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Polish Antitrust Legislation and Case Law Review 2010

by

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Abstract

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

Résumé

L'article présent les développements clés de la loi polonaise d'ententes et la jurisprudence en 2010. Par rapport a la législation, l'article se concentre sur un nouveau règlement d'exemption les d'accords verticaux et de pratiques concertées dans le secteur automobile**.**
L'article présent caractéristiques générales des cas en matière d'ententes, surtout ceux règles par la Cour Suprême et la Cour d'Appel de Varsovie. La description des cas est divisée en parties thématiques concernant les types particuliers des pratiques restreignant la concurrence, identification des marches, relations entre le Droit de la compétition et les autres actes et problèmes relatifs a l'adoption et l'exécution des décisions par le président de l'UOKiK.

Classifications and key words: abuse of a dominant position; anticompetitive agreements; antitrust case law; antitrust legislation; common competition rule of the EU; group exemption; fines; motor vehicle distribution; relevant market.

I. Antitrust legislation. Group exemption on motor vehicle distribution

The only legal act issued in 2010 in the field of Polish competition law t is the Council of Ministers' Regulation of 8 October 2010 on the exemption of certain vertical agreements in the motor vehicle sector from the prohibition of competition restricting agreements[1]. The new act replaced its predecessor:

[1] Journal of Laws 2010 No. 198, item 1315.

Council of Ministers' Regulation of 28 January 2003 on the exemption of certain vertical agreements in the motor vehicle sector from the prohibition of competition restricting agreements[2]. The old block exemption was adopted on the basis of Article 7 of the Act on Competition and Consumer Protection of 15 December 2000[3] (hereafter, Competition Act 2000) and expired on 31 May 2010. It was expected that the new block exemption adopted in 2010 on the basis of Article 8(3) of the Act on Competition and Consumer Protection of 17 February 2007 (hereafter, Competition Act[4]) would resemble Commission Regulation of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector[5]. However, the Polish legislator did not follow the EU line. The new Polish exemption copies instead the legal solutions of the earlier national act of 2003. Except for general exemption conditions (among them: a standard threshold of 30% market share and a higher threshold of 40% for quantitative selective distribution of new cars), the regulation lists both white clauses (those that do not violate the prohibition of competition restricting agreements – Chapter 3 of the regulation, para. 15-16) and black clauses (those that infringe the prohibition – Chapter 4, para. 17-23). Moreover, unlike the new EU exemption that specifies in its Article 3 that from 1 June 2013 'Regulation (EU) No 330/2010 [general block exemption for vertical agreements - AJG] shall apply to vertical agreements relating to the purchase, sale or resale of new motor vehicles', the new Polish group exemption does not contain provisions of this kind. However, the new act will be in force only until 31 May 2013. It is thus likely that the Polish legislator will after that date, following the EU, not adopt any more special block exemptions for agreements in the motor vehicle sector. It is thus possible that from then on, motor vehicle agreements will be treated as 'standard' vertical agreements also under Polish legislation and become subject to the Regulation of the Council of Ministers of 30 March 2011 on the exemption of certain vertical agreements from the prohibition of competition-restricting agreements[6].

[2] Journal of Laws 2003 No. 38, item 329, amendements [in:] Journal of Laws 2004 No. 14, item 116.

[3] Journal of Laws 2000 No. 122, item 1319, as amended.

[4] Journal of Laws 2007 No. 50, item 331, as amended.

[5] OJ [2010] L 129/52.

[6] Journal of Laws 2011 No. 81, item 441.

II. Antitrust case law

1. General characteristics of 2010 jurisprudence

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

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

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

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

counteracting the formation of the conditions necessary for the emergence or development of competition (e.g. SN judgment of 18 February 2010, III SK 28/09, *Telekomunikacja Polska (Netia);* SN judgment of 3 March 2010, III SK 37/09, *Katowice Commune;* SOKiK judgment of 8 December 2010, XVII Ama 199/09, *ZAIKS*).

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

Most of the agreements subject to juridical review in 2010 were price-related (e.g. SOKiK judgment of 10 November 2010, XVII Ama 11/09, *PKS Zielona Góra*). One of the judgments concerned exclusive purchase resulting in an alleged market access limitation (SA judgment of 25 February 2010, VI Aca 61/09, *Lessafre-bio*); another concerned bid rigging (SOKiK judgment of

1 April 2010, XVII Ama 39/09, *Miejskie Przedsiębiorstwo Zieleni w Lublinie*). Competition restricting agreements were scrutinised mainly with respect to markets of a national dimension, for instance: a market for the wholesales of baking yeast (SA judgment of 25 February 2010, VI Aca 61/09, *Lessafre-bio*); markets related to interchange fees in a payment cards system (SA judgment of 2 April 2010, VI Aca 607/09, *Interchange fee*); a market for the wholesale distribution of the 'Harry Potter and the Order of the Phoenix' book (SA judgment of 12 May 2010, VI Aca 983/09, *Harry Potter*); a market for the sale of ceramic roof tiles (SA judgment of 22 July 2010, VI Aca 1105/09, *Röben*) and; a market for drainpipes distribution (SOKiK judgment of 15 November 2010, XVII Ama 231/09, *Gamrat*).

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

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

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

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

3. Agreements restricting competition

3.1. Price agreements

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

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

3.2. Exclusive purchase clause

In the judgment of 25 February 2010, VI ACa 61/09[7], the Court of Appeals did not share the views of the Lesaffre-Bio Corporation that an exclusive purchase clause belonged to the category of clauses that could not be qualified as restricting competition by their very object according to the Competition Act 2000. The justification of an antitrust decision cannot be limited to stating that the sole presence of such clause proves the anticompetitiveness of its goal, such approach is also unfounded in light of the Competition Act in the Court's view. If the scrutinised company denies the use of an anticompetitive practice, refers to circumstances that justify a different evaluation of the object and effect of a given clause, and even refers to market data proving that the

[7] See M. Modzelewska de Raad, 'More economic approach to exclusivity agreements:how does it work in practice? Case comment to the judgment of the Court of Appeals in Warsaw of 25 February 2010 – *Lesaffre Polska* (Ref. No. VI ACa 61/09)' (2011) 4(5) *YARS*.

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

At the same time however, the Court stated that it is still not sufficient to simply claim that an anticompetitive object can be associated with a given agreement solely because of the use of an exclusive purchase clause, the market power of the participating manufacturer and the number of participating distributors as well as their share in the market for the sale of Lesaffre-bio's yeast. Such statements are unfounded without proof of actual real market circumstances at the time of the conclusion of the contract. A high market share of the producer does not make such proof unnecessary because the Competition Act does not prohibit the conclusion of vertical agreements by manufacturers with market shares exceeding 30%. Agreements containing an exclusive purchase clause, concluded by producers with a market share over 30%, are also not prohibited in light of the block exemption for vertical agreements (Council of Ministers' Regulation of 13 August 2002 on the exemption of certain vertical agreements from the prohibition of competition restricting agreements[8]).

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

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

[8] Journal of Laws 2002 No. 142, item 1198, as amended. The regulation is not longer in force; it was replaced by the Council of Ministers' Regulation of 30 March 2011 on the exemption of certain vertical agreements from the prohibition of competition-restricting agreements.

the contested clause, it at least indicated what factors should be taken into account by the antitrust authority while assessing exclusive purchase clauses.

4. Abuse of a dominant position

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

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

4.2. Imposition of unfair prices and trading conditions

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

of a glaringly excessive price is very rare in a free market although it can be used by undertakings in network monopolies.

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

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

In the judgment of 3 March 2010, III SK 37/09, *Katowice Commune*[9], the Supreme Court upheld its position expressed in an earlier ruling of 19 February 2009, III SK 31/08 (*DROP*)[10]. Accordingly, an abuse of a dominant position through 'counteracting the formation of the conditions necessary for the emergence or development of competition' (Article 9(2)(5) of the Competition Act) takes place not only when the behaviour of the dominant company makes it impossible or difficult for its competitors to act, but also when it creates barriers fundamental for the effective entry onto the market or that market's development. In order to establish that a practice listed in Article 9(2)(5) took place, it is not enough to prove that the freedom of another company was restricted. It is also necessary to show that the limitation can actually or potentially influence the parameters of competition on the relevant market.

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

[10] See A. Piszcz, 'Is the forcing of services on suppliers an abuse of a dominant position? Case comment to the judgment of the Supreme Court of 19 February 2009 – *DROP*' (2010) 3(3) *YARS;* K. Kohutek, 'Zarzut nadużycia pozycji dominujące na rynku usług weterynaryjnych – glosa do wyroku Sądu Najwyższego z 19.02.2009 r. (III SK 31/08)' ['Objection of abuse of a dominant position on the veterinary services market – commentary about the Supreme Court judgment of 19 February 2009 (III SK 31/08)'] (2009) 4 *Glosa* 93.

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

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

[11] K. Kohutek, 'Glosa do wyroku SN z dnia 14 listopada 2008 r., sygn. akt III SK 9/08'['Comment to the judgment of the Supreme Court of 14 November 2008, ref. no. III SK 9/08'], LEX/el.2009.

4.4. Imposition of onerous agreement terms and conditions

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

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

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

4.5. Tying

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

5. Control of concentration

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

[12] See Sz. Syp, 'Intersection between the activities of two regulators – shall prior actions taken by the National Telecoms Regulator exclude the ability to intervene by the Competition Authority?Case comments to the judgment of the Supreme Court of 17 March 2010 – *Telekomunikacja Polska S.A.* (Ref. No. III SK 41/09)' (2011) 4(5) *YARS*.

possibilities to enforce an intention to concentrate e.g. on the basis of hitherto negotiations.

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

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

6. Identification of relevant markets

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

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

[13] For more details see K. Tosza, 'The very relevant market. Case comment to judgment of the Court of Appeals of 22 April 2010 – *Interchange fee*' (2011) 4(5) *YARS*.

[14] *Visa* decision of 24 July 2002, COMP/29.373.

Phoenix' constitutes its own relevant market. Being a unique part of a very famous book series, the contested title cannot be replaced by any other fantasy books on offer and distributors cannot afford to not sell it.

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

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

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

[15] See Sz. Syp, 'Intersection between the activities…' (2011) 4(5) *YARS*.

8. Competition Act and other legislation

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

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

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

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[16] See B. Targański, 'Freedom of competition or environmental safety - what should a municipality prioritize?Case comment to the judgement of the Polish Supreme Court of 3 March 2010 – *Katowice Commune* (Ref. No. III SK 37/09)' (2011) 4(5) *YARS*.

[17] The ruling of the Court of Appeals in the same case (judgment of 27 May 2009, VI ACa 1404/08) is presented in: A. Jurkowska-Gomułka,'Polish Antitrust Legislation and Case Law Review 2009' (2010) 3(3) *YARS*.

[18] Act of 13 September 1996 on Sustaining Order and Cleanliness in Communes (consolidated text: Journal of Laws 2005 No. 236, item 2008, as amended.

[19] Journal of Laws of 2007 No. 50 item 331, as amended

[20] Consolidated text: Journal of Laws 2006 No. 13, item 858, as amended.

9. Competences of the UOKiK President to act

The competence to act of the UOKiK President was raised in the *Lesaffre-Bio* case considered first by SOKiK (judgment of 18 August 2008, XVII Ama 83/07) and then by the Court of Appeals (judgment of 25 February 2010, VI Aca 61/09). The applicant contested here the validity of a decision issued by the UOKiK President. In the applicants' opinion, the decision was adopted by a person (Cezary Banasiński) whose competences to act as the UOKiK President expired on 27 October 2007, in other words, before the contested decision was issued on 29 December 2007. The Court of Appeal stated however that in the moment of adopting the said decision, the UOKiK President had been legally appointment to his position and not yet dismissed by the Prime Minister. Such a situation excludes the possibility to declare the contested decision null and void – a claim to do so is thus unjustified. The Court of Appeal shared here the views of SOKiK that competition courts are not entitled to rule on the time of the expiry of the UOKiK President's competences resulting from an appointment act issued by an eligible body. Both courts referred to the resolution of the Supreme Court of 20 February 2008, III SZP 1/08[21] that stated, as a general rule, that general courts do not have the competence to control the procedural accuracy of formally correct acts of appointment and dismissal of public administration bodies. Even if the resolution concerned the UKE President rather than the antitrust authority, the Court of Appeal found it applicable to the UOKiK President also.

10. Immediate enforcement of the decisions of the UOKiK President

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

[21] (2008) 19-20 *OSNP* 304; (2008) 2 *Biuletyn SN* 26.

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

11. Juridical control over the decisions of the UOKiK President

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

The Court of Appeals did not share this opinion and emphasised that as the court of first instance responsible for this matter, SOKiK 'cannot limit itself to pointing out the incorrectness of the decision, but it is entitled, if this is justified by facts and law, to eliminate mistakes in that decision'. The 'non-exhaustion' of administrative procedures, identified by SOKiK as the key reason for its supposed lack of competence to solve the case, should be understood, in the opinion of the Court of Appeals, as a failure to complete the proceedings. The Court of Appeals referred also to the judgment of the Supreme Court of 13 May 2004, III SK 44/04, where the latter stressed that the goal of court proceedings is not to control administrative decisions but to resolve the case on its merits. In the opinion of the Court of Appeals, an antitrust decision can be annulled only when there was no ground to adopt it, for instance, it the UOKiK President incorrectly affirmed the existence of restrictive practices. Article 479^{34} of the Polish Civil Procedure Code does not offer the possibility to annul an antitrust decision and referring the case back

[22] More on TP EMITEL case in the context of competition restricting practices – see E. D. Sage, 'Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation' (2010) 3(3) *YARS*.

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

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

12. Fines

In the judgment of 9 November 2010, VI Aca 383/10 (*Mariusz Sieradzki*), the Court of Appeals refers to the basis for calculating a fine for an antitrust infringement, a vertical price agreement in this case. The problem arises because while Article 106(1) of the Competition Act does state that fines are

based on revenue, it does not clarify what kind of income should be regarded as the basis for calculating the fine: the total income of the scrutinised entity or just the income from the sales of products/services covered by the restricting practice? The Court admitted that the Polish judicature had accepted the calculation of fines on the basis of the overall income. Such an interpretation of Article 106(1) is justified by the preventive nature of fines – otherwise they would be too low to prevent companies from anticompetitive behaviour.

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

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

13. Polish antitrust law and common competition rules of the European Union

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