

Polish Antitrust Legislation and Case Law Review 2009

by

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Abstract

The article presents key developments in Polish antitrust legislation and case law in 2009. Regarding legislation the article focuses on a new leniency regulation and legal acts amending the Polish Competition and Consumer Protection Act, adopted in 2008, that entered into force in 2009. The article provides a general characteristics of antitrust cases, mainly ones ruled by the Supreme Court and the Court of Appeal in Warsaw. A description of cases is divided into thematic parts referring to particular kinds of practices restricting competition, identification of relevant markets, relationships between the Competition Act and other legal acts and problems related to adopting and implementing decisions by the UOKiK President.

Résumé

L'article présent les développements clés de la loi polonaise d'ententes et la jurisprudence en 2009. Par rapport a la législation, l'article se concentre sur les nouvelles règles de clémence et les actes modifiant le Droit de la concurrence et de la protection du consommateur, adoptées en 2008, entrées en vigueur en 2009. 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 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; commitment decision; energy law; fines; leniency; market sharing; refusal to deal; relevant market; unfair prices.

I. Antitrust legislation

1. Amendments to the Competition Act

Two main changes affected Polish antitrust rules in 2009: the amendments introduced indirectly to the Competition and Consumer Protection Act of 17 February 2007 (Competition Act¹) and the issue of a new procedural regulation on leniency.

On 21 March 2009, the Act of 21 November 2008 on civil service² came into force. Its Article 188 modified Article 29(3) of the Polish Competition Act reintroducing a competition as the selection method for the President of the Polish antitrust authority (in Polish: *Urząd Ochrony Konkurencji i Konsumenta*; hereafter, UOKiK).

On 7 March 2009, the Act of 19 December 2008 on the Amendment of the Act on the Freedom of Economic Activity and Other Acts³ came into force. On its basis, some of the provisions contained in the Competition Act concerning the conduct of inspections of those subject to antitrust proceedings were changed. The Amending Act annulled the inspection rules initially regulated by Articles 62-69 of the Competition Act. Instead, a new Chapter 5 was added to Part VI of the Competition Act entitled 'Inspections in proceedings before the President of the Office'. The content of the old provisions was repeated, with minor adjustments, in a new Article 105a-105l. The most important qualitative change introduced by this Amendment Act was the introduction into the Competition Act of the provisions that used to be contained in paragraphs 4, 6-9 of the Council of Ministers' Regulation of 17 July 2007 concerning inspections in antitrust proceedings⁴. The latter change should be applauded but the legislative technique applied in this context overall leaves a lot to be desired (adding a new chapter to Part VI of the Competition Act and transplanting legal provisions in an almost untouched form from one place of the Act to another). It is rather doubtful if the significance of inspection rules will actually increase after their move from general procedure contained in Part VI Chapter 1 to its new Chapter 5. Furthermore, the addition of Chapter 5 has disturbed the so far logical structure of Part VI whereby its first Chapter covers issues common to all types of proceedings before the UOKiK President, dedicating its further chapters their particular categories.

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

² Journal of Laws 2008 No. 227, item 1505.

³ Journal of Laws 2009 No. 18, item 97.

⁴ Journal of Laws 2007 No. 134, item 936.

2. New Leniency Regulation

On the basis of Article 109(5) of the Competition Act, the Council of Ministers adopted on 26 January 2009 a regulation on the procedure to be followed in cases of enterprises' applications to the UOKiK President for the immunity from or the reduction of fines⁵. The new Regulation entered into force on 24 February 2009, replacing the previous act of 17 July 2007⁶.

The goal of the 2009 Regulation is primarily to harmonize the Polish leniency procedure with the EU model (Leniency Notice of 2006). However, leniency is still applicable in Poland to both horizontal and vertical competition restraints. Unlike the EU Notice, the Polish act makes no difference between the procedures to be followed on immunity and those on a fine reduction. The Regulation specifies what the desired content of a leniency application is (paragraph 3 of the Regulation) but does not contain a uniform submission form to be used by those interested. Moreover, the Polish leniency procedure cannot be initiated by a phone call; it may be started however by an oral application (for the record) in the form of a statement given before a UOKiK employee. An undertaking cannot be informed at the moment of the notification whether others have already made submissions in the same case. One of the most significant changes introduced by the new Regulation is the possibility of submitting a summary application ('marker application'), patterned on the practice of the European Commission (paragraph 5 of the Regulation), that guarantees the applicant a 'place in the queue'.

The Leniency Regulation of 2009 is accompanied by separate Leniency Guidelines issued by the UOKiK President. Lacking the legally binding nature of law, the Guidelines constitute however an important set of 'instructions for those enterprises which intend to apply for leniency' (point I.2 of the Guidelines).

The new Regulation is expected to increase the number of leniency applications in Poland and thus to improve the effectiveness of the combat against illegal competition restricting practices. In order to achieve these results, the UOKiK prepared a multimedia advertising campaign on leniency.

⁵ Journal of Laws 2009 No. 20, item 109.

⁶ Journal of Laws 2007 No. 134, item 938.

II. Antitrust case law

1. General remarks

The case law analysis conducted for the purpose of this article covered the judgments of the Supreme Court, the Court of Appeals in Warsaw and the Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumenta*; hereafter, SOKiK) delivered in 2009 on the basis of the Competition Act. The emphasis of this article is clearly placed on those legal issues which were assessed by the higher instance courts (Court of Appeals and Supreme Court). Far less attention is paid to the judgments of SOKiK since its verdicts, especially if they concern controversial issues, are usually subject to a revision by the higher instance courts. As a matter of exception, presented here is also a single judgment delivered in 2009 by the Supreme Administrative Court because it directly concerns the activities of the UOKiK President in his/her capacity as a body of public administration.

Considering no general database exists for Polish jurisprudence, which would make it possible to identify all judgements delivered at any given time by a particular court, the choice of the rulings assessed in this article has been made on the basis of the resources collected by CARS. 26 judgements delivered by SOKiK, 18 rulings by the Court of Appeals in Warsaw (in Polish: *Sąd Apelacyjny w Warszawie*; hereafter, SA) and 8 by the Supreme Court (in Polish: *Sąd Najwyższy*; hereafter, SN) were ultimately identified.

The rulings of the higher instance courts (Court of Appeals and Supreme Court) predominantly referred to practices that had infringed (or at least had been declared to have done so) the previous Competition and Consumer Protection Act of 2000. By contrast, the first instance judgements delivered by SOKiK referred to practices that were assessed in the light of the current Competition Act. In some circumstances resulting from an earlier intervention by the higher instance courts, SOKiK and/or the Court of Appeals have ruled on the same case twice. Indeed, some judgements delivered in 2009 can be classified as another step in a 'judicial saga' – situations where cases restarted as a result of the Supreme Court (rarely Court of Appeals) annulling a judgement of a lower instance court. The most significant judicial sagas that continued in 2009 included, among others, the *Rychwał Commune* case (judgement of SA of 23 June 2009, VI Aca 580/09) and the *Tele 2* case (judgement of SOKiK of 17 June 2009, XVII Ama 102/08).

The jurisprudence of 2009 shows a clear predominance of cases dedicated to competition restricting practices. Only one of the judgements referred indirectly to concentration control (it focused on the imposition of a fine for

the non-fulfilment of the obligation to notify the intent to concentrate, SOKiK judgement of 2 December 2009, XVII Ama 13/09, *SADROB*). Not unlike in previous years, most of the case-law concerned abuses that took the form of: the imposition of unfair prices (e.g. judgement of the Court of Appeals of 27 May 2009, VI Aca 1407/08, *Telekomunikacja Polska*); the imposition of onerous contractual terms yielding unjustified profits to the dominant undertaking (e.g. judgement of the Court of Appeals of 30 October 2009, VI Aca 464/09, *ENION*); the use of discriminatory terms (e.g. judgement of SA of 6 January 2009, VI Aca 846/08, *Carston*) and; counteracting the formation of the conditions necessary for the emergence or development of competition (e.g. judgement of the Court of Appeals of 27 May 2009, VI Aca 1404/08, *Katowice Commune*). Most of the agreements subject to juridical review in 2009 were price related (e.g. judgement of SA of 10 November 2009, VI Aca 297/09, *Budmech*).

The majority of the scrutinised abuses took place on local, municipal markets including: a local waste collection market (e.g. judgement of the Supreme Court of 12 February 2009, III SK 29/08, *Nowy Targ Commune*; judgements of the Court of Appeals of 18 March 2009, VI Aca 990/08, *MPGK Katowice* and 27 May 2009, VI Aca 1404/08 *Katowice Commune*) and; a local market for the provision of water (e.g. SOKiK judgements of 4 September 2009, XVII Ama 69/08, *Jastków Commune* and 27 August 2009, XVII Ama 145/07, *PRWK Katowice*). Only a few abuse cases concerned practices employed on national markets such as the market for the origination of interregional and international connections in fixed telecoms networks and the access market to these connection services (SOKiK judgement of 17 June 2009, XVII Ama 102/08, *Telekomunikacja Polska*). In the great majority of cases, the assessment covered potentially anticompetitive practices used on local markets including: the local market for parking management in the town of Zakopane (judgement of the Court of Appeals of 18 June 2009, VI Aca 1532/08, *Zakopane Town*); local markets for services of leasing telecommunications technical channel systems (judgement of the Court of Appeals of 27 May 2009, VI Aca 1407/08, *Telekomunikacja Polska*) and; the local market for the lease of recreational territories on the Niedzięgiel lake in the Witkowo commune (judgement of the Court of Appeals of 8 September 2009, VI Aca 1377/08, *Witkowo Town and Commune*).

By contrast, most of the anticompetitive agreement cases assessed by Polish courts in 2009 concerned national markets such as: the national market for the trading of rights to broadcast Polish football league matches (judgement of the Supreme Court of 7 January 2009, III SK 16/08, *PZPN and Canal+*) and the national market for the distribution of drainpipes systems (judgements of the Court of Appeals of 10 November 2009: VI Aca 297/09, *Budmech*; VI

Aca 292/09, *Gamrat*; VI Aca 291/09, *PSB*). Agreements presumed to have violated Polish antitrust rules referred to local markets far less frequently, among them was: a market for the provision of personal river shipping services on the Vistula river near Kazimierz Dolny (judgement of the Supreme Court of 14 January 2009, III SK 26/08, *Skoczek, Pieklik*) and a local taxi market in the city of Poznań (judgement of the Court of Appeals of 22 April 2009, VI Aca 1083/08, *City of Poznań*).

2. Agreements restricting competition

2.1. Forms of anticompetitive agreements

Article 6(1)(6) of the Competition Act speaks of the limitation of access to the market or the elimination from the market of undertakings not party to the agreement as one of the prohibited forms of competition restricting agreements. In the judgement of 7 January 2009 (III SK 16/08, *PZPN and Canal+*)⁷, the Polish Supreme Court dismissed a cassation request concerning a ruling of the Court of Appeals that delivered a judgment on an agreement between the Polish Football Association and the pay TV provider Canal+. The agreement in question was prohibited because it foreclosed the relevant market by giving the TV operator a priority option to purchase exclusive broadcasting rights for the Polish football league. A large part of the Supreme Court judgment is dedicated to the issue of public interest as a prerequisite for the application of the prohibition of competition restricting practices: ‘The good being protected in the public interest in this case is competition as such, seen as a mechanism of economic freedom, an established market functioning rule. It can be said therefore (...) that this is how the essence of competition as a public good is defined by the group of prohibited competition restricting practices which are described in Part II of the Competition Act, among them, agreements restricting competition, prohibited by Article 5(1)(6) of the Competition Act of 2000 (currently Article 6(1)(6) of the Competition Act 2007)’.

In the judgement of 14 January 2009 (III SK 26/08, *Skoczek, Pieklik*), the Supreme Court considered the definition of the anticompetitive practice specifically prohibited by Article 6(1)(6). The Court contested there the opinion that a practice can only then be declared as an anticompetitive practice taking the form of ‘limiting access to the market or eliminating from the market undertakings which are not party to the agreement’ if all market

⁷ See J. Sroczyński, ‘The Permissibility of Exclusive Transactions: a Few Remarks in the Context of Exercising Media Rights’ (2010) 3(3) *YARS*, p. 115.

players participated in it or if it covers such a large part of the market that competition from other market players is insignificant.

Article 6(1)(7) speaks of tender collusions. Regarding the definition of a ‘tender collusion’ the Supreme Court stated in its judgement of 14 January 2009 (III SK 26/08, *Skoczek, Pieklik*) that the practice prohibited by Article 6(1)(7) (at the time of ruling – Article 5(1)(7) of the Competition Act 2000) may take the form of ‘fixing the terms of the offers to be submitted’ within the procedure while it is ‘insignificant if the parties to the agreement actually manage to influencing the results of the tender’.

2.2. Other selected issues related to agreements

Consciousness of the violation of the prohibition of competition restricting agreements

The Supreme Court stressed in the aforementioned judgement of 14 January 2009 (III SK 26/08, *Skoczek, Pieklik*) that ‘the consciousness of an infringement of the prohibitions contained in the Competition Act is irrelevant from the point of view of the assessment of the undertakings’ activities as a competition restricting practice’. This statement does not diverge from the Supreme Court’s past jurisprudence seeing as similar views, based on EU case-law, can be found in earlier Polish judgments.

Proving the existence of an agreement

The Supreme Court sustained also in the aforementioned judgement (III SK 26/08, *Skoczek, Pieklik*), its earlier views that the existence of anticompetitive practices can be proven in court proceedings ‘on the basis of indirect evidences, on the basis of the rules referring to factual presumptions. (...) Such presumptions make it possible to equate facts of key importance to the outcome of the case, if conclusions can be drawn from other established facts, so that they constitute the reasoning of the ruling court which should be presented, with respect to all the interconnected facts, in the justification of the judgement in a way that makes it possible to control the correctness of the identification of the facts and conclusions drawn from them’. Similarly, in the judgement of 22 April 2009 (VI Aca 1083/08, *Pietrzyk*), the Court of Appeals stated that ‘when a claim is raised against undertakings that they have concluded an illegal (prohibited by law) agreement concerning price fixing, being seen as one of the gravest infringements of the prohibition of competition restricting practices, it is possible – and sometimes even necessary – to apply presumptions of facts because agreements of that kind (...) can not only fail to take a written form but are also treated by the participants

with deepest secrecy. Thus, price agreements can be proven by either direct or indirect evidence. In practice, the possibility to use direct evidences by the UOKiK President is limited because undertakings are conscious of the illegality of such activities⁷.

A SOKiK's judgment concerning an agreement concluded on a national market for the distribution of drainpipe systems was annulled by the Court of Appeal because the first instance court failed to conduct the necessary evidentiary proceedings 'in order to clarify whether the statement of the appealing party was correct in that it claimed that it cannot be treated as a participant of an illegal price agreement (...) because in this case only unconnected parallel behaviours took place, not covered by the charges contained in the decision, which were imposed on the plaintiff' (judgement of the Court of Appeals of 10 November 2009, VI Aca 297/09 *Budmech*; see also other judgements of the Court of Appeals of 10 November 2009: VI Aca 292/09 *Gamrat*; VI Aca 221/09 *PSB*).

A buying & selling group as a participant of a prohibited agreement

The Court of Appeals noted also in the same judgement (VI Aca 221/09, *PSB*) that SOKiK should have analyzed the market status of a buying & selling group that was considered to have participated in a vertical competition restricting agreement. The Court of Appeals agreed with the argument that the market role fulfilled by this group was different from than that of distributors to which the antitrust decision was addressed. A buying & selling group does not operate on the same market as its members; rather than being a part of the delivery chain, it is the entity that organizes it. The Court of Appeals stressed the need to analyze if the specific character of the buying & selling group, mainly its economic goals and internal organization, should be considered while imposing a fine.

3. Abuse of a dominant position

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

The Supreme Court delivered a judgement concerning a presumed abuse of dominance held on local buying markets of hatchling eggs (duck and goose) that had some effects on a neighbouring veterinary services market (judgement of 19 February 2009, III SK 31/08 *DROP*⁸). The Court evaluated here its

⁸ 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*,

older *acquis* concerning the interpretation of the concept of ‘public interest’ as a pre-condition for the application of the Competition Act. The Supreme Court repeated that ‘it is not necessary to infringe an interest of an individual to apply the instruments of intervention stipulated in the Competition Act (judgement of 7 April 2004, III SK 27/04) – the concept of ‘public interest’ should be interpreted from the perspective of the antitrust axiology (judgement of 16 October 2008, III SK 2/08 and of 5 June 2008, III SK 40/07)’. The Court referred also to the criterion of ‘touching a broader scope of market participants’ that used to be seen as a preliminary condition of an intervention by the UOKiK President. The Supreme Court stressed in this context that this criterion ‘constitutes only one of the forms of the factual appearance of a public interest’. The Court stated also that ‘infringing a public legal interest takes place when the behaviour of an undertaking that is the subject of antitrust proceedings caused or can cause negative – from the perspective of antitrust law – market effects by influencing quantity, quality, price of goods or the scope of consumer choice or that of other purchasers, because the existence of a public legal interest should be assessed in a broader context covering all of the negative effects of monopolistic practices on a given market’. This definition is likely to become the standard for the future interpretation of the concept of public interest in Polish antitrust⁹.

3.2. Imposing unfair prices and trading conditions

The imposition of unfair prices and other trading conditions, prohibited by Article 9(2)(1) of the Competition Act (Article 8(2)(1) of the Competition Act 2000), was the object of frequent juridical review in 2009 (e.g. the judgment of the Supreme Court of 12 February 2009, III SK 29/08 *Nowy Targ*, of 19 February 2009, III SK 31/08 *DROP* and of 19 August 2009, III SK 5/09 *Marquard Media*).

In the *Nowy Targ* case¹⁰, the Supreme Court annulled a ruling of the Court of Appeals and referred the case back for renewed assessment. In the opinion of the Supreme Court, the Court of Appeals had failed to focus on the essence of the case, that is, the price structure applied by the *Nowy Targ* commune on

p. 277; K. Kohutek, ‘Zarzut nadużycia pozycji dominującej 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.

⁹ On an interpretation of a public interest see: D. Miąsik, ‘Controlled Chaos with Consumer Welfare as a Winner – a Study of the Goals of Polish Antitrust Law’ (2008) 1(1) *YARS*.

¹⁰ See G. Materna, ‘Cenowe praktyki ograniczające konkurencję w zakresie hurtowego odbioru ścieków – glosa do wyroku Sądu Najwyższego z 12.02.2009 r. (III SK 29/08)’ [‘Price practices restricting competition in wholesale waste collection – a comment to the judgment of the Supreme Court of 12 February 2009 (III SK 29/08)’] (2010) 4 *Glosa* 112.

a local market for sewage collection from the surrounding areas. The original decision of the UOKiK President declared that the commune had abused its dominance on that market by imposing unfair and excessive prices. The Court of Appeals stated that no competition restricting practice took place because, as shown by the plaintiff, the commune's price list was based on cost calculations presuming a profit of only 2%. The Supreme Court claimed that 'the setting of prices to be applied on a relevant market is clearly not the subject of an antitrust case. It is impossible however, to consider (...) the issue of charging (or not charging) by the dominant undertaking of unfair excessive prices without clarifying and assessing by the Court of the essence of the dispute in the case'. It was the job of the Court of Appeals to conduct a detailed examination of the underlying price structure considering the excessive price imposition charge.

The problem of imposing unfair prices and contractual terms appeared also in the judgement of the Supreme Court of 19 February 2009, III SK 31/08, *DROP*. The Court annulled here both lower instance rulings (by the Court of Appeals in Warsaw and SOKiK) taking note of the fact that Article 8(2)(1) of the Competition Act 2000 (currently Article 9(2)(1) of the Competition Act) referred to the 'imposition' and not to the 'application' of unfair contractual terms. Terms cannot be said to have been imposed when the contractor makes no attempts to negotiating them or presents irrational expectations towards them or does not respond to the proposals submitted by the dominant company who ends up presenting a unilaterally formulated and non-negotiable draft contract.

In the judgement of 19 August 2009, III SK 5/09, *Marquard Media*¹¹, the Supreme Court pointed out that 'a price may be considered unfair even if it is not below costs. (...) Unfair prices may be imposed only on contractors, that is, trading partners of a dominant company, or consumers. An unfair price cannot be imposed on a competitor (not being simultaneously a purchaser of goods from a dominant company) when, through the use of a certain price by the dominant company, a competitor is forced to charge a different price for its own goods in order to be able to meet competition from the dominant company'. In the same judgement, the Supreme Court contested also the way in which point 1 of the UOKiK decision was formulated. The Court claimed that the expressions used in the decision were too general to make it possible to establish which activities of the plaintiff fulfilled the conditions of the use of unfair prices.

¹¹ See K. Kohutek, 'Shall selective, above-cost price cutting in the newspaper market be qualified as anticompetitive exclusion? Case comment to the judgement of the Supreme Court of 19 August 2009 – *Marquard Media Polska*' (2010) 3(3) *YARS*, p. 294.

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

The Supreme Court referred to an abuse of a dominant position by way of counteracting the formation of the conditions necessary for the emergence or development of competition in a number of judgments of 2009. It pointed out that Article 9(2)(5) of the Competition Act, which explicitly prohibits this form of abuse, ‘cannot be treated as a general clause covering various types of behaviour that impede the market activities of competitors’ (see judgements of: 12 February 2009, III SK 29/08 *Nowy Targ Town and Commune*; 19 February 2009, III SK 31/08, *DROP*, and 19 August 2009, III SK 5/09, *Marquard Media*). In the *DROP* case, the Supreme Court stressed that Article 8(2)(5) of the Competition Act 2000 (currently Article 9(2)(5) of the Competition Act 2007) was applied ‘without reference to the prerequisites resulting from the provision’. In the Court’s opinion, counteracting the formation of the conditions necessary for the emergence or development of competition in the meaning of that Article should be understood as ‘an activity of a company holding a dominant position on a relevant market that makes it difficult or even impossible for competitors to act on that relevant market because of the creation of barriers to entry or development of entities already active on that market; the barriers must be of fundamental character as they should concern the conditions necessary for an effective entry or functioning on a market’.

In the *Telekomunikacja Polska* judgment (III SK 28/09), the Supreme Court stated that ‘Article 8(2)(5) of the Competition Act of 2000 (currently Art. 9(2)(5) of the Competition Act of 2007) speaks about the conditions necessary for the development of competition, these are the conditions without which competitors’ activities would not be possible at all or would not be profitable’.

In the *DROP* judgment (III SK 31/08), the Supreme Court confirmed that an abuse of a dominant position in the aforementioned form may take place not only on a market where the scrutinised company holds a dominant position but also on a related market. In the latter case, it is necessary ‘to establish the special circumstances that prove the existence of the dominant undertaking’s economic interest in limiting the scope of the activities or excluding other undertakings from a relevant market other than the one where it is dominant’. An abuse of a dominant position on a related market is possible only when a dominant company acts on the market related to that being controlled or when it makes preparations to enter a new market ‘which can be influenced because of the position held on another market (e.g. by controlling deliveries of semi-products on a market of final products)’. An abuse on a related market may occur also when ‘undertakings active on a related market have to co-

operate with a company holding a dominant position on another market in order to be able to offer their products on that related market' or when 'a dominant company sets rules for the functioning of another market acting as its organizer'. In the Court's view, these conditions were not met when dominance held on the hatchling eggs market was said to have been abused on the market of veterinary services seeing as the latter is not directly related to the former 'because those markets do not cover goods (products or services) comprised in the same production cycle (...) (raw materials – semi-products – final products)'. In this case, the dominant company did not act on the veterinary services market at all, did not plan to enter it and its dominant position was not strengthened as a result of this practice.

In the *Telekomunikacja Polska* judgement of 17 June 2009, XVII Ama 102/08, a decision issued by the UOKiK President was modified by SOKiK. Unlike the antitrust authority, the Court was of the opinion that no abuse took place of a dominant position held on the market for the origination of interregional and international connections in the fixed telecoms network in Poland by the incumbent operator Telekomunikacja Polska SA (hereafter, TP SA). The abuse originally established by the UOKiK President was said to have infringed Article 8(2)(5) of the Competition Act 2000 (currently Article 9(2)(5) of the Competition Act) because it impeded the provision of services by other telecoms operators to the clients of the incumbent as a result of delays in fulfilling pre-selection orders already made to TP SA by those operators. SOKiK came to the conclusion that the antitrust authority did not prove the existence of the said practice to a sufficient degree. UOKiK's analysis covered only 999 orders submitted by alternative operators to the incumbent out of the total of about one million of such orders submitted overall. Even if out of the 999 analysed submissions 254 were not fulfilled to a satisfactory degree, they would still represent a marginal number only in the overall scheme of things not justifying 'the conclusion that TP SA abused its dominant position. In the Court's view, establishing by the UOKiK President, on the basis of an analysis of 999 orders, that there are delays in fulfilling orders, should prompt the UOKiK President to move its office to conduct a detailed evidentiary proceeding in order to unequivocally prove that TP has used competition restricting practices'. Limiting the scope of the examination, the UOKiK President 'was not able to prove a practice but was only able to show it was probable', 'in order to prove a practice, the UOKiK President should have treated Tele2's application, the examination of the 999 orders and the results of its research as preliminary rather than final proof'. Ultimately, SOKiK modified the decision issued by the antitrust body.

3.4. Refusal to deal

Lack of public interest

The *Witkowo Town and Commune* judgement delivered by the Court of Appeals on 8 September 2009, VI Aca 1377/08, focused on a claim of an abuse of a dominant position held by the scrutinised commune. The abuse in question took the form of a refusal to conclude a lease of land contract with a natural person. The Court of Appeals did not find that an infringement took place and thus, it amended the earlier SOKiK judgement, simultaneously modifying the decision issued by the UOKiK President. In the original antitrust decision, the refusal by the Witkowo commune to deal with a natural person was considered to have infringed Article 9(1) of the Competition Act as ‘an unjustified and discriminatory refusal to deal with Ewa Antczak-Izydorek’. SOKiK sustained the decision, despite its criticism of some of its provisions. The Court described the essence of the contested practice in a more precise manner pointed out that it was ‘an unjustified and discriminatory refusal’. SOKiK rejected at the same time the argument that the refusal at hand concerned an individual person only. The Court of Appeals established that through this amendment, SOKiK has actually changed the essence of the UOKiK decision in an unlawful manner because it did not conduct its own evidentiary proceedings. The key problem here was whether a refusal to deal with an individual meets the public interest criterion as a pre-condition for an antitrust intervention. The Court of Appeal adjudged that ‘a clearly proven individual case of refusal to make a leasing deal cannot be treated the same as an unproven practice of refusal to makes leasing deals’. In spite of the fact that ‘it can be sometimes difficult to establish in an unequivocal manner whether a violation of a solely private interest took place or an infringement of a public interest; the arising doubts cannot be explained by suppositions only based on the assumption of the correctness of the reasoning. A single case can be, but does not have to constitute a danger to free competition. The Competition Act does not protect a competitor but competition, so while assessing the effects of a certain practice in the present or in the future one has to consider if granting legal protection to a tenant does not turn in practice into counteracting competition by providing the tenant with a monopoly for the lease of recreational land’.

Essential facility

The *Telekomunikacja Polska* judgement of 27 May 2009 delivered by the Court of Appeals, VI Aca 1407/08, centred on an abuse of a dominant position held on local markets for the provision of (leasing) telecommunications

technical channels in Poland. The abuse took the form of an imposition on the tenants of unfair leasing prices. The UOKiK President saw this practice as an infringement of Article 8(2)(1) of the Competition Act 2000 (currently Article 9(2)(1) of the Competition Act), a finding subsequently sustained by SOKiK. The Court of Appeals changed however the amount of the fine originally imposed by the antitrust authority stressing that the essential facility doctrine could be applied in this case because ‘the necessity of telecommunications technical channels to act and compete by other entities is clear’. That necessity was shown, in the Court’s opinion, by the fact that the market share of TP SA measured by the number of agglomerations where it owned tele-technical channels was over 71,8 % and exceeding 97,86 % if measured by the number of leased channels. The Court of Appeals analyzed the prerequisites of a potential duplication of the infrastructure, stressing that ‘it is rationality that plays the decisive role here’ – it is not enough to find an alternative theoretical solution, that solution must be rational.

3.5. Market sharing

The case law suggests that dominance is rarely abused in Poland by way of market sharing. A market sharing claim, through the differentiation of newspaper prices charged in different Polish regions, was assessed by the Supreme Court in its judgment of 19 August 2009, III SK 5/09 *Marquard Media*. The Court alleged here that Article 8(2)(8) of the Competition Act 2000 (currently Article 9(2)(2) of the Competition Act) ‘refers to a practice known as unilateral market sharing that takes the form of price differentiation by an undertaking holding a dominant position on the basis of a territorial criterion. Sharing of a market may be done by differentiating the product range (some products are available only in a certain area or only in certain configurations) or the conditions of an offer (for instance: a longer guarantee, hire-purchase, additional services) or a differentiation of prices’. The Supreme Court added also that ‘differentiating prices is not a *per se* competition restricting practice, even if applied by an undertaking holding a dominant position’ but in specific situations such as this case, price differentiation may be inspired by anticompetitive reasons. In the Court’s opinion there are some factors that indicate the price differentiation had an anticompetitive motivation: the selection of the territory where lower prices are applied (a territory of ‘key competition’) or the exact moment of the price drop (after the competing newspaper became independent, before a beginning of a new football season).

3.6. Other issues related to an abuse of a dominant position

In the judgement of 2 November 2009, VI Aca 349/09, *Project Żegluga*, the Court of Appeals had an opportunity to express its opinion on the problem of dominance in a duopoly. In the Court's opinion 'a duopoly has a specific feature, making it similar to a market with perfect competition and making it different from other structures, in that it generates paradoxically the highest level of potential (and actual) competition between the entities functioning in a duopoly which, especially in case of a mature market, is introduced by price instruments, not rarely even by 'price wars'.

4. Identification of relevant markets

In some cases, the problem of an inadequate relevant market definition became the reason for the revision of judgements delivered by the courts of lower instances or a UOKiK decision. In the judgement of 19 August 2009, III SK 5/09 (*Marquard Media*), the Supreme Court stated that a local sport press market was identified as the relevant market 'without a sufficiently deep analysis of the competitive relationships between newspapers'. The Court sustained the position of the lower instance courts that sport newspapers cannot be substituted by national newspapers because, even if they provide a wide range of sports news, they do not offer the type of information required by a reader of sport press. However, a general statement that sport press titles belong to a single relevant market was seen as insufficient. In the Supreme Court's opinion, the UOKiK President should have analyzed the scope of the data provided on sporting events held in particular Polish regions in order to determine whether the two scrutinised sport press titles belong to the same relevant market considering the strong 'regional' focus of one of them.

Simultaneously, the Supreme Court claimed that 'if two undertakings act on a certain relevant product market, it is not necessary for the level of the increase in competition to be similar in the whole territory where they are active. It particularly refers to a situation when a weaker competitor is a new market participant'. A relevant geographical market can thus be even national in scope, even if one of the products (in this case, one of the sport newspapers) is not sold in normal distribution outlets in the entire country, on the condition however, that the conditions of competition are homogenous enough in the entire territory.

In the judgement of 14 January 2009, III SK 26/08, *Skoczek, Pieklik*, the Supreme Court has shown that if a tender collusion referred to access to mooring places on the Vistula river, and the colluding undertakings were active on a market for the provision of personal inland transport services, than

the market for the provision of personal inland transport services was correctly identified as relevant in this case. It would not be adequate to include in this relevant market of other services provided from the same mooring places.

In the judgement of 23 April 2009, VI Aca 1035/08, *DAKU International*¹², the Court of Appeals admitted that although Polish jurisprudence tends to define relevant markets as narrowly as possible, this ‘cannot lead to the identification of a relevant market of a single product and single producer (...), but to its identification in a truly correct way’. In the judgement of 6 January 2009, VI Aca 846/08, *Carston*, the Supreme Court stressed that ‘the sole fact that the market for acquisition services is a market secondary to the market for the services provided in a mobile public telecommunications network does not cause the uniformity of the positions of entities active on those markets or the uniformity of their activities’.

In the judgement of 15 May 2009, XVII Ama 64/08, *Kegler*, SOKiK annulled a UOKiK decision on the termination of antitrust proceedings because of lack of a dominant position. The Court found a mistake in the antitrust decision as far as the identification of the relevant geographic market. SOKiK’s objected for instance to the fact that a questionnaire conducted by UOKiK in order to identify the relevant market was not anonymous.

Attention should also be paid to the *EMITEL* judgement of 19 October 2009, XVII Ama 66/08 where the decision of the UOKiK President was annulled by SOKiK due to an incorrect market definition. The Court claimed that the market established by UOKiK as ‘a national market for the emission of television and radio programmes in a terrestrial network’ was in fact a collection of markets because broadcasters must purchase services corresponding to the technical parameters specified in their specific broadcasting concessions. SOKiK stated therefore that not all emission services are substitutable. However, the Court did not correct the UOKiK decision because it concerned in SOKiK’s view a non-existent market which in turn meant that ‘the decision was premature’ – there were no grounds for adopting it.

5. Relationships between the Competition Act and other legal acts

5.1. Competition Act and Energy Law Act

In the judgement of 12 April 2009, ref. no. III SK 36/08, *ENION*, the Supreme Court considered the problem of a correlation between Article 9(2)(4) of the Competition Act and Article 8(1) of the Energy Law

¹² UOKiK Official Journal 2009 No. 3, item 25.

Act¹³. The case focused on a practice of an energy enterprise holding the position of a natural monopoly on a certain relevant market whereby it used the advantage it enjoyed thanks to its position to make the renewal of the deliveries of electricity conditional upon the fulfilment of payment obligations arising from past unauthorised energy use. In the Supreme Court's opinion, energy law would be applicable to individual disputes concerning the justification of particular delivery suspensions. It would not be applicable to practices where 'undertakings, using their monopolistic position, have not continued to provide electricity not because of a suspicion of an illegal use in the past, but only because of failing to make the prescribed payments for electricity that was illegally collected in the past'.

In the judgement of 30 October 2009, VI Aca 464/09, *ENION*, the Court of Appeals claimed that on the basis of Article 18(1) in relation to Article 3(22) of the Polish Energy Law Act, a commune's tasks covered the organisation of energy supplies and the planning of street and public roads' lighting (sustaining lighting points). They did not however cover the financing or co-financing of energy investments beyond this scope. An abuse in the form of the imposition of onerous contractual terms would thus take place in the case of the imposition of such conditions of the provision of lighting services that would make them cover the exploitation and repair of lighting elements other than street lights, and thus make the costs associated with these activities part of the payment for the provision of lighting services.

5.2. Competition Act and Waste Management Act

In the judgement of 27 May 2009, VI Aca 1404/08, *Katowice Commune*¹⁴, the Court of Appeals reconfirmed that 'the Competition Act is not applicable to competition restricting behaviour that is prescribed directly in other legal acts, being *lex specialis* to the Competition Act (...)'¹⁵. The UOKiK President cannot declare that a particular practice restricts competition if that practice is prescribed by the provisions of another legal act which does not leave its addressees any freedom of activity'. The Court of Appeals claimed that 'a rigid establishment of individual waste disposal sites seems to be a practice restricting competition. Answering the question if a given site will accept waste from outside its territory or if it can accept a request from an undertaking to co-operate in the reception of communal wastes coming from outside

¹³ Act of 10 April 1997 – Energy Law (consolidated text: Journal of Laws 2006 No. 89, item 625, as amended).

¹⁴ UOKiK Official Journal 2009 No. 4, item 34.

¹⁵ The Court referred to the Act of 27 April 2001 on Waste Management Act (Journal of Laws 2001 No. 62, item 628, as amended).

the commune where the waste disposal site is located, should belong to the prerogatives of the owners or managers of the sites themselves’.

6. Problems related to the adoption and implementation of the decisions of the UOKiK President

6.1. Requirement of bringing an infringement to an end

In the judgement of 2 July 2009, III SK 10/09 (*Lubelski Rynek Hurtowy*), the Supreme Court considered a number of problems relating to the implementation of a decision issued by the UOKiK President and the requirement to cease a competition restricting practice. The Court claimed that ‘the way in which the decision is implemented can be determined neither in the sentence nor in the justification of a decision because the UOKiK President does not have the right to rule on that issue. The implementation method is determined by the essence of the competition restricting practice that was used by an undertaking. (...) Article 1(2) of the Competition Act refers to the territorial scope of its application and it has a jurisdictional character only. (...) That provision cannot be the source of a norm ordering an undertaking that violated the Competition Act to remove the effects of that infringement’. After the Supreme Court delivered the aforementioned ruling, the Court of Appeals decided to annul a decision of the UOKiK President that imposed a fine for the non-implementation of an antitrust decision by its addressee (judgement of 30 November 2009, VI Aca 1039/09, *Lubelski Rynek Hurtowy*).

6.2. Commitment decision

In the judgement of 19 August 2009, ref. no. III SK 5/09 (*Marquardt Media*), the Supreme Court made its views known on the place of commitment decisions among other decisions issued by the UOKiK President in antitrust cases. The *ratio legis* of the legal provision establishing commitment decisions in the Polish legal systems lies in “enhancing the effectiveness of the antitrust body and accelerating the conclusion of antitrust procedures thanks to the lowering of the standard of proof. This is possible because an antitrust body can work out the solution to an antitrust problem thorough ‘negotiations’ with the undertaking’. The Supreme Court stated however that an undertaking’s application for an adoption of a commitment decision could not be treated as an application for the commencement of a procedure on adopting a commitment decision. ‘Moreover, Article 11a of the Competition Act of 2000 (currently Article 12 of the Competition Act) states that the adoption of a

commitment decision is dependent on the discretion of the UOKiK President. The Competition Act does not state in what circumstances can the adoption of commitment decisions be refused’.

6.3. Addresses of decisions of the UOKiK President

The Supreme Court has once again considered also the problem of the status of a commune as an undertaking in a meaning of the Competition Act. In a decision of 13 February 2006 (RPZ 2/2006), the UOKiK President confirmed that the Oborniki Town and Oborniki Commune had abused its dominant position. The abuse took the form of: (1) the adoption by the town mayor of decisions containing a permission to provide communal waste collection services (the decisions were said to have evidently and discretionally established a short duration for the permits); (2) refusing access to communal waste disposal sites to some undertakings. The UOKiK President declared that such refusal, even if made by the ‘administrator’ of a given waste disposal site (an enterprise responsible for communal management – Przedsiębiorstwo Gospodarki Komunalnej i Mieszkaniowej Spółka z o.o. in Oborniki), was *de facto* ‘inspired’ by the commune’s ownership of that site. Considering the first of the two aforementioned forms of potential abuse, in the judgement of 7 January 2009, III SK 17/08 (*Oborniki Town and Oborniki Commune*), the Supreme Court shared the opinion of the Court of Appeals that administrative decisions resulting from administrative powers (*imperium*) of a particular institution (in this case, the town mayor) ‘are not assessed in the context of the Competition Act’. Regarding the second form of the potential abuse, the Supreme Court stated that undertakings involved in the scrutinised activity ‘created a sufficient circle of undertakings participating in the market’ and that ‘the liability of the undertaking acting directly cannot be replaced by the Oborniki Town and Oborniki Commune’.

6.4. Annulment of a decision of the UOKiK President

In the judgment of 6 January 2009, VI Aca 846/08, *Carston*, the Court of Appeals stated that ‘an annulment of a decision mentioned in the Competition Act refers to a situation when there was no basis for its adoption and after its annulment, there is no need to adopt a new decision on the merits. An annulment followed by the adoption of a new decision with the same content is contrary to Article 78(4) of the Competition Act according to which the UOKiK President can either annul or amend a decision in its entirety or parts, the antitrust body cannot however use those solutions simultaneously’.

In the judgement of 19 August 2009, III SK 5/09 (*Marquard Media*), referring to an abuse of a dominant position on a sports press market, the Supreme Court presented its position on the scope of judicial control of antitrust cases. It held that ‘procedural mistakes concerning evidence cannot cause an annulment of a contested decision if its provisions comply with substantive law. A decision may be annulled in its entirety only if it was adopted without a legal basis, with a severe infringement of substantive law, when a decision was directed to an addressee not party to the proceedings or when a decision referred to a case closed by the final decision in the past. An antitrust decision can also be annulled if full investigations are necessary to solve the case’. The Supreme Court disagreed at the same time with a claim submitted by the plaintiff that ‘proceedings before the UOKiK President are not subject to judicial control’.

6.5. Fines

In the judgement of 19 August 2009, III SK 5/09 (*Marquard Media*), the Supreme Court stressed that a decision imposing a fine is subject to judicial control concerning either the reasons for the imposition of a fine or the factors that influenced its amount. Courts have the right to modify the provisions on fines adopted by the UOKiK President. In order to guarantee the effectiveness of judicial control, an antitrust decision must name all of the factors that have affected the fine. The Supreme Court stressed also that ‘the possibility to mitigate the amount of a fine is accepted by both jurisprudence and doctrine (...) in order to ensure that a decision of the UOKiK President will not result in a restriction of competition due to the partial or total elimination of an undertaking from a market’. The Supreme Court pointed out at the same time that courts analyzing an appeal from a decision of the UOKiK President are not bound by the guidelines on fines adopted by the antitrust authority¹⁶.

Regarding the fine imposed in the *Telekomunikacja Polska* judgement of 27 May 2009, ref. not. VI Aca 1407/08, the need of a detailed income assessment was stressed by the Court of Appeals to act as the basis for the determination of the actual amount of a fine: ‘if the actual income was lower than that used as the basis for a fine, that issue cannot be ignored just because the fine does not exceed the maximum 10% income level’.

In the judgement of 2 December 2009, XVII Ama 13/09, *SADROB*, *SOKIK* established that ‘the termination of illegality cannot influence the sole fact of the imposition of a fine: if a fine was imposed for the non-fulfilment of the duty to notify an intent to concentrate, the fact that the concentration (in the

¹⁶ Guidelines of the UOKiK President on setting fines for competition restricting practices (UOKiK Official Journal 2009 No. 1, item 1).

form of a ‘personal merger’ by members of the board) is not currently being implemented, does not abolish the duty to pay a fine for the non-fulfilment of the legal obligation to notify’.

6.6. Inactivity of the UOKiK President

It is worth noting also a judgement delivered on 1 December 2009 by the Supreme Administrative Court of 1 December 2009, II GSK 237/09, which is likely to influence antitrust enforcement in the future. The case refers to an inactivity problem on the side of the UOKiK President regarding a notification of a suspicion of the use of competition restricting practices by another company. Notifications sent to the UOKiK President do not bind the antitrust authority. According to Article 86(4) of the Competition Act, the UOKiK President sends a written response to the notifying entity informing it about what steps have been taken in response to its submission and the justification of the choices made by the antitrust authority.

In reply to a notification submitted by TP SA concerning a suspicion of the use of competition restricting practices by another telecoms company, the UOKiK President informed the incumbent of the commencement of explanatory proceedings. The initial procedure was closed however with an order adopted on the basis of Article 48(3) of the Competition Act – as a result, full antitrust proceedings were never opened. The UOKiK President sent a letter to TP SA explaining that the accusations contained in its notification did not have an antitrust character and thus, that there were insufficient causes to open full antitrust proceeding. TP SA resubmitted its request to the UOKiK President asking the authority to analyze its claims once again. If the antitrust authority was to sustain its previous position, the incumbent applied for the transfer of the case to the telecoms regulator (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter, UKE) as the competent institution according to Article 65(1) of the Code of Administrative Procedure in relation to Article 83 of the Competition Act.

Since the UOKiK President did not react to the second letter, TP SA accused the authority of inactivity. Subsequently, it applied to the regional administrative court (in Polish: *Wojewódzki Sąd Administracyjny*) for the imposition on the antitrust body of a duty to adopt (in two weeks since the delivery of the judgement) an order on transferring the case to the UKE President. The administrative court rejected the submission as unfounded because it did not consider the antitrust authority as inactive. In the opinion of the court, the fact that the UOKiK President wrote a letter informing the notifying entity that its claims were not of an antitrust character did not mean that the authority declared that it was not the appropriate body to deal with

the case. Sustaining this point of view, the Supreme Administrative Court added that the analysis of competences of the UOKiK President to deal with notifications under Article 86(1) was sufficient for this case; there was no need to analyse all the competences of the UOKiK President in the context of Article 29 of the Competition Act. The Supreme Administrative Court confirmed that the UOKiK President is not bound by the content of a notification and the notifying entity is not a party to antitrust proceedings. Notification issues are, in the Court's opinion, exhaustively regulated in the Competition Act. As such, the application of the Code of Administrative Procedure is excluded in this area – its provisions are applicable to antitrust proceedings only with regard to issues that are not regulated in the Competition Act. The Supreme Administrative Court rejected thus the cassation request as unfounded.

6.7. Application for a preliminary ruling to the European Court of Justice

By the order of 15 July 2009 (III SK 2/09), the Supreme Court applied to the European Court of Justice (ECJ) for a preliminary ruling concerning Article 5 of Regulation 1/2003. The ECJ is expected to rule on the following issue: if a national competition body is allowed – in accordance with the procedural autonomy rule – to adopt a decision stating that an undertaking did not infringe Article 82 TEC (currently Article 102 TFEU), is it also allowed to issue a decision stating that there are ‘no grounds for action’ on the basis of a direct application of Article 5 tirit 3 of Regulation 1/2003. The Supreme Court expresses no doubts that a decision stating the lack of an anticompetitive practice, adopted on the basis of Article 11 of the Polish Competition Act 2000, is not covered by the catalogue of decisions mentioned in Article 5 tirit 2 of Regulation 1/2003. However, the Court doubts if a national competition body is allowed – regarding the content of Article 5 tirit 3 of Regulation 1/2003 – to adopt on the basis of national law a decision on the lack of an anticompetitive practice within the meaning of Article 82 TEC (currently Article 102 TFEU) seeing as Article 5 tirit 3 of Regulation 1/2003 authorizes national competition bodies to ‘decide that there are no grounds for action on their part’. The Supreme Court says that Article 5 tirit 3 of Regulation 1/2003 should be applied if a national competition body intends to refuse to initiate an antitrust proceeding because it claims there are ‘no grounds to act’. However, the situation is totally different when a national competition body initiated the proceeding but later decided the claims were unfounded. The Polish Supreme Court believes that the latter situation raises doubts in the context of Article 5 of Regulation 1/2003.