

## The Scope of Application of the Provisions of the Administrative Procedure Code in Competition Enforcement Proceedings

by

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### *Abstract*

The main premise of this article is an attempt to determine the scope of application of the provisions of the Administrative Procedure Code (KPA) in antimonopoly proceedings. The legislator has introduced an extensive system of norm-referenced proceeding provisions for antimonopoly law. In matters not regulated by the legislature, however, it refers primarily to the solutions standardised by the provisions of the KPA. In the opinion of the author of the article, the general reference to the KPA contained in Article 82 is associated with the desire to create strong safeguards to protect the rights of businesses involved. It is also to promote

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stability, consistency and transparency in the application of the model antimonopoly proceedings. It seems that the legislature came to the conclusion that such a premise might be achieved by establishing the Administrative Procedure Code as the basic procedural instrument for proceedings conducted by the UOKiK President. This rather means that the ‘main burden’ of the creation of a complex mechanism for antimonopoly proceedings rests to a greater degree on the KPA.

### *Résumé*

Le présent article est essentiellement une tentative de définition du champ d'application, à la procédure de concurrence, des dispositions du Code de procédure administrative (KPA). Le législateur a mis en place un système procédural développé, réglementé par les clauses de la loi sur la concurrence. Selon l'auteur du présent article, le renvoi général au Code de procédure administrative en vertu de l'art. 82 de la loi sur la concurrence relève de l'aspiration à créer des garanties solides de protection des droits subjectifs des parties de la procédure. Cela doit contribuer également à la stabilité, la cohésion et la transparence de l'application d'un modèle de procédure de concurrence. Il semble que le législateur se soit convaincu qu'il peut atteindre un tel objectif en instituant le Code de procédure administrative comme un texte procédural fondamental pour la procédure menée par le Président de l'Office polonais de protection de la concurrence et des consommateurs (UOKiK). Cela voudrait dire que le « poids principal » en matière de mise en place d'un mécanisme complexe pour la procédure de concurrence continue de reposer sur le Code de procédure administrative.

**Classifications and key words:** competition; general principles of the Code of Administrative Procedure; antimonopoly (antitrust) proceedings; protection of business rights.

## I. Opening remarks

The Act on the Protection of Competition and Consumers<sup>1</sup> adopted on 16 February 2007 (hereafter usually referred to as the Competition Act, although in some cases the date is attached to distinguish it from other acts discussed in the same context) contains a number of provisions which are procedural in nature. It includes a separate Chapter VI, entitled ‘Proceedings before the President of the Office’ (Articles 47–105)<sup>2</sup>. This broad legal recognition of

<sup>1</sup> Journal of Laws No 50, item 331, as amended.

<sup>2</sup> *Ipsa facto*, the currently valid antimonopoly regulation contains almost half of the provisions of a procedural nature.

separate procedural regulations had in fact taken place under the predecessor law of 15 December 2000 on the protection of competition and consumers<sup>3</sup>.

At the same time, pursuant to Article 83 of the Competition Act, in matters not regulated by the Competition Act for proceedings before the President of the Office of Competition and Consumer Protection (the Polish national competition authority, hereafter called the UOKiK President after the Polish acronym), the provisions of the Act of 14 June 1960 – the Administrative Procedure Code (hereafter, KPA) – are applicable<sup>4</sup>. According to Article 84 of the Competition Act (of 16 February 2007), in proceedings before the UOKiK President matters concerning evidence which are not regulated in the Competition Act, Articles 227–315 of the Act of 17 November 1964 – the Civil Procedure Code (hereafter, KPC)<sup>5</sup> – are applicable. Furthermore, according to Article 82 of the Competition Act, the legal means foreseen in the Code of Administrative Procedure for refuting a decision, and concerning the resumption of proceedings, revocation, change or assessment of the validity of a decision, shall not apply to decisions of the UOKiK President. In addition, in matters concerning searches of premises or belongings not covered in the Competition Act, the Articles of the Criminal Procedure Code<sup>6</sup> regarding searches (Articles 219 and following) are to be applied<sup>7</sup>.

The specific character of proceedings standardised by the provisions of the Competition Act is also reflected in the different mode of appeal from judgements issued by the UOKiK President. Pursuant to Article 81(1) of the Competition Act, a party is entitled to appeal from a decision of the President of the UOKiK to the Court of Competition and Consumer Protection. Procedures on appeals are governed by the provisions of the KPC<sup>8</sup>.

The Competition Act contains provisions governing the proceedings conducted by the President of the UOKiK, standardising the basic procedural mechanisms and institutions in this respect, which differ in form from their counterparts in the KPA (Articles 47–105). The provisions of the Competition Act are constructed in such a way as to include common provisions for all types of proceedings conducted by the UOKiK President (Articles 47–85), as well as separate provisions for individual spheres of antimonopoly regulation. The

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<sup>3</sup> Cf. the Act of 15 December 2000 on the protection of competition and consumers (consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended).

<sup>4</sup> The Act of 14 June 1960 – the Administrative Procedure Code (consolidated text: Journal of Laws 2000 No. 98, item 1071, as amended).

<sup>5</sup> The Act of 17 November 1964 – the Civil Procedure Code (Journal of Laws No. 43, item 296, as amended).

<sup>6</sup> The Act of 6 June 1997 – the Criminal Procedure Code (Journal of Laws No. 89, item 555, as amended).

<sup>7</sup> Article 105c.

<sup>8</sup> Articles 379(1)–379(35) KPC.

phrase ‘antimonopoly proceedings’ shall be used in this article as a reflection of the overall standardisation of proceedings conducted by the UOKiK President based on the Competition Act. The use of this term is justified by its general acceptance in the literature on the subject, and in colloquial language this term is used for all types of proceedings conducted by the UOKiK President. It should be mentioned that in the proceedings conducted by the UOKiK President, cases of restrictive practices and concentration are the most crucial element of the procedural mechanisms contained in the Competition Act.

It can be seen that the complex structure of proceedings provided for by the Competition Act is thus based on a system of numerous referrals to other acts regulating procedure in various spheres of application of the law<sup>9</sup>. Accepting the administrative classification of the institution of referrals used in the legal system<sup>10</sup> and adopted in the literature, it should be noted that Article 83 of the Act is a referral provision which is conventional and general<sup>11</sup>, while Article 84 requires the application, in cases unregulated in the Competition Act, of the relevant provisions of evidentiary proceedings from the Civil Procedure Code, which contains detailed numerical referrals<sup>12</sup>.

The legislature has therefore introduced an expanded system of proceedings, regulated by the provisions of the Competition Act. In situations unregulated by the Competition Act, the legislation refers in the first instance to the procedural mechanisms contained in the KPA<sup>13</sup>. The legislature’s goal was to give antimonopoly proceedings the characteristics of a specific administrative procedure<sup>14</sup>. The main purpose of this report is to analyse the scope of application of the provisions of the Administrative Procedure Code in antimonopoly proceedings. The placing of so many procedural provisions in the Competition Act of 16 February 2007 is one of the elements of the continuing de-codification of the Administrative Procedure Code. Modern doctrine emphasises the need to de-codify administrative procedure in certain

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<sup>9</sup> As regards the legal institution of referrals to other acts see: A. Skoczylas, *Odesłania w postępowaniu sądownoadministracyjnym*, Warszawa 2001, pp. 1–31.

<sup>10</sup> The author presented the above ranking of views based on the entirety of collected doctrine – *Odesłania w postępowaniu...*, pp. 9–22.

<sup>11</sup> The legislator applies the method of sending to the group provisions of another legal act – A. Skoczylas, *Odesłania w postępowaniu...*, pp. 11–14.

<sup>12</sup> Numerical and detailed referrals characterized by an itemized account of provisions to which the determined legal act sends for application – A. Skoczylas, *Odesłania w postępowaniu...*, pp. 16–19.

<sup>13</sup> T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji konsumentów. Komentarz*, Warszawa 2009, p. 1366.

<sup>14</sup> R. Stankiewicz, ‘O istocie postępowania antymonopolowego’ (2008) vol. XLIX *Studia Iuridica* 184; M. Błachucki, ‘Charakter prawny postępowania antymonopolowego’, [in:] J. Boć, A. Chajbrowicz (eds.), *Nowe problemy badawcze w teorii prawa administracyjnego*, Wrocław 2009, p. 790.

areas of administration, as there is a growing necessity to solve many problems that administration has not previously encountered during its operations<sup>15</sup>. The opinion that it is necessary to implement specific solutions in antimonopoly proceedings has appeared in the existing Polish literature on the subject by authors such as J. Borkowski<sup>16</sup>, M. Bychowska and M. Krasnodębska-Tomkiel<sup>17</sup>, among others. It would seem that the differing formation of certain institutions in antimonopoly law in relation to the KPA has its basis in the view that it is necessary for the President of the UOKiK to conduct public tasks on a scale of increasing complexity and difficulty in dealing with the cases which come before the body in practice. The application of this rich structure of referrals to other procedural acts has led, in substance, to the establishment of a structure possessing many characteristics of wholeness. It has, however, lost the attribute of completely autonomous proceedings.

It has already been noted that, in antimonopoly proceedings, pursuant to Article 83 of the Competition Act, in matters not regulated by the Act the provisions of the Administrative Procedure Code apply. This means that, in antimonopoly proceedings, the provisions of the KPA which do not have direct counterparts in the procedural rules of the Act will apply. The solution adopted confirms that the KPA is the primary procedural act for antimonopoly proceedings. This solution is worth comparing to the solution contained in Article 84, according to which the provisions of the Civil Procedure Code for the taking of evidence shall apply 'as appropriate'.

This reference to the Administrative Procedure Code, in the absence of provisions concerning the same procedures in the Competition Act, makes the KPA the basic legal procedural act for proceedings conducted by the UOKiK President. The legislature has introduced an expanded system of detailed procedural institutions in the Competition Act of 16 February 2007, but this is solely due to the need to take into account the specificity of the substantive and legal norms in antimonopoly law, which is not always possible through application of the standard procedural mechanisms and institutions contained in the KPA. The general reference to the KPA contained in Article 83 of the Competition Act is associated with the desire to create strong safeguards to protect the rights of parties involved. It is also designed to promote stability,

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<sup>15</sup> Z. Kmiecik, 'Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej' (2002) 4 *Państwo i Prawo* 31 and following.

<sup>16</sup> J. Borkowski, 'Od procedury zwalczania praktyk monopolistycznych do postępowania w sprawach ochrony konkurencji i konsumentów', [in:] W. Czaplński (ed.), *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych PAN*, Warszawa 2006, p.142.

<sup>17</sup> M. Bychowska, M. Krasnodębska-Tomkiel, 'Procedura antymonopolowa jako instrument ochrony konkurencji – refleksje dotyczące ustawy z 15.12.2000 r. o ochronie konkurencji i konsumentów', [in:] C. Banasiński (ed.), *Prawo konkurencji – stan obecny i przewidywane kierunki zmian*, Warszawa 2006, p. 29.

consistency and transparency in the application of the model antimonopoly proceedings. It seems that the legislature came to the conclusion that such a premise might be achieved by establishing the Administrative Procedure Code as the basic procedural instrument for proceedings conducted by the UOKiK President. This means that in practice the ‘main burden’ of the creation of a complex procedural mechanism for antimonopoly proceedings rests to a large degree on the KPA.

## II. Difficulties in the practical application of composite procedural regulations

The use of such a complex structure of referrals in antimonopoly proceedings may create a number of difficulties in practice. The overall standards applicable in particular proceedings conducted by the UOKiK President are created in the course of the process of applying the law, by stating the applicable provisions to different legal acts. The need to carry out often complex processes of comparison and matching provisions from different legal spheres may cause increasing doubt as to the actual application of the ‘results’. In the literature on the subject, it is stressed that, in formulating such a system of referrals, the legislature ‘(...) could not avoid many errors and lapses, thus hindering the reconstruction of the existing procedures’<sup>18</sup>. Therefore, there is a need for reflection on the possible uses of the referrals indicated by the antimonopoly act in its practical application of by the President of the UOKiK.

The institution of referrals is not uniform, as is clearly indicated in the existing literature on the subject<sup>19</sup>. Therefore, its practical application depends in each case on an individual assessment by the administrative body applying the law whether the specific solution listed in a given provision of a the act indicating referral to other acts can be applied directly; whether it can be applied after suitable modification; or even whether, despite the existence of a referral, the legislative provision is not too contradictory, or the institutional mechanism to which specific referral is made is not irrelevant to a particular usage in the case before the administrative body.

Well-reasoned legislative technique should indicate the possibility of using referrals in cases where a defined legal situation provides for the need

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<sup>18</sup> Z. Kmiecik, *Postępowanie w sprawach ochrony konkurencji...*, p. 42.

<sup>19</sup> J. Nowacki, ‘„Odpowiednie” stosowanie przepisów prawa’ (1964) 3 *Państwo i Prawo* 376–371. In the subject literature they note the problem of the complexity of applying referrals, especially with regard to procedural provisions – Z. Kmiecik, *Postępowanie administracyjne w świetle standardów europejskich*, Warszawa 2007, p. 100 and following.

to take into account the procedural specificities of a particular subject of proceedings with relation to a separate act. In the (unregulated) remainder there will, however, be a referral to another act governing the procedure. The achievement of this in the Act of 16 February 2007 indicates that the intention of the legislature was to grant antimonopoly proceedings the status of specific administrative proceedings, while using the general principles of the Administrative Procedure Code as a foundation for the application and interpretation of individual procedural mechanisms contained in the Competition Act.

### **III. Protection of businesses' individual rights in antimonopoly proceedings and application of the provisions of the Administrative Procedure Code**

There is no doubt that the general provisions of administrative procedure, in addition to their catch-all function, also fulfil a protective function. It should indeed be stated that this is the basic value of administrative procedure. The protective function of administrative procedure is expressed in the introduction of specific institutions and mechanisms which are designed to assure that the individual rights of a subject of the proceedings are guaranteed effective protection during the proceedings, including the protection of the rule of law<sup>20</sup>.

Administrative procedure (including the procedure used by the UOKiK on the basis of the antimonopoly act and referrals to other normative acts) performs the protective function by means of a number of institutions and mechanisms, including in particular:

- 1) guaranteeing to the parties to the proceedings the right to actively participate in the taking of evidence;
- 2) guaranteeing the right to request evidence by a party to the proceedings;
- 3) guaranteeing the right to the protection of information concerning the parties to the proceedings (in antimonopoly proceedings in particular the right to protect trade secrets);
- 4) guaranteeing an effective right of redress.

In the doctrine of administrative proceedings, it is emphasised one role of the institutions and mechanisms indicated above is to fulfil a protective function for the procedural model (emphasis here is on those elements which are primarily designed to meet the general principles for objective truth in

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<sup>20</sup> B. Adamiak, [in:], B. Adamiak, J. Borkowski, A. Skoczylas, *Prawo procesowe administracyjne*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System prawa administracyjnego*, Vol. 9, Warszawa 2010, p. 21.

the proceedings, which govern all aspects of the course of an investigation); whereas another role is to act in a repressive manner (in particular encompassing those institutions and mechanisms which seek to eliminate malfunctioning procedures from the legal process)<sup>21</sup>. All the above mentioned procedures and institutions should ensure that the parties to antimonopoly proceedings are assured the protection of their individual rights in the pending proceedings; proceeding which may have the consequence of the issuance of an authoritative decision imposing an administrative law obligation on a party to refrain from a specific activity (prohibition of restrictive practices), and also possibly an administrative law penalty payment, aimed at disrupting its continued operation. There is no doubt that these procedural institutions created by the legislature should be so designed as to fulfil their intended tasks in the fullest possible way. Guarantees of the protective function for antimonopoly proceedings are created, above all, by the direct application of the provisions of the Administrative Procedure Code.

It also becomes necessary to find different (from the KPA) ways to regulate certain procedural institutions in view of the specific nature of cases conducted by the UOKiK President. It should be indicated, however, that the specific rules which have been created for antimonopoly proceedings which exclude the use of certain KPA instruments may lead to an infringement of the protection function built into the Competition Act's procedural model. Of primary of interest here is the specific regulation of a party to the proceedings, and to some extent a breach of the principle of transparency in the proceedings as regards the introduction of trade secrets.

This different (as compared to the KPA) system of regulation has undoubtedly required the creation of a system of protection for business secrets (cf. Articles 69–71).<sup>22</sup> All these needs are met by the Competition Act, including the specific standardisation of deadlines for dealing with a case [cf. Article 92 and Article 96(1)] and the institution of mechanisms for supervising businesses (not appearing at all in the KPA)<sup>23</sup>, and should be considered fully justified, including as well the inclusion of procedural provisions relating to the overlap of antimonopoly procedures by the national authority with investigations carried out by the European Commission, and cooperation with the Commission<sup>24</sup> in the course of proceedings conducted by the latter<sup>25</sup>.

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<sup>21</sup> B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowno-administracyjne*, Warszawa 2009, p. 25.

<sup>22</sup> Broadly see M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 240 and following.

<sup>23</sup> Articles 62–68.

<sup>24</sup> Article 75(1)(3).

<sup>25</sup> Article 73(1)(3) and (4).



Another necessary step has been the introduction of a decision mechanism which allows the UOKiK President to order a business to discontinue certain activities which, in the judgment of the antimonopoly authority, could constitute market-threatening practices that restrict competition<sup>26</sup>.

#### IV. The direct application of the provisions of the Administrative Procedure Code

As already mentioned above, the provisions of the KPA shall be applied 'directly' rather than 'accordingly'<sup>27</sup>. The solution contained in Article 83 of the Competition Act requires the application of all general principles of administrative proceedings. This also includes the general principles of the Administrative Procedure Code (Articles 6-16 of the KPA)<sup>28</sup>. These are applied directly to the extent that their application is not modified by a specific provision of the Competition Act<sup>29</sup>. The general principles of the KPA contained in Articles 6-16 of the Administrative Procedure Code constitute the foundation for all proceedings conducted by a public authority, and are used in the interpretation of individual procedural mechanisms. The general principles of the KPA also create safeguards for the parties to the proceedings. The concept of general principles in administrative proceedings has been the subject of wide interest to scholars of the doctrines of administrative law<sup>30</sup>. In view of the limited space that can be devoted to this issue in this article, let it suffice to stress the possibility of their co-application with the specifically regulated individual mechanisms of procedural law contained in the Competition Act. As A. Wiktorowska has stated, among the functions of

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<sup>26</sup> Article 89.

<sup>27</sup> Cf. K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 898.

<sup>28</sup> C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 721.

<sup>29</sup> T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1369.

<sup>30</sup> A. Wiktorowska, *Zasady ogólne kodeksu postępowania administracyjnego*, Warszawa 1985 (doctoral dissertation - library of the Faculty of Law and Administration, University of Warsaw); A. Wiktorowska, 'Rola i znaczenie zasad ogólnych KPA (funkcje zasad)' (1996) vol. 32 *Studia Iuridica*, p. 21; K. Ziemiński, *Zasady ogólne prawa administracyjnego*, Poznań 1989, p. 23 and following; M. Wierzbowski (ed.), *Postępowanie administracyjne – ogólne, podatkowe i egzekucyjne*, Warszawa 2006, p. 14 and following; B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1998, pp. 34–106; A. Jaroszyński, 'Zasady ogólne KPA w orzecznictwie NSA (1980) 6 *Organizacja, Metody, Technika*, p. 23; S. Rozmaryn, 'O zasadach ogólnych kodeksu postępowania administracyjnego' (1961) 12 *Państwo i Prawo* 44; Z. Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1987, pp. 45-75 and following.

the general principles of the KPA, the following can be specified: ordering of the procedural system, formulation of model proceedings, interpretative function, and research function<sup>31</sup>. It seems that all these also fulfil their significant role in the interpretation of the rules applicable in antimonopoly proceedings. However, in this context a special role should be attributed to the organising and interpretative functions<sup>32</sup>.

It should also be noted that, in antimonopoly proceedings, the primary principles which are applied are: the principle of legality and the rule of law (Articles 6 and 7 of the KPA); the principle of objective truth (Article 7 of the KPA); and the principle of active participation by the parties to the proceedings (Article 10 KPA). Note however that there are exceptions that indicate an inability to apply a particular general rule in antimonopoly proceedings – as, for example, the inability to apply the principle of conciliatory treatment of administrative matters contained in Article 13 of the KPA. This, however, would seem justified by the nature of the tasks underlying the application of the Competition Act, resulting from its form and the extent of interference in entrepreneurs' subjective rights in the construction of the entire procedural mechanism.

Some modifications concern the application of the rules for the provision of information (Article 9 KPA), owing to the use made during the course of the proceedings of numerous legally protected secrets. Modification of the application of the general principle of active participation by the parties in the proceedings (Article 10 KPA)<sup>33</sup> has been instigated by Article 69(1) and Article 89 of the Competition Act. The first of these provisions relates to the need to safeguard trade secrets during antimonopoly proceedings, while the second relates to restrictions on the possibility of commenting on the collected evidence during the issuance of a provisional decision. Furthermore, there have been modifications to the basic assumptions arising from the principle of continuity of administrative decision (Article 17 KPA), which include restrictions on the possibility of initiating emergency modes at the request a party. In addition there is no possibility to apply the general principle of two levels of instances (Article 12 KPA).

The possibility of direct application of KPA provisions in antimonopoly proceedings also occurs when there are no appropriate procedural mechanisms provided for in the Competition Act. In antimonopoly proceedings, the provisions of Chapters 3, 4 and 5 of Title 1 of the KPA governing issues of the hierarchy of authorities, the properties of authorities (Articles 19–23), and

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<sup>31</sup> R. Stankiewicz, 'O istocie postępowania antymonopolowego...', p. 185.

<sup>32</sup> A. Wiktorowska, *Rola i znaczenie zasad ogólnych...*, p. 263

<sup>33</sup> C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 721.

the exclusion of an employee and an authority (Articles 24–27) finding the direct application. Similarly, the KPA's provisions on proceedings on service (Articles 39–49), summons (Articles 50–56) and methods for establishing deadlines (Articles 57–60) apply fully to antimonopoly proceedings. Among the provisions of Title II of the KPA, the provisions on metrics, protocols and annotations (Articles 66a–72) are directly applicable. The introduction of a provision requiring the keeping of metrics in antimonopoly proceedings can play an especially important role in enhancing the transparency of the proceedings. In antimonopoly proceedings there is a direct application of Title VIII of the KPA (proceedings on complaints and applications). Article 31 of the KPA, relating to the share of subjects in the rights of the parties in administrative proceedings, also applies in antimonopoly proceedings, as do Articles 32 and 33 of the KPA relating to choice of agents.

It also seems that Article 108f of the KPA, referring to the possibility of bestowing immediate enforceability on a decision, will also apply in full in antimonopoly proceedings. It is true that, pursuant to Articles 90 and 103 of the Competition Act, an option was created to bestow immediate enforceability on certain antimonopoly decisions; this regulation is, however, of a residual nature. The Competition Act does not specify in what form to bestow immediate enforceability, nor whether a decision taken by the UOKiK President in this regard can be challenged. It seems that Article 108 of the KPA is applicable both to additional grounds for bestowing immediate enforceability and to the format for bestowing immediate enforceability to which it is applied<sup>34</sup>. In antimonopoly proceedings the provisions of the Administrative Procedure Code to suspend proceedings, both as regards mandatory and optional suspension (Articles 97–103 of the KPA), will also apply.

In this author's opinion, there is direct, full application of Article 105(1) of the KPA in antimonopoly proceedings, which contains the institutional mechanism for compulsory discontinuance of proceedings if they fail to fulfil any purpose<sup>35</sup>. The premise of lack of purpose in antimonopoly proceedings should therefore be understood in light of the jurisprudence of administrative courts, according to which lack of purpose occurs when there is no legal basis to the merits of the case.<sup>36</sup> In the practice of the President of the UOKiK's judgments, decisions to discontinue proceedings due to lack of purpose have

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<sup>34</sup> T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1514.

<sup>35</sup> Similarly A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1313; differently T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2010, p. 858.

<sup>36</sup> Judgment of the Supreme Administration Court of 24 April 2003, III SA 2225/01, unpublished.

occurred. The UOKiK President discontinues proceedings when, during the case, he cannot find any violation of the public interest, or the operator does not occupy a dominant position in the market (absence of a dominant position excludes the possibility of its abuse)<sup>37</sup>. The catalogue of premises for the discontinuance of proceedings is included in Article 75 of the Competition Act and only extends the catalogue of premises for discontinuing proceedings contained in the KPA. The use in antimonopoly proceedings of Article 105(1) of the KPA may become necessary in order to protect the subjective rights of a party. A decision on the merits in the case of lack of purpose to a proceeding would entail unjustified negative consequences for the businesses, contrary to the nature of the standardising solutions in the Competition Act.

The provisions of the KPA concerning the structure of an administrative decision (Article 107 of the KPA) and its provisions relating to the rectification of a decision (Articles 111-113 of the KPA) are also applicable to antimonopoly proceedings. As already mentioned above, the Competition Act contains regulations and provisions relating to the contestation of decisions which are separate from the KPA. Note that only a few of the President of the UOKiK's rulings may be subject to appeal to the Antimonopoly Court within the mode of Article 81. Rules concerning the appealability of judgments and the submission of appeals (Articles 141-144 of the KPA) can apply only to decisions issued by the President of the UOKiK on the basis of the Administrative Procedure Code. This concerns, *inter alia*, orders concerning the costs of proceedings (Article 264 KPA), and orders to bestow immediate enforceability on administrative decisions [Article 108(3) of the 3 KPA].

Article 82 of the Competition Act excludes the ability of a party to a proceeding before the thr UOKiK President, on the party's initiative, to challenge a decision to resume the proceedings, annul the decision, or amend or repeal a decision. It should be noted, however, that the above provision does not exclude the possible use of the institution of expiry of a decision in antimonopoly proceedings at a party's request<sup>38</sup>. Pursuant to Article 162(1) (1) of the KPA, the public administration authority which issues a decision in the first instance can confirm its termination if the decision has become purposeless, the revocation of such a decision is required by a provision of law, or when this is in the public interest or in the interest of a party. It should also be noted that the legislature has not set down the expiry of the decision as an excluded mode, which only confirms that this mode can be used.

There is therefore the possibility (or even necessity) for the UOKiK President to commence proceedings on the expiry of a decision, insofar as

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<sup>37</sup> Decision of the UOKiK President of 25 July 2007, RPZ-40/2007, unpublished.

<sup>38</sup> T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1362.

the premises contained in Article 162(1) of the KPA are fulfilled. The UOKiK President may, in this regard, initiate proceedings *ex officio*, or may also have an obligation to initiate proceedings on the revocation of the decision insofar as a party to the proceedings submits such a request.

## **V. Application of the provisions of the Administrative Procedure Code, with modifications**

It should be noted once again at the outset that where the Competition Act does not contain a procedural institution, it is necessary to apply the relevant provisions of the KPA. However, the situation becomes more complicated concerning the use of those KPA institutions which find their counterparts in the provisions of the Competition Act of 16 February 2007. Firstly, the provisions contained in Articles 28–34 of the KPA relating to the legitimacy of parties in administrative proceedings should be noted. These provisions find ‘appropriate’ use as long as Articles 88, 94 and 101 of the Competition Act do not regulate this matter directly<sup>39</sup>. Some modifications also occur in the application of the KPA’s provisions relating to Chapter 7 of Title I (‘Case processing’). The provisions of the Competition Act separately specify the deadlines for processing cases, excluding the application of Article 35(3) of the KPA. This does not mean, however, that in antimonopoly proceedings in matters of concentration there is no application of Article 35(2) of the KPA, which requires conduct of the case ‘without delay’ on the basis of evidence provided by a party to the proceedings at the time of their commencement. In antimonopoly proceedings, Article 36 of the KPA, which mandates notification of a party to the proceedings in the event a deadline for handling a case is exceeded, as well as the provisions of Articles 37 and 38 of the KPA, creating countermeasures against inactivity or lengthy processing of proceedings by an administrative authority, are applicable to antimonopoly proceedings.

At the same time, it must be added that the Competition Act does not regulate matters relating to the length of time for processing cases involving the imposition of administrative financial penalties. Accordingly, in establishing a deadline for processing such a case Article 35(3) of the KPA is applied.

Chapter 1 of Title II of the KPA, referring to the institution of proceedings, has limited application to antimonopoly proceedings. In antimonopoly proceedings, Article 61(3) and (3a) of the KPA, referring to the determination of the commencement date for the proceedings, and Articles 63–66 of the

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<sup>39</sup> Similarly T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1370.

KPA, are applicable. Note also that Article 64 of the KPA, standardising the effects of formal deficiencies in a submission, may perhaps be applied in full in antimonopoly proceedings in the matter of restrictive practices and practices which run counter to the collective interests of consumers. It does not apply, however, to antimonopoly proceedings in matters of concentration. The effects of formal absences in such notifications are governed by Article 95(1) of the Competition Act.

With appropriate modifications, Chapter 3 of Title II of the KPA on making files available with regard to the protection of trade secrets, may be applied. Access to case files is an expression of the general principle of notifying parties (Article 9 of the KPA) and the general principle of active participation by parties to the proceedings (Article 10 of the KPA). In antimonopoly proceedings, Articles 73 and 74 of the KPA are applicable. The complement to Article 74 is the regulation contained in Article 69 of the KPA on the introduction of limitations on access to a party's case files page to protect trade secrets.

In administrative proceedings, provisions for administrative hearings (Articles 89–96 of the KPA) are also applied, with appropriate modifications resulting from the Article 60 of the Competition Act.

## **VI. The scope of referrals to the Civil Procedure Code in matters of evidence (Article 84)**

Some doubt may be associated with the Competition Act's use of referrals to the KPC of evidentiary matters. It should, however, be recalled that investigations carried out by the UOKiK President remain administrative, although characterised by certain specific differences. As already mentioned, the adoption of general referrals unregulated by the Competition Act to the provisions of the KPA means that the majority of the general principles of the KPA apply to proceedings conducted by the UOKiK President. This model is designed to fulfil the general principles of objective truth and officialisation.

Pursuant to Article 84 of the Competition Act, in cases concerning evidence in proceedings before the UOKiK President, and not regulated in the Competition Act, Articles 227-315 of the Civil Proceedings Code (hereafter, KPC) shall apply. In the opinion of this author, Articles 229-234 of the KPC are not applicable due to the lack of mutuality of contract in the model of antimonopoly proceedings<sup>40</sup>. The commitment to implement the general

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<sup>40</sup> Differently, see T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa...*, Warszawa 2010, p. 863.

principle of objective truth contained in Article 7 of the KPA means, however, that in antimonopoly proceedings Article 77 of the KPA, indicating that ‘the burden of proof’ in administrative proceedings lies with the body conducting the proceedings, should also apply<sup>41</sup>. In antimonopoly proceedings, however, only the catalogue of evidentiary means contained in the KPC applies.

It is here that the role which the legislator has assigned to referrals to the Civil Procedure Code should be examined. It seems that the only justification for the adoption of such a concept is the above mentioned and quoted opinion of E. Modzelewska-Wąchal, who maintains that this solution was related to a desire to ensure the homogeneity of evidentiary proceedings conducted both before the UOKiK President, as a public authority, and later before the Antimonopoly Court on review<sup>42</sup>.

## VII. Conclusions

The characteristics of the model of antimonopoly proceedings is deemed to necessitate the individual procedural institutions and mechanisms prescribed in the Competition Act of 16 February 2007, which includes a complex system of referrals to other procedural acts. The adoption of a general referral to the provisions of the KPA in cases unregulated by the antimonopoly act means that the ‘evolution’ of the majority of specific procedural mechanisms and institutions which are applicable in proceedings before the UOKiK President takes place in conjunction with the application of the general principles of the KPA. The crucial role of the KPA’s general principles, which can contribute to shaping the model of antimonopoly proceedings, in particular their organisation, must be emphasised above all.

Quite apart from the position adopted by the legislature concerning the possible review of a decision by the UOKiK President, it should be noted that antimonopoly proceedings display all the characteristics of administrative proceedings of a specific nature. Thus it may be concluded that these are proceedings which are non-autonomous in nature.

Having regard to the above, it can be concluded that the construction of a procedural mechanism based largely on the regulations contained in the Administrative Procedure Code adopted in the Polish legal system ensures a more effective implementation of the objectives of protecting competition

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<sup>41</sup> Similarly, see M. Bernatt seems to claim [in:] M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 124–125.

<sup>42</sup> E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, pp. 279–280.

in Poland. At the same time, it protects the subjective rights of businesses participating in the proceedings.

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