant geographic market as a national market consisting of numerous undefined local markets.

The Supreme Court found such approach to be incorrect because the definition of the relevant geographic market was pre-determined by the alleged anticompetitive practice – a uniform pricing policy all across Poland. It sent the case back to the Court of Appeal in Warsaw. At the same time, the Supreme Court offered its own definition of the relevant market. It held that in this case the relevant market is one national market of the supply of the cable ducting system (rather than a national market seen as a conglomerate of local markets). This is dictated, in the view of the Supreme Court, by the fact that TP is present on the whole territory of Poland, it provides access to the cable ducting system all across the country, and it unifies the method of calculating the lease fee for such access.

Thus, *Telekomunikacja Polska* is an example of the Supreme Court substituting its own definition of the relevant market for that of UOKiK and of the lower courts. It does not follow from the Supreme Court's judgment

⁴⁵ The Supreme Court judgment of 17 March 2010, III SK 40/09.

⁴⁶ The UOKiK decision of 24 May 2004, RPZ 10/2004.

that UOKiK's determination of the relevant market (even if it was supported by complex economic analysis) merits courts' special respect⁴⁷.

5. *Autostrada Małopolska*: Narrow Definition of the Relevant Market Can Be Upheld

Autostrada Małopolska shows that the Supreme Court might uphold UOKiK's definition of the relevant market even if this definition is very narrow and open to disputes (alternative definitions are available)⁴⁸.

The case concerned the practice of Stalexport, the operator of the A-4 highway between Katowice and Cracow. Stalexport charged car drivers a fixed fee of 13 PLN for the use of that toll road despite the fact that a substantial part of that road was periodically subject to roadworks, leading to numerous traffic problems and reduced utility for drivers. The competition authority found that Stalexport abused its dominant position by maintaining a set service fee despite a decrease in the quality of the services provided (imposition of unfair prices)⁴⁹. The UOKiK decision was upheld first by the reviewing lower instance courts and later by the Supreme Court⁵⁰.

Interestingly, the Supreme Court confirmed UOKiK's definition of the relevant market as the market for paid driving on the A-4 highway between Katowice and Cracow (for broader analysis of the case see Krajewska, 2013, p. 246–250). Both the defendant as well as outside commentators (Kohutek, 2012) claimed that the relevant market was defined too narrowly. They referred to an analysis of the product market in view of the objective of the service. They argued that the market should be defined more broadly to include alternative roads between Katowice and Cracow as well as rail and bus connections (Krajewska, 2013, p. 249). They believed that these services should be seen as substitutes to the A-4 highway. In particular, because of the roadworks on the A-4 highway, the travel time and conditions (one-lane road only) were similar by means of the A-4 highway and alternative ordinary roads (Kohutek, 2012; Krajewska, 2013, p. 249).

The Supreme Court did not share this view. According to the Supreme Court, what distinguishes the two kinds of roads is the fee that has to be paid by drivers using the A-4 highway (commercial character of the service) and the ordinary characteristics of a highway (such as the possibility to drive faster,

⁴⁷ For the Supreme Court substituting its own assessment for this of UOKiK and of the lower instance courts in the field of the abuse of dominance see also the Supreme Court judgment of 19 February 2009, III SK 31/08.

⁴⁸ The Supreme Court judgment of 13 July 2012, III SK 44/11.

⁴⁹ The UOKiK decision of 25 April 2008, RKT-09/2008.

⁵⁰ See the Supreme Court judgment of 13 July 2012, III SK 44/11.

freely overtake, lack of road crossings). As a result, only another toll highway between Katowice and Cracow, with similar quality parameters to the A-4 highway, could thus be a substitute for the scrutinized toll dual-carriageway between Katowice and Cracow (Krajewska, 2013, p. 248–249).

Even if UOKiK won the case and had its narrow definition of the relevant market upheld by the Supreme Court, the language of the Supreme Court judgment in *Autostrada Małopolska* does not suggest that any implied judicial deference was a reason for that. The Supreme Court offered its own analysis of the relevant market (especially as to the paid and commercial character of the highway) and reached the same conclusions as UOKiK.

V. The Variables of Judicial Deference – Is There a Place for Respect to UOKiK’s Findings?

1. Introduction

The previous part has shown that Polish courts, and the Supreme Court in particular, are not necessarily inclined to accord deference to UOKiK’s findings involving the application of an ambiguous legal term in a given factual context. Arguing for more judicial deference to an administrative authority’s expert findings is justified when three variables are present: due process guarantees within the administrative proceedings; institutionally guaranteed impartiality of the administrative decision-makers (the division of prosecutorial and investigative functions from decision-making ones); and the expertise of the administrative decision-maker⁵¹. The greater the degree of the presence of these variables, the more deferential judicial review can be. This part of the paper aims to briefly analyse the extent to which these variables are present in the proceedings held before UOKiK. Their significant presence could justify greater than at present judicial deference to UOKiK’s findings.

2. Due Process Guarantees

The question whether proceedings before UOKiK offer sufficient procedural guarantees to the firms involved had attracted widespread attention in literature in recent years (see for example Turno, 2008; Kolasiński 2010; Bernatt, 2011a). Authors were arguing that the level of procedural rights’

⁵¹ See the Introduction and the literature invoked there.

protection is insufficient and that improvements are very much needed. In particular, the broad procedural amendment of the Competition Act of 2014⁵² was considered a lost opportunity to improve the system (Martyniszyn, Bernatt, 2015, p. 8; see also Kowalik-Bańczyk, 2014; Skoczny, 2015). Calls formulated during the legislative consultation process were ignored and the amendment focused on instruments bringing more effectiveness to competition protection in Poland (such as settlements, remedies, leniency plus and individual liability of managers).

Eventually, the new UOKiK presidency offered in 2015 several improvements by means of soft law guidelines. The Polish competition authority introduced an EU-like statement of objections, new rules regulating direct contacts between undertakings and UOKiK representatives, new policy concerning the publication of all judicial rulings reviewing UOKiK's decisions, and a new policy concerning public access to UOKiK's market analysis. In addition, an internal evaluation committee inside UOKiK was established (Bernatt, 2016c, p. 247–252; Laszczyk, 2016, p. 141–156).

Still, even in light of these improvements, proceedings before UOKiK are characterized by some shortcomings. The Competition Act lacks clear grounds for the protection of legal professional privilege and the privilege against self-incrimination in proceedings before UOKiK (Bernatt, 2012, p. 264). In addition, uncertainties exist as to the far reaching protection of business secrets and the scope of parties' right to be heard (Bernatt, 2010a, p. 53–70). Further problems relate to the question of the proportionality of UOKiK inspections and the scope of judicial control over these inspections (Bernatt, 2011b, p. 47–66; see also Materna, 2012) as well as a near-complete exclusion of third parties' access to UOKiK proceedings (Bernatt, 2012, p. 264). Moreover, a UOKiK decision whether to organize an oral hearing or informal, direct meetings between the representatives of UOKiK and undertakings is fully discretionary (Bernatt, 2016c, p. 252). From a comparative point of view, it is fair to say that the level of protection of procedural rights is arguably lower than in the proceedings before the European Commission or in other countries of the region such as Hungary (in respect of Hungary see Domotorfy, Simon 2016; Toth 2015). It is certainly different from standards offered in proceedings before the US Federal Trade Commission – an administrative agency that under US administrative law standards is arguably entitled to judicial deference (Zeisler, 2015, p. 287–93; Bernatt, 2016a, p. 315–320)⁵³.

⁵² The Act of 10 June 2014 amending the Act on the Protection of Competition and Consumers and the Code of Civil Procedure [2014] OJ 945.

⁵³ For the analysis of judicial deference in the context of FTC administrative decision issued under sec. 5 of the FTC Act see also Crane, 2008, p. 1159; Hemphill, 2009, p. 628; Marshak, 2011, p. 1121; Hurwitz, 2014, p. 208.

It is therefore possible to conclude that the scope of procedural guarantees offered to the parties in proceedings held before UOKiK – while improving – still remains insufficient.

3. Institutional Impartiality

Even greater challenges concern the institutional impartiality of UOKiK. Inside UOKiK, there is no division of prosecutorial and investigative functions on the one hand, from decision-making ones on the other. It is possible that the same case handlers that work for UOKiK's Competition Protection Division, who were involved in the investigatory *ex-parte* phase of the proceedings and then in its main phase on the merits, will later draft the UOKiK decision. Such draft decision before being signed by the UOKiK President will be consulted with other departments (including the legal department and the market analysis department) and so the modification of the draft is possible. Still, this safeguard is too weak to eliminate the risk of prosecutorial bias. In particular, there is no one inside UOKiK who is independent from the UOKiK President who could remedy these shortcomings (someone like the EU Commission's hearing officer). The Internal Evaluation Committee established in 2015 is responsible for the coherence of UOKiK departments and local offices and the overall quality of its decisions (Bernatt, 2016c, p. 251). It does not address directly problems surrounding the lack of institutional impartiality.

In addition, the impartiality of the person holding the position of the UOKiK President may be at potential risk also since there are no guarantees of his/her independence. The position of the Polish competition authority has no term – the UOKiK President can be revoked at the Prime Minister's discretionary will at any time (Bernatt, Skoczny, 2011, p. 5; Jaroszyński, 2014, p. 833). For these reasons he/she may opt for not taking actions that would raise political concerns or conclude specific proceedings in a way he/she believes is expected by the Government.

Poland's model may differ from solutions employed in other Central European Countries such as Hungary (the President of the Hungarian Competition Authority does not perform decision-making functions as this is the task of the independent, collegial Competition Council, see Domotorfy, Simon, 2016). It is very different from the Federal Trade Commission institutional and procedural model (Bernatt, 2016a, p. 315–316).

For all these reasons, it is possible to conclude that institutional impartiality is insufficient in the Polish competition law model.

4. UOKiK's Expertise

The level of actual expertise of UOKiK as an institution is difficult to measure in abstract terms. It depends very much on the level of expertise of particular case-handlers involved in a given decision-making process, the level of expertise of the people responsible for the management of UOKiK departments in a particular period of time, and the level of expertise of the person serving as the UOKiK President. Still, one can hypothesize that the following factors can adversely affect the level of UOKiK's expertise.

First, the Competition Act regulates only generally the expected skills of the person to become the UOKiK President. Article 29(3a) states that the UOKiK President should possess qualifications and knowledge in the fields for which the President of the Office is responsible. Practice suggests that this criterion was not always interpreted very strictly and that a university degree in a legal or economic field was considered to be sufficient. Still, the fact that the Nominating Commission of an expert character is responsible for proposing three candidates to the Prime Minister largely guarantees that a layman of a merely political background will not be proposed. The experience of other Central European countries – such as the Czech Republic and Slovakia suggests that a political nominee is not necessarily an unreality (Blazo, 2016).

Second, the fact that the UOKiK President can be revoked at any time by the Prime Minister creates the potential risk that drafts of merit-based, technocratic decisions can be influenced during the decision-making process by political considerations.

Third, the monocratic and hierarchical character of UOKiK poses the danger that UOKiK employees, in particular those on executive positions, can be changed every time the President changes. Experienced people may be directly or indirectly forced to leave⁵⁴ to be replaced by the incoming President's colleagues with a far more limited experience.

Fourth, as it has been noted recently by a UOKiK official, the employees of this Department (primarily responsible for antitrust enforcement) are usually very young (often employed just after university) and inexperienced⁵⁵. Due to relatively low salary levels, many of them leave the authority to work in the private sector after gaining some experience at UOKiK. A movement in the opposite direction does not take place.

⁵⁴ The rules guaranteeing the stability of employment in the civil service in Poland changed significantly in 2016.

⁵⁵ See the opinion of A. Zawłocka-Turno, the director of the UOKiK Department of Competition Protection at the international seminar on combating cartels held in Warsaw in October 2016, <http://www.lex.pl/czytaj/-/artykul/uokik-szuka-sposobow-pozyskiwania-informacji-ws-karteli> (17.11.2016).

Fifth, most of the case-handlers are lawyers. Even if UOKiK has a separate Department of Market Analysis (employing economists), its focus is on preparing market studies. Its role in adjudication is limited, external. The department only “assists other UOKiK departments by means of preparing economic analyses for the purposes of proceedings carried out by the Office”⁵⁶. In other words, economic knowledge is not necessarily directly present during antitrust proceedings, and so decisions are drafted by lawyers. They do not work hand in hand with economists, a fact that is true for other competition agencies such as the Federal Trade Commission (First, Fox, Hemli, 2012, p. 43–44).

Sixth, the quality of the justification of UOKiK decisions may be insufficient. The decisions issued by UOKiK in abuse of dominance cases analysed in section IV of this article show a weakness in their economic analysis when it comes to the determination of the relevant market – the principal reason for the Supreme Court to have rejected them. Actually, studies or calculations prepared by the Department of Market Analysis, which support UOKiK’s findings of an economic nature, are not necessarily revealed in the justification of its decisions⁵⁷.

VI. Conclusions

The analysis provided in this article brings about the following conclusions.

First, SOKiK – the court responsible for the 1st instance review of the decisions issued by the Polish competition authority, UOKiK – is entitled by statute to provide a full review on the merits of such decisions covering both legal and factual questions. In practice however, SOKiK’s review often falls short of providing effective judicial review on the merits. Instead, the review provided by SOKiK tends to be superficial and formal. The judgments of SOKiK often do not offer its own analysis on the merits, and its focus tends to be on fines rather than on substantive issues of the case before it. The shortcomings of SOKiK’s review can be remedied by the 2nd instance review offered by the Court of Appeal in Warsaw as well as, most importantly, by the Supreme Court equipped with expert knowledge in the competition law field⁵⁸. Still, this kind of

⁵⁶ <https://uokik.gov.pl/departments.php#faq500> (17.11.2016).

⁵⁷ This opinion derives from the opinion expressed by UOKiK economists during the 1st Polish Congress of Competition Law in 2015, see more http://www.1pkpk.wz.uw.edu.pl/working_papers/Ekonomika_ekonomizacji.pdf (17.11.2016).

⁵⁸ Most of the judgments are delivered by the bench of the court consisting of Polish leading scholar in the field of antitrust acting as judge rapporteur. In the past, leading EU law scholar was often responsible for deciding antitrust cases in the Supreme Court.

review process is inefficient – it is characterized by its extensive length making the execution of UOKiK decisions suspended (fines included) until they are ultimately confirmed by the courts.

Second, the case law of the Supreme Court concerning the abuse of a dominant position (relevant market definition) does not suggest that there is much space for judicial deference to UOKiK's determinations of ambiguous legal terms in a particular factual context. In particular, the Supreme Courts expects the lower instance courts to carefully review UOKiK decisions involving novel issues that have not yet been settled. The Supreme Court's own review is intense and, even if barred from deciding on facts, the Court is ready to substitute both UOKiK's and the lower courts' determinations with its own, taking into account the factual context established by UOKiK and the lower instance courts. At the same time, the case law of the Supreme Court may suggest that there might be more place for judicial deference if UOKiK decisions contained broader, economically sound market analyses and UOKiK were to play an active role during contradictory judicial proceedings (rather than remained a passive defendant of its decisions).

Third, according greater judicial deference to UOKiK does not seem justifiable at the moment. The proceedings held before UOKiK do not show the presence of the identified variables to a sufficient extent. Shortcomings with respect to the due process rights of the parties are still not fully resolved. Inside the UOKiK structure, there is no division between investigatory and prosecutorial functions from decision-making functions (no internal walls). The expertise and sufficient level of experience of the UOKiK President and UOKiK's employees involved in competition proceedings is not fully guaranteed by it by the law or by UOKiK's institutional organization. This is particularly true when it comes to knowledge in the field of economics.

Setting-up a better system of judicial review in Poland requires practical changes on both the judicial and the administrative level, as well as some legal reforms of an institutional and procedural nature. To provide effective judicial review, SOKiK judges need to improve their expertise. Since SOKiK has now less consumer cases to deal with⁵⁹, its judges have the chance to develop their competences in the antitrust field. There is also a need for SOKiK judges to be supported with expert assistant-staff. In addition, further improvements regarding due process rights in the proceedings held before UOKiK are required. Changes may well be brought at first by means of soft law. More controversially, there is a need for reshaping the institutional structure of UOKiK. Different people and different units should be responsible for running investigations and proceedings to those responsible for the drafting of UOKiK

⁵⁹ Abusive contractual terms suits are no longer part of SOKiK's mandate.

decisions. Internal walls between such units should be created. In addition, UOKiK management should work on including more economic knowledge in their decision-making process and on creating incentives for experienced antitrust experts to work for the competition authority. There is also a need for a legal amendment that would guarantee the independence of the UOKiK President from the Government and would secure his/her expertise in the antitrust field. The Polish competition authority needs also to focus greatly on the quality of the justifications of its decisions. If these changes happen to be implemented, UOKiK will have a valid reason to ask courts for greater deference to its findings even if alternative ones were to exist. This could serve effective enforcement of competition law in Poland.

To finish, Polish experiences with reviewing courts equipped with all powers to fully review the decisions issue by the competition authority shows – not surprisingly – that the problems with the adequate model of judicial review are not necessarily connected with the legal competences of the courts (law in books) but rather with practical constraints concerning both courts and the competition authority. Building a model of judicial review where both effective review and respect to the administration's competition policy is put in place requires far more than a good statute.

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