

## **Can the Right To Be Heard Be Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure**

by

Maciej Bernatt\*

### **CONTENTS**

- I. Introduction
- II. Procedural framework regulating the right to be heard
  - 1. The general character of Polish competition procedure
  - 2. Regulation of the right to be heard
- III. Access to information about the proceedings
  - 1. General comments
  - 2. Information about the explanatory proceedings
  - 3. Information about objections
    - 3.1. Obligation to pass information about the objections
    - 3.2. Information about the objections in proceedings concerning practices restricting competition
    - 3.3. Information about competition concerns
- IV. Access to evidence
  - 1. Access to evidence in proceedings concerning concentration
  - 2. Access to evidence versus access to case file
  - 3. Justification of the decisions vs. the protection of business secrets
- V. Conclusions

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\* Maciej Bernatt, Ph.D., assistant professor at the Jean Monnet Chair on European Economic Law, Faculty of Management, University of Warsaw; ordinary member of the Centre for Antitrust and Regulatory Studies; assistant of chief justice in the Polish Constitutional Court. Comments are welcomed at [mbernatt@mail.wz.uw.edu.pl](mailto:mbernatt@mail.wz.uw.edu.pl)

### *Abstract*

This article analyses Polish competition procedure from the perspective of a) the right to be heard, and b) the right to receive information about the proceedings. It points out problems with access to information about competition proceedings which influence the level of protection of the right to be heard in these proceedings. In order to appraise this issue, the article embarks upon an examination of the rules governing the right to be heard in Polish competition enforcement proceedings. It then focuses on the extent of the competition authority's obligation to inform undertakings about the actions addressed to them. The article includes discussion of the rules that circumscribe the parties' right of access to evidence in the proceedings. Finally, proposals for changes in the practice of the competition authority, as well as in the Polish legal framework, are put forth. The new rules governing competition proceedings before the European Commission serve as an example for improvements in Polish competition procedures.

### *Résumé*

Dans cet article, la procédure polonaise de concurrence est analysée dans l'optique du droit d'être entendu et du droit à l'information. Le but en est d'identifier les problèmes en matière d'accès à l'information sur la procédure de concurrence, susceptibles d'impact sur le niveau de protection du droit d'être entendu dont jouissent les entreprises qui sont les parties de la procédure. Les considérations contenues dans l'article se focalisent d'abord sur les dispositions qui règlent le droit d'être entendu pendant la procédure de concurrence. Ensuite, l'attention porte sur l'obligation qu'a l'autorité de concurrence d'informer les entreprises sur les actions intentées contre elles. L'article analyse aussi l'étendue de l'accès des parties de la procédure de concurrence aux éléments de preuve recueillis par l'autorité de concurrence. On formule également dans l'article des propositions de changements législatifs et pratiques en matière d'application du droit. Les règles nouvelles qui régissent les procédures de concurrence devant la Commission européenne sont prises en compte en tant qu'indications utiles à l'évolution de la procédure polonaise.

**Classification and key words:** competition proceedings; antitrust proceedings; competition authority; right to be heard; due process; right to fair hearing; procedural fairness; fundamental rights

## **I. Introduction**

The right to be heard is universally recognized as one of the most important guarantees of procedural fairness. EU law accepts that the right to be heard is one of its general principles. In the European Convention on Human Rights (hereafter, ECHR) the right to be heard is enshrined in the right to a fair trial

(Article 6 ECHR). The jurisprudence of the EU courts and the European Court of Human Rights confirms that the right to be heard is fully applicable in proceedings conducted by administrative authorities. This is also true in the case of proceedings before the Polish competition authority (known as the President of the Office of Competition and Consumers Protection, hereafter, the President of the UOKiK, following the Polish acronym), where the right to be heard must be respected as a general principle of administrative procedure as well as one of the guarantees of the constitutional principle of procedural fairness enshrined in the democratic state of law clause contained in Article 2 of the Polish Constitution.

Because it is undisputed that the right to be heard must be respected in Polish competition proceedings, this the article does not analyze this issue. Instead it aims to show the problems with access to information in competition proceedings that influence the level of protection of the right to be heard in such proceedings. In order to appraise this, the article embarks upon an examination of the rules governing the right to be heard in Polish competition enforcement proceedings. Thereafter it focuses on the extent of the competition authority's obligation to inform undertakings about the actions addressed to them. The article also discusses the rules and practices that circumscribe the parties' right of access to evidence in the competition proceedings<sup>1</sup>.

## II. Procedural framework regulating the right to be heard

### 1. The general character of Polish competition procedure

Polish competition procedure is regulated in the Act on the Protection of Competition and Consumers<sup>2</sup> adopted on 16 February 2007 (hereafter usually referred to as the Competition Act). Proceedings before the UOKiK President are described therein. They can take the form of explanatory or competition proceedings. The latter are officially called antimonopoly proceedings and are of two types: antimonopoly proceedings in cases of practices restricting competition, and antimonopoly proceedings in cases of concentration.

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<sup>1</sup> The problems discussed in this article have been analyzed more deeply in my book (in Polish) concerning procedural fairness in the proceedings before the competition authority, published in 2011, see: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 99–152. For the abstract of the book in English visit my SSRN Author page: <http://ssrn.com/author=1183912>

<sup>2</sup> Journal of Laws No. 50, item 331, as amended.

Appeals against final decisions of the UOKiK President (the Polish national competition authority) terminating the above mentioned proceedings are dealt with by the Court of Competition and Consumer Protection (hereafter, SOKiK). The proceedings before this Court are fully regulated by the Code of Civil Procedure, not by the Competition Act. The procedural regulations of Polish competition proceedings (and their interpretation) are also influenced by the standards deriving from Article 6 ECHR<sup>3</sup>.

Procedural issues not regulated specifically in the Competition Act are subject to the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure<sup>4</sup> (see Article 83 of the Competition Act). Based on this referral, the general principles of administrative procedure (i.e. legalism and the principle of the objective truth, the obligation to provide information to the parties, the principle of active participation by a party in the administrative proceedings) are binding in the proceedings before the President of the UOKiK. Additionally the Code of Civil Procedure<sup>5</sup> (not the Code of Administrative Procedure) regulates *per analogiam* the hearing of evidence before the President of the UOKiK in matters not regulated in the Competition Act. This poses some doubts whether the specific provisions of the Code of Administrative Procedure (especially Articles 75-81) that transpose general principles of administrative procedure into concrete rules and regulate the hearing of evidence in administrative proceedings are applicable in the proceedings before the President of the UOKiK. An analysis conducted from the point of view of procedural fairness and the right to be heard yields a positive answer to this question<sup>6</sup>. General principles of administrative procedure cannot be seen separately from the specific provision of the Code of Administrative

<sup>3</sup> On the application of Article 6 ECHR to competition proceedings, see more in my article: 'Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 51-63. See also, in Polish literature: K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, Centrum Europejskie Natolin, Warszawa 2010, [http://www.natolin.edu.pl/pdf/zeszyty/Natolin\\_Zeszyty\\_39.pdf](http://www.natolin.edu.pl/pdf/zeszyty/Natolin_Zeszyty_39.pdf), pp. 95–112; A. Stawicki, *Komentarz do art. 106* [w:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2010, point 1.1.

<sup>4</sup> Journal of Laws 2000 No. 98, item 1071.

<sup>5</sup> Act of 17 November 1964, Journal of Law 1964, No 43, item 296.

<sup>6</sup> M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu...*, pp. 129–132. Such an approach finds support in the jurisprudence of Antimonopoly Court (predecessor of the SOKiK Court), see the judgment of 9 May 2001, XVII Ama 91/00, LEX no. 55940. For a different opinion, however, expressed by the authors of one of the commentaries to the Competition Act, see: C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 723. The SOKiK, when dealing with the appeals from decisions of the UOKiK President, deliberated over the arguments whether Articles 75–81 of the Code of Administrative Procedure might have been violated in: judgment of 27 December 2007, XVII Ama 90/06, not reported; the resolution of 16 November 2004, XVII Amz 13/05, not reported;

Procedure that guarantee them. Thus, an interpretation of Articles 83 and 84 of the Competition Act that takes into account the perspective of the right to be heard is required. Such an interpretation would seem to yield the conclusion that the simultaneous application of the provisions concerning the hearing of evidence from both the Code of Administrative Procedure and the Code of Civil Procedure should not be excluded<sup>7</sup>. Thus, for example, Article 81 of the Code of Administrative Procedure – which is crucial for the right to be heard<sup>8</sup> – is in force in competition procedure cases. Consequently, the facts in the proceedings before the President of the UOKiK must be established (only) on the basis of evidence which the party has been given the possibility to comment on.

## 2. Regulation of the right to be heard

The above description of Polish competition procedure demonstrates its complicated nature. This influences on the degree of precision concerning the regulation of the right to be heard in Polish competition proceedings. When it comes to the first phase of the proceedings before the UOKiK President – explanatory proceedings, the right to be heard is scarcely regulated due to the fact that at this stage there are no parties to the proceedings (the objections against undertakings are not yet raised). The undertakings, even if directly addressed by the actions of competition authority such as inspections or information requests, have no access to the materials collected during the explanatory proceedings and cannot comment on them. As they have limited knowledge about the subject matter and/or focus of the explanatory proceedings, in practice in most cases they will not be able to submit effective explanations concerning the essential circumstances of a given case under Article 50(3) of the Competition Act.

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judgment of 7 January 2004, XVII Ama 24/03 (2005) 2 *Wokanda*, item 50; the resolution of 6 February 2006, XVII Amz 28/05, not reported.

<sup>7</sup> Article 83 of the Competition Act provides that the matters not regulated by the Competition Act, as regards the proceedings before the UOKiK President, shall be subject to the provisions of the Code of Administrative Procedure, subject to Article 84. Article 84 of the Competition Act stipulates that in matters concerning evidence in proceedings before the President of the Office within the scope not regulated in the Competition Act, Articles 227 to 315 of the Code of Civil Procedure, shall apply accordingly.

<sup>8</sup> B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Kraków 2005, commentary to Article 81 of the Code of Administrative Procedure, Nb. 1; R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2008, commentary to Article 81 of the Code of Administrative Procedure, Nb 1.

Undertakings may exercise their right to be heard during the main phase of the proceedings before the President of the UOKiK – antimonopoly proceedings. Article 10 of the Code of Administrative Procedure stipulates that administrative bodies are required to ensure that the parties are actively involved at each stage of proceedings and that they shall allow the parties to express an opinion on the evidence and materials collected before any decision is issued. However, for the right to be heard to be used effectively, parties to the proceedings must receive exact information concerning the details of the proceedings, including information about the objections raised against undertakings (charges of participating in a practice restricting competition, or competition concerns about a planned concentration). Such an obligation derives from Article 74 of the Competition Act, under which the UOKiK President, when issuing a decision terminating the proceedings, shall take into consideration only the objections which the parties concerned were able to comment on.

Access to the file of the case and the evidence contained therein is crucial to the parties' right to be heard. Article 73(1) of the Code of Administrative Procedure provides that at each stage of the proceedings a public administration body shall allow parties to see the file and to make notes or copies thereof. However, this right may be significantly limited during antimonopoly proceedings as a consequence of the protection of business secrets. Article 69(1) of the Competition Act stipulates that the UOKiK President is entitled to limit access to evidence to the extent indispensable. This rule relates to evidence attached to the case file in situations where rendering such evidence accessible would entail a risk that business secrets, or any other secrets protected by separate legal provisions, might be revealed. Thus, the right to be heard of the undertaking participating in proceedings as a party may be in conflict with the need to protect business secrets of another undertaking<sup>9</sup>.

Another legal institution of critical importance for the right to be heard is the oral hearing, as this gives the parties the possibility to have direct contact with the decision makers. An oral hearing can be organized in the course of the proceedings before the UOKiK President [Article 60(1) of the Competition Act]. However, the decision whether to convene an oral hearing is completely discretionary. Even if the parties submit a request in this respect the UOKiK President is not obliged to organize an oral hearing. In this regard Polish

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<sup>9</sup> For more on this issue, see: M. Bernatt, 'Right to be heard or protection of confidential information? Competing guarantees of procedural fairness in proceedings before the Polish competition authority' (2010) 3(3) *YARS* 53–70, available at: <http://ssrn.com/abstract=1874796>. See also G. Materna, 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK' (2008) 4 *Przegląd Prawa Handlowego* 27–33.

procedure differs negatively from its EU counterpart where an oral hearing is obligatory for the Commission to be organized when parties so request<sup>10</sup>.

### III. Access to information about the proceedings

#### 1. General comments

The use parties may make of their right to be heard is directly connected with their right to receive information on the proceedings conducted against them. The President of the UOKiK has an obligation to inform, derived from Article 9 of the Code of Administrative Procedure. It stipulates that public administrative bodies are obliged to provide the information and explain all factual and legal circumstances of the case that can influence the rights and obligations of the parties. It is undisputed that the obligation to inform should be understood as broadly as possible<sup>11</sup>. The information delivered by public administrative bodies must be full and appropriate<sup>12</sup>.

#### 2. Information about the explanatory proceedings

Under Article 9 of the Code of Administrative Procedure, the obligation to inform refers to the parties to the proceedings. Thus information about the commencement of explanatory proceedings is not delivered to anybody, as there are no parties yet. Taking into account that unannounced inspections directed by the UOKiK President functionaries usually take place during the explanatory proceedings, the undertakings have usually no knowledge - until such inspections begin - about the activity of the state organs that is addressed

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<sup>10</sup> The problems surrounding the limited use made of the oral hearing in Polish competition procedure falls outside the scope of this article. For more on this issue, see: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu...*, pp. 134–144. As to the EU law see also T. Giannakopoulos, 'The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures' (2001) 4 *World Competition*.

<sup>11</sup> Judgment of Administrative Supreme Court of 12 April 2000, I SA/Ka 1740/98, available at <http://orzeczenia.nsa.gov.pl>; see also judgment of Administrative Supreme Court of 25 June 1997, SA/Lu 2087/95, LEX no. 30816; the judgment of Supreme Court of 23 July 1992, III ARN 40/92 (1993) 3 *Państwo i Prawo* 110; judgment of Voivodship Administrative Court of Warsaw of 1 December 2004, II SA 4506/03, available at <http://orzeczenia.nsa.gov.pl>.

<sup>12</sup> G. Łaszczycza, Cz. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, Vol. I, *Komentarz do art. 1–103*, Lex, 2007, commentary to Article 9 of the Code of Administrative Procedure, Nb 5–7.

against them. Obviously some explanatory proceedings are of such a nature that there is a clear need to surprise an undertaking with unannounced inspections, as this guarantees the effectiveness of the proceedings. However, the formalistic approach under which information about the institution of explanatory proceedings is never made known to the undertakings concerned should be deemed inappropriate<sup>13</sup>. Rather, the opening of a proceeding should be made publicly known unless there are valid reasons to justify its secret character.

This is the practice of the Commission, recently officially confirmed. The opening of the proceedings is made public, either by press release or an announcement on the DG Competition website, unless such publication may harm or impede the investigation<sup>14</sup>. Such an approach is also advisable in the case of Polish competition procedure. The introduction of such a practice could facilitate active cooperation between the undertakings and the President of the UOKiK. It would trigger a higher level of protection of right to be heard, including the antimonopoly proceedings subsequent to the explanatory ones, inasmuch as a party to the antimonopoly proceedings would have a deeper knowledge of the case.

### 3. Information about objections

#### 3.1. Obligation to pass information about objections

An exhaustive knowledge about the objections is crucial to the parties' right to be heard. For this reason parties should receive, at the beginning of the antimonopoly proceedings in cases of practices restricting competition, a thorough explanation about charges concerning their alleged participation in anticompetitive agreements or abuse of dominant position. As concerns antimonopoly proceedings in cases of concentration, undertakings giving notice of a concentration should be informed about any competition concerns of the planned concentration identified by the UOKiK President in the course of the proceedings.

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<sup>13</sup> For a similar opinion, see: A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, Warszawa 2009, commentary to Article 48, Nb 10.

<sup>14</sup> See Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (2011/C 308/06), para. 20. The introduction of such practice was publicly announced by the DG Competition Director in his speech at the OECD Competition Committee Meeting (18 October 2011, Paris) as proof of the growing concern to assure transparency in competition proceedings.



### 3.2. Information about objections in proceedings concerning practices restricting competition

With respect to the proceedings concerning practices restricting competition, the biggest deficiency is that the undertakings are informed only generally about the charges raised against them. Decisions on the commencement of these proceedings do not contain a thorough, detailed justification. In particular they lack a detailed description of the facts and evidence collected in the case files which led the UOKiK President to the conclusion that the Competition Act may have been infringed. They lack also a description of the legal assumptions made concerning the application of the facts to the relevant legal provisions<sup>15</sup>. The parties to the proceedings are not informed about the length of the presumed violation nor the identity of those that participated in the alleged infringement<sup>16</sup>. It also happens that undertakings receive decisions on the commencement of proceedings where only the strict legal basis is quoted, and the factual and legal justification is completely missing. For example in the decision of 8 December 2009 the UOKiK President pointed out that the charges were formulated precisely because they reflected the exact wording of the legal provisions<sup>17</sup>. This problem exists also when it comes to the proceedings in which Articles 101–102 TFEU (under the Regulation 1/2003<sup>18</sup>) is made the legal basis of the decision by the UOKiK President<sup>19</sup>.

This may be seen as part of the broader problem of not paying enough attention to procedural issues in the practice of the President of the UOKiK. In the decisions establishing the infringement of competition law it is usually stated only that the parties have the right of access to the case file and the right to make use of it, and that the President of the UOKiK informed the parties about the closure of the evidentiary proceedings and about the parties' right to see the entire evidence collected in the proceedings and the right to express its

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<sup>15</sup> It is the obligation of the administrative bodies to inform the parties to the proceedings about legal circumstances that influence the findings in the decision, see J. Borkowski, [in:] J. Borkowski (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1989, pp. 72–73. See also W. Taras, 'Prawny obowiązek informowania obywateli przez organy administracji państwowej' (1986) 1 *Państwo i Prawo* 73.

<sup>16</sup> M. Kolasiński, 'Influence of the General Principles of Community Law on Polish Antitrust Procedure' (2010) 3(3) *YARS* 38.

<sup>17</sup> See the decision of the UOKiK President of 8 December 2009, DOK-7/2009, available at <http://www.uokik.gov.pl>

<sup>18</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

<sup>19</sup> M. Kolasiński, 'Influence of the General Principles...', pp. 38–43.

final opinion in the case<sup>20</sup>. For example, in the decision of 23 November 2011 the UOKiK President dismissed without specific explanation the complaint of one of the parties that the charges in the case were formulated in an unclear and imprecise fashion, which limited the right of the defense<sup>21</sup>.

Another issue that remains controversial is whether, in the resolution on the institution of antimonopoly proceedings, the relevant market should be preliminarily established or not. The Polish Supreme Court, in its judgment of 7 May 2004, ruled that it is not necessary to do so<sup>22</sup>. The absence of such a finding lack does not amount, in the opinion of the Court, to a violation of Article 10 of the Code of Administrative Procedure. According to the Court the Competition Act obliges the UOKiK President only to inform the parties about the commencement of the proceedings. In consequence, according to the Court the resolution does not have to contain a description of the relevant market. Such an approach must be critically assessed, as the determination of relevant market is a crucial premise of agreements restricting competition and abuse of dominant position<sup>23</sup>. In order for an undertaking to defend itself effectively it is important to have knowledge about the elements of its alleged misbehavior that have brought the UOKiK President to the preliminary conclusion that the competition law had been breached. It must be also borne in mind that the UOKiK President acts on an *ex officio* basis and issues the resolution on the institution of antimonopoly proceedings usually after the completion of explanatory proceedings. As a consequence the President of the UOKiK should be able to show preliminarily why he/she considers that a given undertaking infringed the Competition Act. Thus the practice of describing preliminarily the relevant market in the resolution on the institution of antimonopoly proceedings must be strongly supported<sup>24</sup>.

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<sup>20</sup> See decisions of the UOKiK President (published at [www.uokik.gov.pl](http://www.uokik.gov.pl)) of: 29 December 2006, DOK-166/06; 20 December 2007, DOK-98/07; 29 August 2008, DAR-15/2006; 29 August 2009, DOK-6/2008; 8 December 2009, DOK-7/2009; 23 November 2011, DOK-8/2011.

<sup>21</sup> Decision of the UOKiK President of 23 November 2011, DOK-8/2011, p. 95. The UOKiK President stated only that the complaint was ill-founded inasmuch as the party demonstrated, in its written statement filed in the course of the proceedings that it understood the charges raised. This decision is not final yet. Similar arguments were raised unsuccessfully by the parties in the proceedings completed by decision of 8 December 2009, DOK-7/2009.

<sup>22</sup> Judgment of the Supreme Court of 7 May 2004, III SK 38/04, UOKiK Official Journal [2004] 4, item 330.

<sup>23</sup> See A. Jurkiewicz, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Article 74, Nb 7–8 and M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 110–112. The need for providing the parties with information about the relevant market is underlined in the literature in regards with the proceeding before the Commission, C.S. Kerse, N. Khan, *EC Antitrust Procedure*, 5th Edition, London 2005, Nb. 4–020.

<sup>24</sup> M. Różewicz-Ładoń points out that in practice information about the relevant market is in principle transmitted to the addressee of the resolution upon the institution of antimonopoly

This tendency to not explaining in detail neither the facts nor the legal reasoning that supports the charge of anticompetitive behavior at the beginning of antimonopoly proceedings is not in line with the purposive and a systematic interpretation of the Competition Act. Rather, it is wrongly based on a strictly textual interpretation. It must be advocated that even if the resolution on the commencement of antimonopoly proceedings (Article 88 of the Competition Act) is not appealable, it nevertheless needs justification in order to protect the parties' right to be heard. The provisions of the Competition Act are possible to be interpret in such a way that takes into account obligation of the UOKiK President to inform the parties thoroughly about the charges raised against them. The UOKiK President is obliged to inform parties about the institution of antimonopoly proceedings [Article 88(2) of the Competition Act]. These proceedings end with a decision which must be based on the charges to which the parties have had an opportunity to comment on (Article 74 of the Competition Act). Therefore in light of the Article 9 of Code of Administrative Procedure (the obligation to inform) it seems clear that in the resolution on the institution of the proceedings it is indispensable for the UOKiK President to identify precisely the charges and justify them, both from a factual and legal perspective<sup>25</sup>. The information collected during explanatory proceedings should be legally sufficient to formulate a justification for the commencement of antimonopoly proceedings.

The argument for a thorough justification of the resolution on the institution of antimonopoly proceedings is supported by the practice of the Commission. In the EU competition proceedings the statement of objections contains a full factual and legal description of the presumed infringement<sup>26</sup>. What is more, it has recently been decided that in the statement of objections a section on

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proceedings; see K. Róziewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warszawa 2011, p. 121.

<sup>25</sup> In the past the Competition Court correctly expected the President of the UOKiK to show, in the resolution on the commencement of antimonopoly proceedings, what actions of the undertaking could have violated the competition law and which legal provision(s) was breached; see the judgement of the Competition Court of 7 January 2004, XVII Ama 24/03. See also the judgement of 23 February 2004, XVII Ama 30/03, not reported and of 23 July 2003, XVII Ama 94/02 (2000) *Wokanda* 7–8, item 89.

<sup>26</sup> Article 10 of Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ [2004] L 123/18. See C.S. Kerse, N. Khan, *EC Antitrust Procedure*, Nb. 4-020 and cases: C-62/86 *AKZO v Commission*, ECR [1991] I-3359, para. 29; T-10/92 *Cimenteries CBR SA v Commission*, ECR [1992] II-571, para. 33; T-191/98 *Atlantic Container Line AB v Commission*, ECR [2003] II-3275, paras. 113 and 162.

finis is included, where preliminary calculation of the fine is given<sup>27</sup>. This section indicates the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and whether the infringement was committed intentionally or by negligence<sup>28</sup>. The statement of objections must also mention whether certain facts may give rise to aggravating circumstances and, to the extent possible, to attenuating circumstances<sup>29</sup>. The Commission underscored that the section on fines is a major novelty, intended to provide greater clarity and to encourage parties to come forward with arguments in this respect early on<sup>30</sup>.

### 3.3. Information about the competition concerns

When it comes to antimonopoly proceedings in cases of concentration, a different problem appears. The undertakings that give notice of the planned concentration are not informed during the course of the proceedings about the objections the UOKiK President has against the planned concentration (competition concerns)<sup>31</sup>. This is not in line with the reasonable interpretation of Article 74 of the Competition Act, in the light of Article 10 of the Code of Administrative Procedure. The notion of ‘charge’ used there must be understood broadly and refer not only to proceedings in cases of practices restricting competition, but also to proceedings in cases of concentration. Article 74 is situated in the first chapter of the sixth section of the Competition Act and thus it is applicable to any kind of proceedings before the UOKiK President – including the one in cases of concentration.

The fact that the parties are not informed about the competition concerns may be a consequence of the fact that Polish procedure in cases of concentration has only one phase. The Competition Act does not distinguish any formal moment when the UOKiK President would have to inform the

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<sup>27</sup> See the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, paragraphs 84–85. Compare also: Joaquín Almunia, ‘Fair process in EU competition enforcement’, European Competition Day, Budapest, 30 May 2011, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/396&format=DOC&aged=0&language=EN&guiLanguage=en>

<sup>28</sup> Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, para. 84.

<sup>29</sup> *Ibidem*.

<sup>30</sup> See the speech by DG Competition Director Alexander Italianer at the OECD Competition Committee Meeting (18 October 2011, Paris), ‘Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of Hearing Officer’, available at [http://ec.europa.eu/competition/speeches/text/sp2011\\_12\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf).

<sup>31</sup> T. Skoczny, ‘Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy’ (2010) 5 *Europejski Przegląd Sądowy* 21.

notifying undertaking about any objections he/she might have against the planned concentration. Thus the party may be surprised by the final outcome of the decision and cannot propose remedies before it is issued<sup>32</sup>. This problem could be resolved by the introduction of two phases in the proceedings in cases of concentration. This would enable the notifying party to be more active and propose the solutions to problems concerning concentration raised by the President of the UOKiK during the course of the proceedings. Thus, the introduction of a two-phase process, which is proposed in the UOKiK President's *Competition Policy 2011–2013* program, must be supported<sup>33</sup>.

## IV. Access to evidence

### 1. Access to evidence in the proceedings concerning concentration

As noted above, the right to active participation in the proceedings is a general principle of Polish administrative procedure. The consequence of this is that the parties must have an opportunity to comment on all the evidence collected during the proceedings. Otherwise Article 10 of the Code of Administrative Procedure is violated<sup>34</sup>. Article 81 of the Code of Administrative Procedure provides that the facts in the administrative proceedings can be established only on the basis of evidence to which the party concerned has been given the possibility to comment on. What is more, in the jurisprudence of administrative courts it is underlined that the right of the parties to express their final opinion in the case on the basis of all the evidence collected is not waived, even when the parties might know the facts established during the proceedings<sup>35</sup>. Even if

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<sup>32</sup> In recent two decisions by the UOKiK President prohibiting concentration (the decision of 13 January 2011, DKK-1/2011 and of 3 February 2011, DKK-12/2011, available at <http://www.uokik.gov.pl>) the undertakings that notified concentration were not given a chance to propose remedies in the course of the administrative proceedings. The question arises whether this is possible during first-instance judicial proceedings before the SOKiK.

<sup>33</sup> *Polityka konkurencji na lata 2011-2013*, Urząd Ochrony Konkurencji i Konsumentów, available at <http://www.uokik.gov.pl/download.php?plik=10111>, pp. 66–67.

<sup>34</sup> See the judgments of the Supreme Administrative Court of: 10 May 2006, II OSK 810/05, LEX no. 236469; 6 October 2000, V SA 316/00, LEX no. 50116; 5 April 2001, II SA 1095/00, LEX no. 53441. Violation of Article 10 of the Code of Administrative Procedure may be the reason for revocation of the decision by the court, see judgment of the Supreme Administrative Court of 10 January 2002, V SA 1227/01, LEX no. 109326.

<sup>35</sup> The judgments of Voivodship Administrative Court of Warsaw of: 8 November 2006, III SA/Wa 1933/06, available at <http://orzeczenia.nsa.gov.pl> and of 22 March 2006, III SA/Wa 3179/05, available at <http://orzeczenia.nsa.gov.pl>.

the parties have such knowledge they still need be informed about the relevance of these facts to the decision making process.<sup>36</sup>

In cases of practices restricting competition, the President of the UOKiK informs the parties about the termination of antimonopoly proceedings and calls upon the parties to file their final opinion in the case after their study of all the evidence collected. This is reported in the final decision of the UOKiK President. However, an analysis of recent decisions of the UOKiK President issued in the antimonopoly proceedings in cases of concentration suggest (decisions prohibiting the concentration) suggests that this does may not actually take place in these proceedings<sup>37</sup>. In the decisions of 13 January 2011 and of 3 February 2011 the undertaking giving notice of the concentration was not been given a chance to comment on all the evidence collected during the proceedings before the final decision was issued. Such practice is without legal justification, especially when it concerns decisions prohibiting the concentration. During the proceedings the UOKiK President collects the information and obtains economic analyses which may suggest that the planned concentration - contrary to the opinion of the undertaking giving notice - may have an anticompetitive effect. Not providing the party with the possibility to comment on such information and analyses after all the evidence in the case is collected violates the right to be heard of the parties to the proceedings.

## 2. Access to evidence vs. access to case file

The other problem relevant for a question to the issue of the right to be heard in the competition enforcement proceedings is whether the parties to the antimonopoly proceedings (both in cases of practices restricting competition and in cases of concentration) always know what evidence collected in the case file will support the decision of the UOKiK President.

There is no proof that confirms that the parties concerned have knowledge of this. In the proceedings concerning practices restricting competition, the resolution on the institution of antimonopoly proceedings does not refer to specific evidence that supports the charges of anticompetitive conduct. Also, the call for the parties to express their final opinion in the case after the termination of the proceedings does not point out what portions of collected data (especially documents) collected in the case file (which can contain massive amounts of information) are considered pertinent by the UOKiK President in his/her decision-making process. Even though the parties to

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<sup>36</sup> Ibidem.

<sup>37</sup> See the decision of 13 January 2011, DKK-1/2011 and of 3 February 2011, DKK-12/2011.

the proceedings have access to the case file, they may have difficulties with identifying which part thereof is considered by the UOKiK President as the proof of an infringement of competition law<sup>38</sup>. In some cases, especially those complicated ones in which a massive amounts of information is collected, the mere access to the case file may not suffice to enable an effective defense against the charges raised.

For this reason the mere right of access to the case file should not be understood, in the context of the actual practice of the UOKiK President, as a sufficient guarantee of the parties' right to be heard. Rather the parties when exercising their right of access to the case file, should be informed which part thereof is considered to constitute incriminating evidence in the case. Such information should be made available to the parties preliminarily, in the resolution on the institution of antimonopoly proceedings, and finally when the parties are called upon to express their final opinion in the case after the termination of the proceedings. This may be achieved either by a change in the practice of the UOKiK President, or by introduction of specific regulations to the Competition Act that would establish such an obligation on the part of the UOKiK President.

### **3. Justification of the decisions versus the protection of business secrets**

Another problem concerning the right to be heard (and the right to judicial review as well) concerns the way of justifying the final decisions of the UOKiK President, and is connected with the protection of business secrets in the competition proceedings.

It has already been pointed out that Polish legislation and jurisprudence, unlike that of the EU one, does not properly balance the protection of business secrets with the safeguards of the right to be heard<sup>39</sup>. It fails to stipulate clearly what the limits of the protection of confidential information are in situations when the right to be heard of other parties to proceedings is at stake<sup>40</sup>.

This problem of giving preference to the protection of business secrets over the right to be heard can be observed in the justification of the UOKiK

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<sup>38</sup> M. Kolasiński underlines that access to the case file before the issuance of a decision does not constitute a sufficient guarantee of the right to a fair hearing. He notes that undertakings frequently review hundreds of pages of case files, without being aware of the relevance of the specific facts or evidence included or knowing how to identify of the issues they should comment on, see M. Kolasiński, 'Influence of the General Principles...', p. 38.

<sup>39</sup> M. Bernatt, 'Right to be heard or protection of confidential information?...', pp. 58–62.

<sup>40</sup> *Ibidem*.

President's decision<sup>41</sup>. Under Article 32(3) of the Competition Act the decisions of the UOKiK President published in the Official Journal of the Office of Competition and Consumers Protection are required to be made public, with the omission of information constituting a business secrets and other confidential information protected under separate provisions. This regulation applies only to the public version of the decision and not the one delivered to the parties. In the Competition Act there is no legal basis to limit, in the justification of the decision, the access of the parties to information constituting a business secret which is considered to be the proof of the infringement. Article 69(1) of the Competition Act regulates the limitations on access to evidence access contained in the case file, and should not be interpreted as a ground for protection of business secret that are the proofs of the infringement at the same time.<sup>42</sup> Additionally it may be noted that Article 71(1) of the Competition Act regulates only the personal obligation of the employees of the Office of Competition and Consumers Protection to maintain the confidentiality of business secrets to which they obtain access to during proceedings<sup>43</sup> and thus may not be rather seen applicable to the way the decisions are justified.

From the perspective of the right to be heard and the principle of equality of arms it is crucial for the parties to learn on what evidence the decision is based. Otherwise they may well have difficulties in formulating an effective appeal of such a decision and questioning it in further judicial proceedings. In the light of Articles 81 and 10 of the Code of Administrative Procedure, practices restricting competition or the anticompetitive character of a concentration cannot be proven by evidence to which the parties have no access to or even no knowledge of. The UOKiK President rather faces an alternative: either to prove the infringement (or anticompetitive character of the concentration) with the use of evidence that does not constitute a business secret, or to reveal the business secrets relied on to the parties and explain that such a disclosure was necessary for the right to be heard to be fully protected<sup>44</sup>.

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<sup>41</sup> See the decision of 3 February 2011, DKK-12/2011.

<sup>42</sup> See the proposed solution to this problem: M. Bernatt, 'Right to be heard or protection of confidential information?...', pp. 67–68.

<sup>43</sup> Article 71(1) of the Competition Act is relied upon by the UOKiK President as a source of the prohibition against revealing business secrets in the public version of decision; see the decision of 24 February 2011, DOK-1/2011, available at <http://www.uokik.gov.pl>, p. 4; see also the decision of 4 November 2010, DOK-9/2010, available at <http://www.uokik.gov.pl>, p. 2. Such an approach is incorrect in the light of the wording of Article 71(2) *in fine* and the fact that Article 32(3) of the Competition Act provides specific regulation in this respect.

<sup>44</sup> A similar approach is advised in case of a resolution on the limitation of access to evidence in the course of the proceedings under Article 69(1) of the Competition Act, see M. Bernatt, 'Right to be heard or protection of confidential information?...', pp. 67–68.



For this perspective it is important that in the decision of 3 February 2011 many pages of its operative part contain omissions that are revealed only in the attachment to the decision, which remains unknown to the addressee of the decision (the information contained in this second attachment is known only to the UOKiK President, and afterwards to the SOKiK)<sup>45</sup>. The lack of this information may have impeded, or maybe even rendered impossible, discussion with the UOKiK President about, i.e. the ways in which the relevant market and the anticompetitive effect of the concentration were determined in the decision. The reason for that is that the addressee of the decision had no access to the calculations of the UOKiK President in this respect<sup>46</sup>, because in the opinion of the UOKiK President these calculations contained business secrets.

The above analysis should not be seen as appeal for not protecting business secrets in the justification of these type of the UOKiK President's decisions that are delivered to the parties. It points out that there is a need for properly balancing the protection of business secrets with respect for right to be heard of the parties. In my opinion, the UOKiK President should not try to prove an infringement with the information that are business secrets at the same time.

Comparatively it is important to note that under the Commission notice on the rules for access to the Commission files<sup>47</sup>, the qualification of a piece of information as confidential is not a barrier to its disclosure if such information is necessary to prove an alleged infringement or could be necessary to exonerate a party<sup>48</sup>. The Commission believes that the need to safeguard the rights of defense of the parties, through the provision of the widest possible access to the case file outweighs the concern for the protection of confidential information of others<sup>49</sup>. The preamble to Regulation 773/2004 explicitly states that where business secrets, or other confidential information, are necessary to prove an infringement, the Commission should assess whether the need

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<sup>45</sup> See for example pp. 62–63, 67, 69, 71, 74 of the decision of 3 February 2011, DKK-12/2011. A similar problem probably occurs in the decision of 23 November 2011, DOK-8/2011 as its justification contains information that was not revealed, not only to the public but also to the parties (this information is included in attachments 1–5 to the decision, which are either secret for all parties or for some of them), see pp. 4–5 of the decision.

<sup>46</sup> Decision of 3 February 2011, DKK-12/2011, pp. 62–63.

<sup>47</sup> Commission notice of 22 December 2005 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty; Articles 53, 54 and 57 of the EEA Agreement, and Council Regulation (EC) No. 139/2004, OJ [2205] C 325/07.

<sup>48</sup> Para. 24 of the Commission notice on the rules for access to the Commission file.

<sup>49</sup> *Ibidem*. But see the opinion expressed before the CFI judgment of 29 June 1995 in the case T-30/91 *Solvay v Commission*, ECR [1995] II-1775 was delivered – C. Lavoie, 'The Investigative Powers of the Commission with respect to Business Secrets under Community Competition Rules' (1992) 17 *European Law Review* 30.

to disclose each individual document is greater than the harm which might result from it<sup>50</sup>. The Commission is not allowed to use, to the detriment of an undertaking party to the proceedings, those facts, circumstances or documents which it cannot, in its view, disclose. That is so because a refusal to disclose would adversely affect that entity's opportunity to effectively communicate its views on the truth or on the implications of those or other circumstances, based on the documents, or on the conclusions drawn from them by the Commission<sup>51</sup>.

## V. Conclusions

In his speech in October 2011 DG Competition Director Alexander Italianer, while presenting new EU Best Practices for antitrust proceedings, noted in the name of Commission: 'We hope that our experience will inspire other agencies to further work in improving transparency and accountability, which we can only encourage'<sup>52</sup>. It is strongly advised that this encouragement will be taken seriously by the Polish competition authority. The divergences between the Polish and EU procedures are of a significant nature. This article has demonstrated that there is a need for a large number of improvements so as to guarantee to a greater extent the parties' right to be heard. The approach undertaken by the Commission should be considered exemplary in this respect for Poland. On many occasions the President of the UOKiK has publicly emphasized the importance of transparency in competition proceedings<sup>53</sup>. Now the task for the UOKiK President is to implement this declaration into practice with regard to the right to be heard. In particular, the undertakings to which the competition proceedings refer to should have broader knowledge about the proceedings as well as better and more precise access to evidence. The UOKiK President should extend works under the mandate of the *Competition Policy 2011-2013* program, so as to propose new legal solutions that would guarantee a fair hearing in Polish competition proceedings to a

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<sup>50</sup> See point 14 of the Preamble to Commission Regulation 773/2004.

<sup>51</sup> The ECJ judgment of 13 February 1979 in case 85/76 *Hoffmann-La Roche v Commission*, ECR [1979] 461, para. 14.

<sup>52</sup> A. Italianer, *Best Practices for antitrust proceedings...*, p. 8.

<sup>53</sup> See in English: M. Krasnodębska-Tomkiel, 'Procedural Fairness' OECD Working Party No. 3 on Cooperation and Enforcement, 16 February 2010, available at <http://www.uokik.gov.pl/download.php?plik=7998>. See also the opinion of M. Krasnodębska-Tomkiel, available at [http://www.uokik.gov.pl/aktualnosci.php?news\\_id=2050](http://www.uokik.gov.pl/aktualnosci.php?news_id=2050) and the speech by J. Król, the President of the UOKiK Deputy, at a conference in Poznań in November 2010, [http://www.uokik.gov.pl/aktualnosci.php?news\\_id=2314](http://www.uokik.gov.pl/aktualnosci.php?news_id=2314).

greater extent than at present. Some improvements may also be achieved by mere change of current practice of the competition authority. It is also the role of the courts (especially the SOKIK) to scrutinize whether the right to be heard is respected during the proceedings before the UOKiK President. The courts should also pay special attention to the issue whether the burden of proof of the infringement of competition law rests on the UOKiK President in the judicial proceedings as well<sup>54</sup>, and whether the appealing undertaking lodging the appeal and the competition authority have equal knowledge about the evidence collected in the case file<sup>55</sup>.

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<sup>54</sup> See for example the judgment of the Supreme Court of 17 March 2010, III SK 40/09, Lex no. 585839.

<sup>55</sup> Positive changes in this respect can be achieved if the judgement of the Supreme Court of 7 July 2011 (III SK 52/10, Lex no. 1001322) will be properly implemented by the SOKIK. In the light of this judgment the SOKIK is obliged to hear, in the course of judicial review, the evidence deriving from the administrative proceedings. This evidence cannot be automatically treated as the part of court case file. Consequently both the SOKIK. Court and the appealing undertaking will probably have more specific knowledge about the whole body of relevant evidence in the case before the oral hearing is closed.

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