



Office of Competition and Consumer Protection

POLISH COMPETITION LAW –
COMMENTARY, CASE LAW
AND TEXTS

Mateusz Błachucki



Warsaw 2013

POLISH COMPETITION LAW - COMMENTARY, CASE LAW AND TEXTS

Mateusz Błachucki



Office of Competition and Consumer Protection

Warsaw 2013

Reviewed by:

Prof. nadzw. INP PAN and UW Małgorzata Król-Bogomilska

Copyright 2013 Mateusz Błachucki and Office of Competition and Consumer Protection

Office of Competition and Consumer Protection

plac Powstańców Warszawy 1

00-950 Warsaw, Poland

www.uokik.gov.pl

ISBN 978-83-60632-82-6

Print: Drukarnia Braci Grodzickich Sp.J.

www.dbg.com.pl

Contents

Introduction	6
PART I COMMENTARY	8
Chapter 1. The development of the Polish antimonopoly legislation	8
1.1. Cartel legislation in the years 1918-1939	8
1.2. Legislation under the communistic regime	10
1.2.1. Rudimentary legislation in the years 1945-1987.....	10
1.2.2. The Act of 1987.....	11
1.3. Polish antimonopoly acts in the years 1990-2007	14
1.3.1. The Act of 1990.....	14
1.3.2. The amendments to the Act of 1990	17
1.3.3. The Act of 2000 - the first modern antimonopoly act	20
Chapter 2. The present antimonopoly act - overview and application	23
2.1. Overview.....	23
2.2. Scope of application	23
2.3. Notion of ‘undertaking’	25
Chapter 3. Public and private enforcement of antimonopoly law	26
3.1. Antimonopoly authority	26
3.2. Courts competent in competition matters	29
3.2.1. The court of competition and consumer protection	29
3.2.2. Administrative courts.....	30
3.3. Private enforcement	31
Chapter 4. Anticompetitive practices.....	32
4.1. Anticompetitive agreements	32
4.2. Abuse of a dominant position	39
4.3. Decisions of the antimonopoly authority	43

Chapter 5. Merger control	45
5.1. Brief characteristics of the system	45
5.2. The notion of ‘concentration’	45
5.3. Turnover thresholds	46
5.4. Exemptions from the notification obligation	47
5.5. Merger tests	48
5.6. Decisions in merger cases	49
5.7. Remedies in merger cases	51
5.8. Merger control undertaken by other public authorities in Poland	53
Chapter 6. Sanctions for infringements of the antimonopoly act	53
6.1. Introduction	53
6.2. Financial sanctions	54
6.2.1. Sanctions for undertakings	54
6.2.2. Fines for natural persons	55
6.3. Directives of fines assessment	56
6.4. The <i>leniency</i> programme	57
6.5. Structural sanctions in merger cases	61
Chapter 7. Antimonopoly proceedings - course of actions	62
7.1. Introduction	62
7.2. Decision making process - overview	62
7.3. Explanatory proceedings	62
7.4. Party to the proceedings	63
7.5. Public interest intervenients	64
7.6. Initiation of the antimonopoly proceedings	65
7.7. Statutory duration of antimonopoly proceedings	66
7.8. Evidence proceedings	67
7.8.1. Means of evidence	67
7.8.2. Collecting evidence	68
7.8.3. Burden and quality of proof	69
7.9. Access to files	69
7.10. Transparency of the antimonopoly proceedings	71
7.11. Protection of business secrets	72
7.12. Costs of antimonopoly proceedings	72
7.13. Legal remedies and change of final decisions	73

Chapter 8. Appeal proceedings before the courts	74
8.1. The course of actions before the antimonopoly court	74
8.2. The course of actions before the administrative courts	77
Chapter 9. The future of the Polish antimonopoly legislation	78
Selected bibliography	80
PART II CASE LAW	86
1. Application of the antimonopoly act	86
2. Anticompetitive agreements	94
3. Abuse of dominance	98
4. Merger control	104
5. Fines	105
6. Antimonopoly proceedings	108
7. Proceedings before the antimonopoly court	117
8. Proceedings before the administrative courts	121
PART III BASIC LEGAL TEXTS	122
1. Introduction	122
2. Act of 16 February 2007 on competition and consumer protection	125
3. Regulation of the Council of Ministers of 30 March 2011 on the exemption of certain types of vertical agreements	161
4. Regulation of the Council of Ministers dated 17 July 2007 concerning the notification of the intention of concentration of undertakings	166
5. Regulation of the Council of Ministers of 26 January 2009 on the <i>leniency</i> applications	177

1. Introduction

Competition law is a relatively new law regime. Nonetheless, it became an integral part of modern regulation of public economic law. The subject of this work is the Polish antimonopoly law. Polish competition law has been developing since the collapse of communism in 1989. The implementation of the law reflects the change of economic regime and is indispensable for the proper functioning of the free market economy in Poland. Although Polish legislator has been inspired by foreign legal traditions - especially EU - when adopting antimonopoly acts the relevant statutes and regulations are adapted to the Polish legal system and contain many specific provisions. This is particularly true with regard to procedural and institutional issues.

The aim of this publication is to present foreign readers with the first English course on Polish competition law. The book consists of three parts. First is a monographic presentation of the Polish antimonopoly law. The considerations are not, however, limited to the antimonopoly act in force. Presentation of the current model of the competition law is preceded by the comprehensive theoretical study laying down the origins and basic definitions of contemporary Polish antimonopoly law. The second part is a selection of judicial case law in competition cases. Its role is to provide a reader with a practical insight into how the competition law is applied by the courts and what are the most important issues developed by the judiciary. The last part brings basic legal texts. It enables readers to confront the theoretical background and the case law with actual wording of relevant regulations or soft law documents. a combination of these three parts aims at giving an overview of the Polish competition law. The three parts supplement each other and are cross-referenced. Such method allows avoiding duplication of certain contents. Therefore it is suggested to study all three parts in parallel in order to get the more comprehensive view of the presented issues.

Attention should be drawn to the terminology. Despite theoretical nuances the terms: 'competition' (as an adjective) and 'antimonopoly' are used interchangeably. Furthermore, apart from the official name of the antimonopoly authority - the President of the Office of Competition and Consumer Protection the shorter form - "the antimonopoly authority" or "UOKiK" is used as well. Similarly, the official name of the completion act i.e. the Act on competition and consumer protection is used interchangeably with the name "antimonopoly act". If there are, in the text, considerations regarding person or persons it shall mean both - natural and legal persons. The historical numbering of articles of the European treaties may be a little bit confusing; therefore new numbers are used with a reference to previous numbers whenever it is necessary.

The Polish antimonopoly law has gained quite an extensive literature¹. There are four commentaries available by K. Kohutek and M. Sieradzka², C. Banasiński, E. Piontek (eds)³, T. Skoczny (ed.)⁴ and A. Stawicki and E. Stawicki (eds)⁵. There are several textbooks published on the competition law i.e. the classical one by S. Gronowski⁶ or Z. Brodecki (ed.)⁷ and

1 The section presents only basic literature limited to books. Comprehensive list is given in the end of this part. For the ease of the foreign reader, Polish titles are additionally translated into English and provided in brackets.

2 K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], Wolters Kluwer, Warsaw 2008.

3 C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], LexisNexis, Warsaw 2009.

4 T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], Wolters Kluwer, Warsaw 2009.

5 A. Stawicki (ed.), E. Stawicki (ed.), J. Baehr, J. Kreuger, T. Kwieciński, M. Radwański, B. Turno, A. Wędrychowska-Karpińska, A. Wiercińska-Krużewska, A. Wierciński, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], Wolters Kluwer, Warsaw 2010.

6 S. Gronowski, *Polskie prawo antymonopolowe*, [Polish antimonopoly law], ZPP, Warsaw 1998.

7 Z. Brodecki (ed.), *Konkurencja*, [Competition], LexisNexis, Warsaw 2004.

M. Stefaniuk⁸. Merger control attracted moderate attention of academics, with the exception of J. Olszewski⁹ and M. Błachucki¹⁰. The basic book on cartels is the work of M. Król-Bogomiłska¹¹. Various aspects of anticompetitive practices were analyzed: block exemptions¹², vertical restraints¹³, refusal to deal¹⁴ or the abuse of dominance¹⁵. Furthermore, there are several monographs on selected general issues of antimonopoly law: fines¹⁶, rule of reason¹⁷, the notion of undertaking¹⁸, procedural fairness in the antimonopoly proceedings¹⁹, right to be heard²⁰ or relation between competition law and intellectual property law²¹. Procedural issues of Polish competition law were covered in three monographs by D. Sylwestrzak²², K. Róziewicz²³ and M. Błachucki²⁴. It is worth mentioning that UOKiK has also published numerous books and monographs²⁵ - some of them are available in English²⁶. To complete this presentation of the relevant literature *Yearbook of Antitrust and Regulatory Studies* should be mentioned. This is a yearbook printed in English which makes it particularly useful for foreign readers²⁷.

8 M. Stefaniuk, *Publicznoprawne reguły konkurencji*, [Public law rules of competition], Verba, Lublin 2005.

9 J. Olszewski, *Nadzór nad koncentracją przedsiębiorców jako forma prewencyjnej ochrony konkurencji*, [Supervision over concentration of undertakings as a form of preventive competition protection], URZ, Rzeszów 2004.

10 M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, [The system of antimonopoly merger proceedings], UOKiK, Warsaw 2012.

11 M. Król-Bogomiłska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, [Combating cartels in the antimonopoly and criminal law], Scholar, Warsaw 2013.

12 E. Kosiński, *Rodzaje i zakres sektorowych wyłączeń zastosowania ogólnych reguł ochrony konkurencji*, [Types and scope of sectoral exemptions from general competition rules], Wydawnictwo Naukowe UAM, Poznań 2007 and *Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce*, [Block exemptions from prohibition of anticompetitive agreements in the European Community and Poland], A. Jurkowska, T. Skoczny (eds.), Wydawnictwa Naukowe WZ UW, Warsaw, 2008.

13 R. Poździej, *Dystrybucja produktów na zasadzie wyłączności w Polsce i Unii Europejskiej*, [Exclusive distribution of products in Poland and European Union], Verba, Lublin 2006.

14 M. Kolański, *Obowiązek współpracy gospodarczej w prawie antymonopolowym*, [Duty to cooperate in the antimonopoly law], TNOiK, Toruń 2009.

15 A. Brzezińska, *Zakaz nadużycia pozycji dominującej we wspólnotowym i polskim prawie antymonopolowym*, [Prohibition of abuse of a dominant position in the Community and Polish antimonopoly law], TNOiK, Toruń 2008, K. Kohutek, *Praktyki wykluczające przedsiębiorstw dominujących. Prawidłowość i stosowalność reguł prawa konkurencji*, [Exclusionary practices of dominant undertakings. Correctness and applicability of competition law rules], Wolters Kluwer, Warszawa 2012 or M. Szydło, *Nadużywanie pozycji dominującej w prawie konkurencji*, [Abuse of dominance in competition law], Wolters Kluwer, Warszawa 2010.

16 M. Król-Bogomiłska, *Kary pieniężne w prawie antymonopolowym*, [Financial penalties in the antimonopoly law], KiK, Warsaw 2001.

17 D. Miąsik, *Reguła rozsądku w prawie antymonopolowym*, [Rule of reason in the antimonopoly law], Wolters Kluwer, Warsaw 2004.

18 G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*, [The notion of undertaking in Polish and European competition law], Wolters Kluwer, Warsaw 2009.

19 M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, [Procedural fairness in the proceedings before the competition authority], Wydział Zarządzania, Warsaw 2011.

20 K. Kowalik-Bañczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych - w kierunku unifikacji standardów proceduralnych w UE*, [Right to be heard in the European antimonopoly proceedings - towards the unification of procedural standards in the EU], Wolters Kluwer, Warsaw 2012.

21 D. Miąsik, *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej*, [The relationship between competition law and intellectual property law], Wolters Kluwer, Warsaw 2012.

22 D. Sylwestrzak, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów*, [Proceedings before the President of the Office of Competition and Consumer Protection], LexisNexis, Warsaw 2012.

23 K. Róziewicz-Ladoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, [Proceedings before the President of the Office of Competition and Consumer Protection in antitrust cases], Wolters Kluwer, Warszawa 2011.

24 M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, [The system of antimonopoly merger proceedings], UOKiK, Warsaw 2012.

25 For example M. Krasnodębska-Tomkiel, *Wspólnotowe prawo konkurencji. Skutki dla Polski*, [Community competition law. Conclusions for Poland], UOKiK, Warsaw 2006, C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawno-ekonomiczne)*, [Competition and consumer protection in Poland and European Union (legal and economic studies)], UOKiK, Warsaw 2005 or C. Banasiński (ed.), *Prawo konkurencji - stan obecny oraz przewidywane kierunki zmian*, [Competition law - the current state and foreseeable developments], UOKiK, Warsaw 2006. All available at www.uokik.gov.pl.

26 M. Krasnodębska-Tomkiel (ed.), *Changes in Competition Policy over the Last Two Decades*, UOKiK, Warsaw 2010 or *Consumer Protection and Competition Policy - working together?*, UOKiK, Warsaw 2006.

27 Selected volumes are available at <http://www.yars.wz.uw.edu.pl/>.

PART I COMMENTARY

Chapter 1. The development of the Polish antimonopoly legislation

This chapter presents the history of the Polish antitrust legislation. All six adopted antimonopoly acts are discussed here. However, not all of them are of the same importance for the development of the Polish competition law. Such opinion is especially relevant in relation to the first discussed Acts of 1933²⁸ and of 1939²⁹. Therefore a very careful attention is drawn to the Act of 1987³⁰, the Act of 1990³¹ and the Act of 2000³² with the subsequent amendments. The chapter aims at identifying trends in the development of the Polish antitrust law as well as procedure and at evaluating the result of those changes.

1.1. Cartel legislation in the years 1918-1939

Regaining of independence by Poland in 1918 was a great achievement. However, it was only a first step in building of a sovereign state. One of the next steps was unification and adoption of legislation. The problem of cartels was present in the governmental policy from the very beginning. However, this policy was different from the present standards. Cartels were not only allowed but, in certain periods of time, they were even supported by the government³³. The first act that indirectly covered the problem was the Act of 2 July 1920 on war usury³⁴. It sanctioned “the participation in agreement or in association that was intended for economic activities”. Despite this unequivocal article, that rule was never applied to cartels. The coup d’état of J. Piłsudski in 1926 started a new era in the Polish politics. At the beginning marshal Piłsudski and his supporters were looking for help from the industrial and business elites. Therefore normative regulation of cartels was constantly postponed. Nonetheless the economic crisis of 30’s and the growing criticism of cartels made the government put forward a project of a cartel act. The Polish parliament adopted the act on 28 March 1933.

The Act of 1933 regulated “all agreements, resolutions and decisions, which by the way of mutual obligations, aiming at control or regulation of production, sell, prices or conditions of exchanging goods in the field of mining, industry and trade” (Article 1). All such activities were to be in a written form, under the pain of nullity (Article 2) and notified to the Minister of Industry and Trade within 14 days from the day of conclusion. All notified cartels were registered in the cartel registry maintained and run by the Minister (Article 3). The Minister was obliged to refuse to accept the notified agreement if provisions of such contract or the execution of those provisions were against the public good (Article 4), and then to file a motion to the Cartel Court to cancel the agreement (Article 5). The Cartel Court

28 Act of 28 March 1933 on cartels, Journal of Laws No. 31, item 270. Hereinafter referred to as the Act of 1933.

29 Act of 13 July 1939 on cartel agreements, Journal of Laws No. 63, item 418. Hereinafter referred to as the Act of 1939.

30 Act of 28 January 1987 on counteracting monopolistic practices in national economy, Journal of Laws No. 3, item 18, with further amendments. Hereinafter referred to as the Act of 1987.

31 Journal of Laws of 2000 No. 31, item 381, with further amendments. Hereinafter referred to as the Act of 1990.

32 http://uokik.gov.pl/a_akty.phtml?z=1&d=1&lang=1 (06/09/12).

33 Z. Landau, *Rozwój ustawodawstwa kartelowego w Polsce międzywojennej na tle polityki kartelowej rządu*, [Development of cartel legislation in the interwar Poland from the perspective of government cartel policy], *Kwartalnik Historyczny* 1972, No. 1, p. 72

34 Journal of Laws No. 65, item 449.

was a special court established alongside the Supreme Court. It consisted of 5 members: three Supreme Court judges, one representative of the Minister and one representative of chambers of commerce and industry (Article 6). The judgments of the Court were legally binding and final (Article 7(1)(5)). Moreover, during the proceedings before the Cartel Court, Civil procedural code of 29 November 1930³⁵ applied. The evidence proceedings before the Court were much deformed - what was important in cases when, there was not written proof of the agreement. The Minister had limited investigating competences - he could only oblige the undertaking to exhibit financial records and other documents relevant to the notified agreement (Article 9). Apart from procedural provisions, the Act of 1933 contained also sanctions of administrative nature³⁶. The Minister of Industry and Trade imposed a fine of PLN 50 000 or 100 000 for the infringement of the obligation of notification. Penal sanctions were imposed by the regional court for execution of repealed agreement³⁷.

Commenting the Act of 1933 scholars underline that, in practice, the bill did not change anything in the legal situation of cartels. The only new provision was the introduction of obligation of revealing cartel agreements. Nevertheless it was a clear sign that the Polish government wanted to increase supervision over cartels. Together with the economic crisis the side effects of cartels became more and more toilsome for the society. Such situation created a decisive impulse for a new cartel policy. The Minister of Industry and Trade started to execute his powers and filed several motions to the Cartel Court to nullify cartel agreements. Furthermore, the governmental control over cartels was strengthened after the amendment of the Act of 1933³⁸. The most important change was granting a competence for the Minister of Industry and Trade to nullify cartel agreements. The Minister's decision was, from then on, final unless one of the parties of repealed agreement filed a motion to the Cartel Court to review this decision. However, in order to limit appeals, all costs of the court proceedings were barred by the losing party who had filed the motion. Such financial restrains had preventive effect on minor undertakings. The negative aspect of this change was deterioration of the legal position of the Cartel Court. And last but not least, new sanctions of criminal nature were introduced.

The amendment of 1935 was an unambiguous signal for the industry that the government kept intending to increase supervision over cartels. Soon after, in the December 1935, the Minister of Industry and Trade nullified 93 cartel agreements (out of 274 existing). As it could have been foreseen there were only few appeals³⁹. However, the government decided that the act on cartels was not restrictive enough and the draft of new act was prepared. It became a law on 13 July 1939⁴⁰. Under the Act of 13 July 1939 on cartel agreements⁴¹, conclusion of cartel agreements was still legal if notified. New premise was added, the aims of such agreements must have conformed to interests of national economy (Article 2). As a result, the discretionary power of the Minister of Industry and Trade was augmented. Some commentators called it "socialization" of cartels⁴². The supervision procedure remained, in

35 Journal of Laws No. 83, item 651.

36 M. Król-Bogomilska, *Kary pieniężne w polskim prawie antymonopolowym na tle europejskiego prawa wspólnotowego*, [Financial penalties in the Polish antimonopoly law from the perspective of the European law], Państwo i Prawo 1998, No. 7, p. 42.

37 Several ordinances were adopted in course of implementation of the Act of 1933: Ordinance of the Minister of Justice with consultation of the Minister of Industry and Trade and the Minister of Treasury of 28 June 1933 on execution of provisions of the cartel act in relation to the Cartel Court, Journal of Laws No. 33, item 381, Ordinance of the Minister of Industry and Trade of 4 July 1933 on reporting of resolutions and decisions of cartels, Journal of Laws No. 33, item 382, Ordinance of the Minister of Industry and Trade of 4 July 1933 on registry of cartels, Journal of Laws No. 33, item 383.

38 Decree of the President of Poland of 27 November 1935 on amending the Act on cartels of 28 March 1933, Journal of Laws No. 86, item 529.

39 Z. Landau, op. cit., p. 83.

40 The Act of 1939 was adopted on July 13, but formally came into force on October 20.

41 Journal of Laws No. 63, item 418.

42 Z. Landau, op. cit., p. 84.

practice, unchanged, as well as the sanctions. The Act of 1939 was far more comprehensive, many of the provisions previously placed in implementing ordinances were now transferred into the main act. Due to German aggression of September 1939, the Act of 1939, although legally binding, was never executed⁴³.

During the communistic time 1918-1939 the period of the antimonopoly legislation was totally criticized. For some scholars pre-September Poland patronized, under “the influence of capitalists, from the beginning to the end, promptly developing cartelization (...)”. The legislation on cartels is the vivid example of abusing the power, by national and foreign capital, for its own purposes⁴⁴. The mentioned opinion is naturally ideologically based. The Acts of 1933 and of 1939 were not perfect but showed clearly that the governmental policy began to be stricter and anti-cartel oriented. The procedural rules of those acts did not constitute any special administrative procedure. There were very few such provisions and they were mostly of technical nature. The presented model of cartel proceedings and substantive law had no influence on further development of the Polish antitrust procedure and law. To be strict the development was blocked for almost four decades. The 1918-1939 legislation is an example of the early stage of development of competition law representing contemporary view on the role of state in economy.

1.2. Legislation under the communistic regime

1.2.1. Rudimentary legislation in the years 1945-1987

After the end of the World War II communistic regime and economy were established by Soviets in Poland. As it is discussed elsewhere in this work, in totalitarian political systems with centralized economy there is no place for real competition and it is not possible to talk about monopolies, in classic economic meaning of this word, since the national economy is one large institutionalized monopoly. The People’s Republic of Poland was not an exception. As some scholars wrote in the late 70’s there were not any antimonopoly legal provisions in the Polish legislation⁴⁵. They pointed out that in the “socialistic regime, it is the state itself, which directly designs and controls the activity of economic organizations” and therefore there is no need for such legislation. It was noticed elsewhere that there existed monopolies in Poland but those were special ‘social monopolies’⁴⁶. The constitutive feature of such monopoly was that “the more powerful it is, the more it should feel obliged in relation to the society, on which behalf, it is performing its monopoly”.

Those ideological axioms failed to confront the reality⁴⁷. Accompanied by economic crisis and growing side effects of socialistic economy, scholars began to criticize negative implications of state monopolies. The articles cited above were the first cautious attempts to articulate the

43 It has never been formally repealed.

44 J. Jończyk, *Prawo kartelowe*, [Cartel law], [in:] *Historia państwa i prawa Polski 1918 -1939*, [History of Polish law and state 1918-1939], Part I, PWN, Warsaw 1962, p. 414.

45 S. Soltysiński, J. Trojanek, *Proces koncentracji produkcji i usług a zagadnienie ochrony interesów konsumenta w PRL*, [Process of concentration of production and services and the problem of protection of consumer interests in the People’s Republic of Poland], *Studia Prawnicze* 1978, No. 1, p. 23. However, such legislation was present in other communistic states e.g. Hungary or Yugoslavia - brief presentation of these legislations is carried out by I. Wiszniewska, A. Kawecki, *Problem legislacji antymonopolowej w systemie zreformowanej gospodarki*, [Problem of antimonopoly legislation in the system of reformed economy], *Przegląd Ustawodawstwa Gospodarczego* 1982, No. 10, p. 259 - 260.

46 J. Trojanek, *O potrzebie i ekonomiczno-prawnych sposobach przelamywania monopolistycznych praktyk w gospodarce społecznej*, [On the need and economic and legal solution of breaking monopolistic practices in the socialized economy], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1973, No. 3, p. 50.

47 J. Trojanek stated it clearly: *theoretical presumption that the monopoly of socialistic company acts always in favour of social interest and that the more powerful it is, the more it should feel obliged in relation to the society... turned out to be idealistic and in consequence delusive and false* - J. Trojanek, *Ustawa antymonopolowa z 1987 roku. (Próba oceny podstawowych rozwiązań)*, [The antimonopoly act of 1987. (An attempt to evaluate its basic solutions)], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1987, No. 4, p. 1.

necessity to contravene the monopolies' abuses of their privileged positions. Academics pointed out at acts that may have been used to counteract monopolistic practices⁴⁸. According to those Authors, such indirect effect may have had selected articles of Civil code⁴⁹ or the activity of commissions of State Economic Arbitrage⁵⁰. Later on it was indicated also that Article 8 of Act of 26 February 1982 on prices⁵¹ having prohibited a vender taking advantage of monopolistic situation and gaining the profit exceeding the average. Nonetheless such fragmented legislation did not constitute an effective mechanism of competition and consumer protection nor could be regarded as a competition law within the meaning of this work.

1.2.2. The Act of 1987

The real breakthrough was, however, to come. The martial state declared in 1981 and the subsequent, the most serious (of systemic nature), economic crisis occurred and it created for communists an impulse to initiate in-depth economic reforms. Antimonopoly act seemed to be an integral part of the programme of restructuring the socialistic economy⁵². The programme consisted of several other acts and aimed at rationalization of socialistic economy and at elimination of some other inherent weaknesses e.g. the role of the so-called 'unions' (*zrzeszenia*) was especially criticized⁵³. The first draft of an antimonopoly act was prepared in 1984 and 1985⁵⁴. Nonetheless, it took the Polish parliament next two years to formally adopt the act⁵⁵. On 28 January 1987 Polish parliament (*Sejm*) adopted the Act on counteracting monopolistic practices in national economy⁵⁶.

According to the Preamble, the act was adopted *in order to prevent national market and it's participants from monopolistic practices economic of economic units*. The Act was aimed at preventing establishment of new monopolistic structures by introducing a merger control. It was underlined that the consumer protection function, as well as a function of creation and protection of development of competition⁵⁷. The Act formally covered a wide subjective and objective range. It was concerned with virtually all economic activity conducted by all legal and natural persons, irrespective of the form of property or size. However, at the same time, the scope of application of the Act of 1987 was limited in relation to several powerful state monopolies (Article 3(1)). The list of economic units excluded from the scope of its application was published in the Regulation of the Council of Ministers of 24 October 1988 on designation of economic units excluded from the scope of the Act on counteracting monopolistic practices in national economy⁵⁸. As it can be seen, the Act did not combat monopolies. Their existence was neither forbidden nor subject to

48 It was very characteristic that S. Soltysiński and J. Trojanek did not criticize the principle of monopolization of economy but only some of the side effects of such economic regime.

49 Act of 23 April 1964 - Civil Code, Journal of Laws No. 16, item 93, with further amendments. It was possible thanks to the process of 'socialization of civil law' which strengthened the position of consumer in relations with 'socialised economic units' J. Trojanek, *op. cit.*, p. 61.

50 Act of 23 October 1975 on State Economic Arbitrage, Journal of Laws No. 34, item 183, with further amendments). 51 Journal of Laws No. 7, item 52.

52 Such necessity was stressed by S. Soltysiński, *O potrzebie ustawodawstwa zwalczającego praktyki monopolistyczne i nieuczciwą konkurencję*, [On the need of adoption of legislation on combating monopolistic practices and unfair competition], *Państwo i Prawo* 1982, No. 12, p. 16-18.

53 I. Wiszniewska, *Kartelowe zagrożenia w działalności zrzeszeń przedsiębiorstw państwowych*, [Adverse effects of cartel activities of groupings of state undertakings], Part I and II, *Przegląd Ustawodawstwa Gospodarczego* 1983, No. 11 and 12, and K. Sobczak, *Niektóre aspekty grupowania przedsiębiorstw oraz ochrony antymonopolowej*, [Selected aspects of grouping undertakings and antimonopoly protection], *Przegląd Ustawodawstwa Gospodarczego* 1986, No. 6.

54 For details of the draft, see I. Wiszniewska, *O projekcie ustawy antymonopolowej*, [On the draft of the antimonopoly law], *Państwo i Prawo* 1982, No. 10. See also the interview with the author of the draft J. Gościński, *Poskramianie monopolu*, [Combating monopolies], *Prawo i Życie* 1983, No. 12.

55 Such a delay was criticized by E. Piontek, *Znaki zapytania*, [Question marks], *Prawo i Życie* 1986, No. 6.

56 Journal of Laws No. 3, item 18.

57 I. Wiszniewska, *Praktyki monopolistyczne w świetle ustawy antymonopolowej*, [Monopolistic practices in the light of the antimonopoly act], *Państwo i Prawo* 1987, No. 7, p. 33.

58 Journal of Laws No. 39, item 309.

legal sanctions. Nonetheless, the Act prohibited their specific practices and monopolistic agreements. It created also a system of supervision over mergers of economic units (Articles 17-19).

The Act of 1987 provided a catalogue of monopolistic practices and agreements that were prohibited. Article 8 outlawed:

- a) imposing, without reasonable explanation, onerous contract terms that yield undue benefits to the economic unit that imposes them;
- b) making the conclusion of a contract contingent on having the other party accept or perform another service not connected with the object of the contract, which would not otherwise be accepted or performed if there were a choice;
- c) imposing on the economic unit - party of the contract a duty of exclusive purchase, sell or conclusion of other contracts only with the certain economic unit;
- d) charging excessively exorbitant prices, within the meaning of the Act on prices.

Moreover, it was also prohibited:

- a) to share the market according to criteria of territorial scope or consumers;
- b) setting or limiting the volume of production or sales;
- c) restricting the access to the market, or eliminating from a market, economic units not included in the agreement (Article 11).

The Minister of Finance was appointed as the antimonopoly authority. He was competent to issue decisions and impose financial fines. The Council for Counteracting Monopolistic Practices was established as a consulting body to the Minister of Finance (Article 4). The Council was designed as forum for discussions and for formulation of proposals for the Minister for his antimonopoly policy. It consisted of representatives of authorities of public administration, cooperatives, trade unions and consumer organizations (Article 5). The competencies of the Council and the method of proceeding were regulated in details by Administrative ordinance of Prime Minister of 30 December 1987 on detailed tasks, composition and the method of proceeding of the Council for Counteracting Monopolistic Practices⁵⁹.

The Minister of Finance was the institution who took administrative decisions upon the Act of 1987. The Administrative procedural code applied with only few exceptions. The proceedings could have been instituted *ex officio* or upon a motion. There was a limited group of persons authorized to demand initiation of administrative proceedings:

- a) voivodeship national councils;
- b) economic units whose interests were prejudiced or may be prejudiced by a monopolistic practice, as well as unions and associations of such economic units;
- c) state and public inspection institutions and institutions supervising activity of economic units;
- d) public institutions that protect consumer interests pursuant to statutory provisions, if that interest was or may be infringed.

The motion initiating proceedings had to be made in a written form and be properly reasoned. Decisions issued by the antimonopoly body could be appealed to the Supreme Administrative Court. For procedure under the Court, general principles of administrative - judicial

⁵⁹ Polish Law Gazette of 1988 No. 1, item 3.

procedure applied⁶⁰. There was one exemption from the above regulations - the objection⁶¹ made by the Minister of Finance to notified merger of economic units was governed by separate provisions. This specific appellate procedure was regulated by § 4 of Regulation of the Council of Ministers of 23 December 1987 on conditions and method of notification of intention of concentration of economic units and the procedure of appealing proceeding in case of making the objection by the antimonopoly authority⁶².

The Act of 1987 contained sanctions for the infringement of the Act. They were of civil, administrative and criminal nature⁶³. The basic sanction was the sanction of invalidity. It had been applied to monopolistic practices and agreements, as defined in the Act (Articles 10, 12 and 23). Moreover, the antimonopoly body could impose an administrative fine (Article 20). However, those fines were not issued automatically for the infringement of the Act itself, but for not having obeyed the decision of antimonopoly institution interdicting monopolistic practices (Article 20(1)). In case of three former infringements of the Act within three past years the Minister of Finance may have divided or liquidated an economic unit (Articles 21-22). There were also penal sanctions (including prison) for passing false data to the antimonopoly authority (Article 25).

From the very beginning, the Act of 1987 raised controversies. Some stemmed from significant changes liberalising the Act and made by the parliament. Many of these provisions were unclear. However, the most important doubts provoked the problem of sanctions. Ambiguous formulation of rules caused that it was hard to determine whether the monopolistic practices and agreements forbidden by Articles 8 and 9 were null and void or it was the example of suspended invalidity like it was in the case of Articles 11, 12 and 13. Suspended invalidity was inappropriate solution for the antimonopoly act since it allowed an enterprise to use illegal monopolistic practices until receiving the nullity decision. Therefore such activity should be declared illegal, by the act, *ex lege*. Some academics criticized also premises of imposing administrative sanctions. The number of infringements of the antimonopoly act is not as significant as occupying a dominant position on the market. As a result the act may have been used mostly against small companies and partnerships instead of big state monopolies. Also the procedure of imposing administrative fines was a subject of criticism. They should be issued for infringing the Act automatically - the condition of preceding decision prohibiting monopolistic practices was unnecessary liberalization of preventive function of the Act.

Apart from sanctions another controversial rule of the Act of 1987 was granting a status of an antimonopoly authority to the Minister of Finance. It resulted in creation of self-contradictory legal position of the Minister of Finance. On the one hand, he was representing the interest of the State Treasury and was responsible for sufficient state incomes - the source of such incomes were often state monopolies, and on the other hand, he was to fight monopolistic practices and agreements of those monopolies. A better solution would have been establishment of a special independent body directly subordinated to the parliament or the Council of State.

The Act of 1987 turned out to be ineffective instrument of fighting monopolies. There had been only 9 decisions issued upon the Act. Several other proceedings were discontinued. Those taken decisions were concerned with monopolistic practices. Nevertheless, the basic problem of Polish economy, at that time, were monopolistic agreements leading to market sharing or setting and limiting production, and sales. Many of these provisions were

60 For details see, Act of 31 January 1980 on Supreme Administrative Court and on amending the Act - Administrative Procedure Code, Journal of Laws No. 4, item 8, with further amendments.

61 This was an administrative decision, in the meaning of Procedure Administrative Code.

62 Journal of Laws No. 41, item 242.

63 S. Sołtysiński, *Sankcje w ustawie o przeciwdziałaniu praktykom monopolistycznym w gospodarce narodowej*, [Sanctions in the Act on the combating of monopolistic practices in the national economy], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1987, No. 4, p. 21.

ambiguous and proved to be too liberal. Nonetheless, the Act of 1987 was unprecedented, in Polish post-war legislation, trial of legal limitation of the role of monopolies in a socialistic economy. It created a good basis for further development of competition law in a free-market economy. The model of antitrust procedure was partially adapted by the subsequent Act of 1990.

1.3. Polish antimonopoly acts in the years 1990-2007

1.3.1. The Act of 1990

Transition from centralized to free-market economy would not be possible without demonopolization of economy and development of competition. To achieve those aims, new and efficient antitrust legislation was necessary. Therefore one of the first acts adopted by the Polish parliament after 1989 was the Act of 24 February 1990 on counteracting monopolistic practices⁶⁴. The Act was a basic regulation for the development of competition law during the first decade of economic transformation. It has been amended twelve times.

The presentation of the Act of 1990 begins with exhibition of basic rules of original text of the Act. Afterwards subsequent amendments are discussed. Not all changes were of equal importance. Hence, the paper concentrates only on the most important ones. Moreover, literature and case law are limited to the necessary minimum since most of the problems will be further discussed in more detail.

The Act of 1990 was a semi-comprehensive act. It consisted of both procedural and materials rules. In comparison to the repealed Act of 1987, the new act was far more restrictive. The Act covered a wide subjective and objective range⁶⁵. The catalogue of monopolistic practices was enlarged and the scope of exclusions from the application of the act - limited. Application of the Act was founded on 'effects-based' principle. It meant that the Act applied to all agreements having effect on Polish territory irrespective of the actual place of conclusion. The Act introduced new terms and definitions - a dominant position and abuse of such position. The rule of reason was introduced to Polish competition law. According to the Preamble, the Act was adopted *in order to ensure the development of competition, to protect economic entities from monopolistic practices, and to protect the interests of consumers*. Although the Preamble proclaimed three goals, the first one - preservation of free competition - was predominant. The other two were also important but in case of any conflict the first must have prevailed.

The Act of 1990 introduced the term 'monopolistic practice' without defining it. It enumerated several kinds of monopolistic practices. Contrary to provision on abuse of dominant position the list of anticompetitive agreements was exhaustive⁶⁶.

First, there were prohibited agreements consisting of:

- a) fixing, directly or indirectly, prices and rules of their formation among competitors, in their relationship with third parties;
- b) sharing markets according to criteria of territories, product groups, or entities;

64 Journal of Laws No. 14, item 88.

65 W. Rakoczy, *Podmiotowy zakres stosowania ustawy o przeciwdziałaniu praktykom monopolistycznym*, [Subjective scope of application of the Act on combating monopolistic practices], *Przegląd Prawa Handlowego* 1993, No. 15, p. 14.

66 This was changed in 1995 were open list of anticompetitive agreements was introduced. On this subject see M. Król-Bogomińska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, [Combating cartels in the antimonopoly and criminal law], Scholar, Warsaw 2013.

- c) setting or limiting the volume of production, sales, or purchases of commodities;
- d) restricting the market access of, or eliminating from a market, economic entities not included in the agreement;
- e) setting among competitors or their associations of terms of their contracts with third parties.

Apart from agreements the Act of 1990 recognized also other types of monopolistic practices. Some of them were transferred directly from the Act of 1987. For example prohibition of imposing onerous contract terms making the conclusion of a contract contingent on having the other party accept another service not connected with the object of the contract. A new provision was referred to as 'interdiction of competition'. It prohibited combining of managing functions in competing economic entities. It was strange and rather too far-reaching that the Act of 1990 treated interlocking directorates as a form of prohibited anticompetitive agreement, not as a form of merger (as it was in the antimonopoly act of 2000).

The second major group of practices constituted the ones consisting in the abuse of a dominant position. For purposes of the Act, a dominant position was defined as position of economic entity if it does not encounter significant competition on a national or local market; it is presumed that an economic entity has a dominant position if its market share exceeds 40%. There were listed several ways of abusing a dominant position by:

- a) counteracting the formation of conditions indispensable for the emergence or development of competition;
- b) dividing the market according to criteria of territories, product groups, or entities;
- c) selling commodities in a way that leads to offering privileged status to certain economic entities or other entities;
- d) refusing to sell or purchase commodities in a way discriminating against certain economic entities when there are no alternative supply sources or outlets;
- e) unfair influence on price formation, including fixing resale prices and selling below costs of production in order to eliminate competitors.

All legal actions constituting any of the mentioned practices were null and void unless the economic entity invoked the 'rule of reason' and proved that such practice was necessary to conduct activity and did not result in a significant restriction of competition. Nonetheless, there were three types of monopolistic practices that could not be justified on any ground (including 'rule of reason'):

- a) limiting production, sale, or purchase of commodities, despite having adequate capacity, particularly when it leads to an increase in sales prices or a reduction in purchase prices;
- b) refraining from the sale of commodities to increase prices;
- c) excessive pricing.

The Act of 1990 also governed merger control for the first time. Economic entities were obliged to notify an intention to merge or transform in order to establish a new economic entity whenever the new economic entity gained a dominant position. The antimonopoly body had two months to take a decision. Merger, transformation or establishment of a new economic entity could be implemented if the antimonopoly authority did not oppose in a negative decision. Obtaining a positive clearance was not necessary to perform the operation.

The Act established a new antimonopoly body - the Antimonopoly Office. The Office had a legal status of central state administration authority. It was subordinated to the Council of Ministers which appointed and recalled the President of the Office (Article 17). The Antimonopoly Office structure consisted of several regional offices and the head office in Warsaw. The most important tasks and activities of the Office were as follows:

- a) issuing, in cases pursuant to the Act, administrative decisions;
- b) supervising the observance of the law and passing the law and regulations on counteracting monopolistic practices of economic entities;
- c) registering economic entities enjoying a dominant position on the home market;
- d) reviewing prices fixing under conditions of restricted competition;
- e) conducting research on the state of concentration of the economy and presenting conclusions;
- f) drafting or advising on draft proposals for new laws concerning monopolistic practices or development of competition;
- g) preparing government proposals for competition policy (Article 19).

The antimonopoly authority was vested with investigating competencies. Staff members of the Office during an inspection were empowered to enter premises of the inspected economic entity and look into its documents or collect data and information on operations of the inspected party. The information obtained by inspectors was confidential.

The model of proceedings before the President of the Antimonopoly Office remained practically unchanged. The Code of Administrative Procedure applied accordingly. They could have been instituted *ex officio* or upon a motion. There was also, almost the same, a limited group of persons authorized to demand initiation of administrative proceedings:

- a) economic entities whose interests were prejudiced or might be prejudiced by a monopolistic practice, as well as unions and associations thereof;
- b) state and public inspection institutions;
- c) public institutions that protect consumer interests pursuant to statutory provisions, if that interest was or may be infringed.

As it can be noticed the authorities of public administration of local level were deprived of such right. The most significant change, though, was made in relation to the appellate procedure. Decisions issued by the President of the Antimonopoly Office, from then on, may have been appealed to a special court, established upon the Act of 1990, the Voivodeship Court of Warsaw - the antimonopoly court⁶⁷. The proceedings before the Court followed the rules of Civil procedural code⁶⁸ in economic cases. Binding judgments of the Antimonopoly Court may have been revised in course of extraordinary revision (pl. rewizja nadzwyczajna) by the Supreme Court. It should also be indicated that a party lodging an appeal to the Antimonopoly Court did not have right to the legal measures to revise administrative decision, specified in the Administrative procedural code, in particular the measures that would result in resumption of proceedings, abrogation, amendment or an assessment of invalidity of a decision (Article 23).

Infringements of the provisions of the Act were sanctioned by the antimonopoly authority. The basic sanction was administrative fine. It was imposed for violation of prohibitions listed in the Act. It was a measure of administrative nature⁶⁹. The amount of fine was up to 15%

67 Regulation of the Minister of Justice of 13 April 1990 on the establishment of antimonopoly court, Journal of Laws No. 27, item 157.

68 Act of 17 November 1964 - Civil procedural code, Journal of Laws No. 43, item 296, with further amendments.

69 I. Wiśniewska, *Polska ustawa antymonopolowa z 1990 r.*, [Polish antimonopoly act of 1990], *Przegląd Ustawodawstwa Gospodarczego* 1990, No. 7-8, p. 130.

of the revenue. It could have been issued for having failed to execute the decision of the antimonopoly institution or the judgment of the Antimonopoly Court. Even more severe sanction was the one introduced by Article 15. According to this provision *state enterprises, cooperatives, and companies under Commercial Law that have a dominant position on a market can be divided or liquidated if they permanently restrain competition or the conditions for its emergence.*

From the very beginning the Act of 1990 was subject to criticism. Some authors underlining positive aspects of the Act, pointed out at negative provisions which should have been amended⁷⁰. First of all, the formulation of the rule of reason was ambiguous. Also the regulation of the obligation of notification of a merger was a potential source of problems. It was also pointed out that the merger regulations should be providing for exemptions from the obligation to notify. Lack of such exemptions resulted in notifications of transactions which did not have any impact on competition in Poland. Also other authors put forward several remarks upon the application of the Act of 1990⁷¹. They criticized the lack of provisions governing appellate procedure in relation to orders issued by the antimonopoly institution during the antitrust proceedings⁷². It indicated the significant role of the Antimonopoly Court in interpretation (or potentially creation?) of legal norms of competition law. Finally, the lack of many essential definitions (e.g. notion of concentration) and the vagueness of many existing definitions (e.g. dominant position) were criticized⁷³.

1.3.2. The amendments to the Act of 1990

The Act of 1990 was an important step forward in the history of Polish competition law. Nonetheless, from the very beginning it was obvious that it needed to be amended in order to become an efficient instrument of demonopolization of the market⁷⁴. The first change was rather insignificant. The Act of 17 May 1990 on division of tasks and competencies, laid down in specific acts, between the authorities of municipalities and authorities of government administration and on amending various acts⁷⁵ vested the authorities of municipalities with the right to demand the initiation of the antitrust proceedings. The next amendment was far more complex⁷⁶. Market share necessary to presume a dominant position was heightened up to 40%. However, it was the antitrust procedure that was changed and supplemented substantially. The burden of proof was transferred on a party invoking the rule of reason. The antimonopoly body could, from then on, issue a decision only within one year in which the monopolistic practice was ceased. The amendment developed the specific meaning of rule of process economy in the antitrust procedure. If, according to the information in demand and the information obtained by the Antimonopoly Office the Act of 1990 was not infringed, no administrative proceedings should be commenced. The party submitting the demand must be informed about it and provided with a justification of such decision. However, if a party kept standing for its claim the antimonopoly body must initiate proceedings. And last but not least, the group of people liable under the Act for not cooperating with antimonopoly body during investigation was widened.

70 Ibidem, p. 131-132.

71 T. Gosztyła, *Wybrane problemy regulacji i orzecznictwa antymonopolowego*, [Selected problems of antimonopoly enforcement and jurisprudence], *Radca Prawny* 1993, No. 2.

72 Ibidem, p. 24-25.

73 W. Szpringer, *Koncepcja „przyjaznych” i „wrogich” fuzji kapitałowych w prawie spółek i prawie rynku kapitałowego*, [The concept of friendly and hostile takeovers in the company law and capital market law], *Przegląd Prawa Handlowego* 1993, No. 7, p. 15.

74 For details see W. Rakoczy, *Zastosowanie instrumentów demonopolizacyjnych w restrukturyzacji gospodarki*, [Application of demonopolization legal instruments in the restructuration of economy], *Przegląd Ustawodawstwa Gospodarczego* 1993, No. 11, p. 24.

75 *Journal of Laws* No. 24, item 198.

76 Act of 28 June 1991 on amending the Act on counteracting monopolistic practices, *Journal of Laws* No. 65, item 279.

The following amendment⁷⁷ was of a systemic nature. It was the most serious change from the adoption of the Act in 1990. Firstly, new definitions of competitor, average salary and income were added. The definition of economic entity was altered by inclusion entities organizing or rendering services of public utility, which were not business activity in the meaning of provisions of Act of 23 December 1989 on business activity⁷⁸. Secondly, significant changes were made to provisions on merger control. They were almost completely rewritten. Especially important were new sanctions for infringing provisions on merger control. Also the catalogue of monopolistic practice was a subject to alteration and transformation. In relation to antitrust procedure the amending Act introduced clear rule that orders of the Antimonopoly Office could be revised by the Antimonopoly Court in appellate procedure upon filing a complaint (pl. *zażalenie*). All economic entities and their associations were obliged to submit all documents and data relevant to case pending before the antimonopoly institution on his demand. Moreover, new provisions on protecting business secrecy during an investigation were brought in. However, the most serious changes in the antitrust procedure were made by introduction of the application of enumerative list of articles of Civil procedural code during antimonopoly proceedings in relation to the matters concerning the evidence and costs of proceedings. It created several problems, but it was perceived as a step towards a better adjustment of provisions on antimonopoly process to the complex character of antimonopoly cases⁷⁹.

The next two amendments were connected with the reform of the so-called “economic centre” of a government. The first Act of 8 August 1996 amending the Acts regulating functioning of economy and public administration⁸⁰ changed the name of the Antimonopoly Office to the Office for Competition and Consumer Protection (UOKiK). Also, a new definition of consumer was added. The Act introduced rules for protecting and taking under consideration the consumer interest. In order to ensure execution or those rules, the Act has widened tasks of the antimonopoly authority in respect of protection of consumer interest and subordinated the Trade Inspection to the President of the Office of Competition and Consumer Protection. Main function of the Trade Inspection is market surveillance and providing help to consumers⁸¹. Financial sanction was raised from 15 to 100% of income for having committed the most serious monopolistic practices. The later Act of 20 December 1996 on amending the Acts related to the reform of functioning of economy and public administration, and on amending the Act on commercialization and privatization of state - owned enterprises⁸² changed the legal position of the antimonopoly body. The Office of Competition and Consumer Protection was subordinated directly to the Prime Minister. He was vested with the right to appoint and recall the President of the Office.

The next Act of 20 August 1997 - Provisions introducing the Act on National Judiciary Registry⁸³ replaced the term “economic entity” with “undertaking”. Far more important was one of the next amending acts - Act of 24 July 1998 on amending certain acts regulating competencies of authorities of public administration - in connection with the reform of state regime⁸⁴. It established a new institution in competition and consumer policy - district consumer ombudsmen. Their main task is protecting consumer interests but they may also

77 Act of 3 February 1995 June on amending the Act on counteracting monopolistic practices, Journal of Laws No. 41, item 208.

78 Journal of Laws No. 41, item 324.

79 M. Król-Bogomilska, *Zasady procedury cywilnej w postępowaniu przed Urzędem Antymonopolowym cz. I*, [Principles of the civil procedure in the proceedings before the Antimonopoly Authority. Part I], Glosa 1995, No. 8, p. 5.

80 Journal of Laws No. 106, item 496.

81 See art. 3 of the Act of 15 December 2000 on Trade Inspection, Journal of Laws of 2001 No. 4, item 25, with further amendments.

82 Journal of Laws No. 156, item 775.

83 Journal of Laws No. 121, item 770, with further amendments.

84 Journal of Laws No. 106, item 668.

play a certain role in competition policy⁸⁵. The said act was a sign of development of Polish competition law and policy. The legislator noticed that antitrust law should be supplemented by consumer law to ensure proper functioning of the market. The most visible sign of this tendency was alteration of the title of the antimonopoly act⁸⁶. Not of a less importance was increasing the role of local government in the competition policy by adding relevant provisions to the Act of 1990. The subsequent amendment resulted from the Act of 22 October 1998 on amending the Act on monopolistic practices⁸⁷. The change concerned mostly the third chapter of the Act of 1990. The amendment aimed to speed up the procedure of merger control by exclusion from the obligation of notification mergers of undertakings when their combined turnover did not exceed ECU 25 million. Notification was not mandatory in case when the person acquired stocks or shares of another undertaking resulting in achieving less than 10% of votes at a general assembly or assembly of partners.

The said amendments of 1998 were warmly welcomed by scholars and practicing lawyers. They underlined importance of introducing of new provisions increasing the protection of consumers' interests⁸⁸. Many of them were in favor of changes in the notification procedure, which, in their opinion, accelerate proceedings. They evaluated positively exclusion from the notification procedure privatization and transformation of state enterprises. It was argued that the Polish economy is so advanced in transformation that such provisions were no longer necessary⁸⁹. Some academics disagreed with this opinion⁹⁰. For them, such amendment may lead to strengthening of monopolistic position of state enterprises. They were in favor of new consumer-oriented provisions. However, they pointed out that they did not create comprehensive consumer regulation, yet, and it needed to be developed⁹¹. New provisions on merger control widened the subjective scope of applicability of the antimonopoly act. Those changes were, generally, evaluated positively⁹².

The last significant change of the antimonopoly act of 1990 was made by the Act of 30 June 2000 on the conditions for admissibility and supervising of state aid for undertakings⁹³. Upon this act the President of the Office of Competition and Consumer Protection was vested with a new competence of supervision over state aid granted to undertakings.

The Act of 1990 is a good example of the evolution of economic law in a transforming economy. Together with its development, the Act was liberalized and the supervision of the antimonopoly authority tended to be relaxed, more selective and subtle. It also gives a full picture of the process of constant improvement of law. The law will always lag behind the economic reality but it's an inevitable *signum tempore* of the world of globalization and rapidly changing forms of competition. The development of the Act of 1990 is a clear hint for the parliament to adopt comprehensive acts with unequivocal provisions. Otherwise it

85 Legal character of district (municipal) consumer ombudsman is discussed by M. Skorb, *Instytucja powiatowego rzecznika konsumentów w kontekście ochrony praw konsumentów w Polsce*, [Institution of the district (municipal) ombudsman in the light of consumer protection in Poland], *Prawo Spółek* 1999, No. 7-8, S. Kania, *Status prawny powiatowego rzecznika konsumentów*, [Legal status of district (municipal) ombudsman], *Samorząd Terytorialny* 2001, No. 5, and A. Wierzbiica-Barbarowska, *Pozycja prawna powiatowego (miejskiego) rzecznika konsumentów*, [Legal status of district (municipal) ombudsman], *Studia Prawno-Ekonomiczne* 2001, No. 63.

86 From then on, the official title was the Act of 24 February 1990 on counteracting monopolistic practices and protection of consumers' interests.

87 *Journal of Laws* No. 154, item 938.

88 S. Gronowski, *Zmiany w ustawie antymonopolowej*, [Changes of the antimonopoly act], *Monitor Prawniczy* 1999, No. 2, p. 9.

89 *Ibidem*, p. 12.

90 J. Olszewski, *Uwagi o zmianach i propozycje dalszego reformowania prawa antymonopolowego*, [Remarks on changes and proposals for further reforms of the antimonopoly law], *Rejent* 2000, No. 3, p. 78.

91 *Ibidem*, p. 82.

92 R. Pasiak, *Niektóre skutki ostatnich zmian ustawy o przeciwdziałaniu praktykom monopolistycznym dla spółek publicznych*, [Selected effects of the change of the antimonopoly law for public undertakings], *Prawo Spółek* 1999, No. 6, p. 25 and 29.

93 *Journal of Laws* No. 60, item 704, with further amendments.

will be the courts that not only decide upon, but create the law, as well, even though they do not have any legitimization.

1.3.3. The Act of 2000 - the first modern antimonopoly act

Since passage of the Act of 1990, the economic and political situation of Poland has substantially changed. Establishment of free-market economy and close joining the European Union have created an impulse for adoption a new antimonopoly act. According to Narrative memorandum⁹⁴ there were several reasons for such act:

- a. significant transformation of Polish economy;
- b. rearrangement of Polish legislation after adoption of the Constitution in 1997⁹⁵;
- c. need of effective legal instrument of competition protection;
- d. harmonization of Polish law with EC standards⁹⁶.

The Act of 2000 pretended to have been a comprehensive act regulating all matters related to the competition and consumer protection. It was true only in relation to provisions on competition protection - those provisions were well-developed and several new rules were added. Nevertheless, the Act of 2000 provided only selective regulation of the consumers' protection - there were only institutional provisions. Therefore, the basic aim of the antimonopoly act was determination of conditions for the development and protection of competition. It was done by the regulation of rules and measures of counteracting competition-restricting practices and anticompetitive concentrations of undertakings and associations thereof. The Act did not introduce the definition of competition but thanks to defining the term 'competitor' it was possible to determine the mechanism of competition. It is a situation of simultaneous release or possibility of release for free circulation, purchase or possibility to purchase products on the relevant market. The Act of 2000 governed all anticompetitive practices or concentrations which cause or may cause effects in the territory of Poland. It proved that antimonopoly act was to combat actual and potential distortions of competition.

UOKiK gained more independence thanks to the new regulation of appointment process. The President of UOKiK was appointed by the Prime Minister for the period of 5 years, *selected by way of a contest, from among the persons with university education, in particular in the field of law, economy or business administration, distinguished by their theoretical knowledge and practical experience in the scope of market economy and competition and consumer protection* (Article 25(2)). The contest was governed by the regulation of the Prime Minister⁹⁷ and it used to be the only such contest in the Polish public administration. The Prime Minister might recall the President of the Office. However, there was an enumerative list of grounds for such recall:

- a. assuming relation of work, with the exception of employment as professor at the university or in scientific institution,
- b. undertaking business activity in a capacity of undertaking or assuming function of a member of managing or controlling body of the undertaking,
- c. condemnation by a lawful judgement for the offence committed in deliberate guilt,

94 All drafts of the acts in the parliamentary proceedings are accompanied by narrative memorandums were objectives and impact of the proposed act are presented by the authors of the legislative proposal.

95 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 with further amendments.

96 Narrative memorandum... , op. cit., p. 44-45.

97 Regulation of the Prime Minister of 29 June 2001 on the method and procedure for organising the contest for the office of the President of the Office of Competition and Consumer Protection, Journal of Laws No. 69, item 720.

- d. flagrant infringement of their responsibilities,
- e. resigning from their office (Article 25 (5)).

This regulation guaranteed independence and stability of work of the antimonopoly authority.

The substantive provisions were significantly modified. The Act of 2000 prohibited two kinds of anticompetitive practices of undertakings (individual and collective) and anticompetitive concentrations. This division of practices and whole systematics of the antimonopoly act was based on the Community legislation⁹⁸. The Act of 2000 introduced prohibition of collective competition-restricting practices. a new definition of 'agreement' and 'competition-restricting agreement' was added. At first, legislator determined types of cooperation that fall within the scope of application of the antimonopoly act (Article 3 (4)).

The Act of 2000 stipulated general prohibition of competition-restricting agreements and it provided only exemplary list of such practices. This list contained horizontal and vertical (including distribution) agreements. In comparison to the Community legislation two additional types of agreements were added i.e. agreements on limiting access to the market or eliminating from the market undertakings which are not party to the agreement and agreements on fixing conditions of a bid made by undertakings participating in a tender. There was one, general exclusion from the scope of the said prohibition, concerning agreements of insignificant market relevance. Apart from it, the Council of Ministers issued block exemptions. Such exemptions were issued four times⁹⁹.

The second type of competition-restricting practices was abuse of a dominant position. The antimonopoly act introduced the uniform term of a dominant position - the idea of monopolistic position is abandoned. Dominant position was a *position of the undertaking which allows him to prevent the efficient competition on the relevant market thus enabling him to act in a significant degree independently from competitors, contracting parties and consumers; it is assumed that undertaking holds a dominant position where his market share exceeds 40%*. Contrary to the Act of 1990 the prohibition of abuse of a dominant position was of absolute character and cannot be justified on any ground. Moreover, this prohibition referred not only to the individual undertakings but also to practices applied by a group of undertakings, by introduction of a new prohibition of abuse of collective dominant position. The antimonopoly act did not define the term 'abuse' but it indicated a few examples of such activity.

The antimonopoly act of 2000 regulated also merger control. Contrary to the previously binding provisions on anticompetitive practices - mergers were allowed but were subject to preventive supervision. The Act of 2000 introduced a wide definition of undertaking by supplementation of the basic definition of undertaking from the Act of 19 November 1999 - Law on business activity¹⁰⁰. In the meaning of the antimonopoly act, undertaking was as well:

- a. natural and legal person as well as organisational unit without legal status, organising or rendering services of public utility nature, which are not business activity;

98 R. Janusz, M. Sachajko, T. Skoczny, *Nowa ustawa o ochronie konkurencji i konsumentów*, [New Act on competition and consumer protection], *Kwartalnik Prawa Publicznego* 2001, No. 3, p. 176.

99 Regulation of the Council of Ministers of 30 July 2002 on exemption from the prohibition of competition restricting agreements of certain categories of agreements concluded between the undertakings conducting insurance business activity, *Journal of Laws* No. 137, item 1151, Regulation of the Council of Ministers of 30 July 2002 on exemption from the prohibition of competition restricting agreements of certain categories of agreements concerning transfer of technologies, *Journal of Laws* No. 137, item 1152, Regulation of the Council of Ministers of 13 August 2002 on exemption from the prohibition of competition restricting agreements of certain specialization agreements and research - development agreements, *Journal of Laws* No. 142, item 1188, Regulation of the Council of Ministers of 13 August 2002 on the exemption of certain vertical agreements from the prohibition of competition restricting agreements, No. 142, item 1189.

100 *Journal of Laws* No. 101, item 1178, with further amendments.

- b. natural person exercising profession on its own behalf and account or performing activity in the frame of exercising such profession;
- c. natural person being in a possession of stocks or shares ensuring at least 25% of votes in bodies of at least one undertaking or having control over at least one undertaking, even if not conducting business activity, provided that this person is undertaking further activities subject to control of concentrations.

This definition was criticized for establishing more restrictive provisions than Community law¹⁰¹. Excessive scope of supervision over concentrations was also a result of the lack of definition of concentration. The Act of 2000 listed circumstances when notification is necessary i.e. in cases of mergers, acquisitions and joint-ventures. Moreover, notification was compulsory also in situations of quasi-concentrations as follows:

- a. taking over or acquisition of stocks or shares of another undertaking resulting in achieving at least 25% of votes at a general assembly or assembly of partners;
- b. assuming by the same person the function of a member of the managing or controlling body of the competing undertakings;
- c. initiating to exercise the rights arising from stocks or shares taken over or acquired without prior notification.

The development of definitions in the Act of 2000 was assessed positively, though it is a subject of criticism for lack of precision and granting too much discretionary power to the antimonopoly authority¹⁰².

The Act of 2000 established several exemptions from the obligation of notification of concentration. Firstly, concentrations of insignificant market relevance were exempted. This lack of relevance was identified in cases, where:

- a. turnover of the undertaking did not exceed, in the territory of the Republic of Poland, during any of two accounting years preceding the notification, the equivalent of EURO 10 million (in cases of mergers, acquisitions and joint-ventures);
- b. combined market share of undertakings intending to concentrate does not exceed 20%;
- c. financial institution acquires on a temporary basis stocks and shares with a view to reselling them.

The first exemption was perceived well, although it was hard to find a rational explanation why it is limited to certain types of concentration¹⁰³. The turnover threshold of EURO 10 million was regarded as set at the optimum in the reality of Polish economy. The method of calculating turnover was defined in the Regulation of the Prime Minister of 23 May 2001 on the method for calculating the turnover of undertakings participating in concentration¹⁰⁴. Nevertheless, 20% market share in the second exemption was criticized as set at too high level¹⁰⁵. Apart from the mentioned exemptions there were also three more, though of a less practical importance.

101 R. Janusz, M. Sachajko, T. Skoczny, op. cit., p. 190.

102 M. Rogala, *Kontrola koncentracji przedsiębiorców w nowej ustawie antymonopolowej*, [Merger control in the new antimonopoly act], *Prawo Spółek* 2001, No. 9, p. 47 and 52.

103 Not covering minority shareholding or interlocking directorates which were also notifiable at that time.

104 Journal of Laws No. 60, item 611.

105 J. Olszewski, *Nowa ustawa o ochronie konkurencji i konsumentów cz. II*, [New Act on competition and consumer protection. Part II], *Monitor Prawniczy* 2001, No. 15, p. 776.

Chapter 2. The present antimonopoly act - overview and application

2.1. Overview

The present Act of 16 February 2007 on competition and consumer protection¹⁰⁶, entered into force on 21 April 2007. This act is now the main source of general competition rules in Poland. This statute regulates institutional, substantive and procedural issues of Polish competition law. The act describes proceedings before the President of UOKiK in cases concerning anticompetitive agreements and abuse of a dominant position, merger control and abuse of collective rights of consumers. All those matters are to some extent regulated distinctively but many provisions are common for all cases. This is especially true with regard to procedural provisions. Those provisions take a special place in the antimonopoly act since they form almost 60% of all provisions of this act. The Act on competition and consumer protection empowers the Council of Ministers to issue several implementing regulations. Such regulations were adopted - the detailed list is presented in the third part of this book. Furthermore, several soft law documents have been issued by the antimonopoly authority - they are presented in the third part of the book, as well.

The characteristic feature of the antimonopoly act is that its procedural provisions are not exhaustive and there are numerous references to procedural codes and statutes to be applied accordingly. Three references are of crucial importance. Firstly, there is a general reference to administrative procedural code¹⁰⁷. This means that procedural aspects that are not regulated directly in the antimonopoly act are generally governed by the administrative procedural code unless otherwise provided in the act. In particular, the regulation of the evidence proceedings contained in the antimonopoly act is supplemented by the provisions on evidence of the civil procedural code¹⁰⁸ i.e. Articles 227-315 of the code. Procedure on search in turn refers to the provisions of the criminal procedural code¹⁰⁹. As a result of this legislative technique it is necessary to bear in mind that understanding and knowledge of all the main Polish procedural codes is indispensable to properly follow the course of conduct during antimonopoly proceedings.

2.2. Scope of application

The antimonopoly act is an administrative economic law statute and it regulates only public intervention in the market. It establishes public authority competent to undertake such intervention. The act defines procedural framework and substantive base for actions of UOKiK. The intervention is carried out in the public interest. The public interest premise plays a jurisdictional role determining which cases should be taken by the antimonopoly authority. Private interests are protected only as a function of the primary goal. It is assumed that the public interest is defined through the prism of the consumer welfare standard¹¹⁰. UOKiK counteracts anticompetitive practices and supervises concentrations of undertakings if they have or may have impact in the territory of the Republic of Poland, following the

¹⁰⁶ Journal of Laws No. 20, item 331.

¹⁰⁷ Act of 14 June 1960 - Administrative Procedural Code, Journal of Laws of 2000 No. 98, item 1071, with further amendments.

¹⁰⁸ Act of 17 November 1964 - the Civil Procedural Code, Journal of Laws No. 43, item 296, with further amendments.

¹⁰⁹ Act of 6 June 1997 - Criminal Procedural Code, Journal of Laws No. 89, item 555, with further amendments.

¹¹⁰ D. Miąsik, *Controlled Chaos with Consumer Welfare as the Winner - a Study of the Goals of Polish Antitrust Law*, Yearbook of Antitrust and Regulatory Studies 2008, vol. 1(1), p. 57.

extraterritoriality principle¹¹¹. In consequence, the Polish antimonopoly authority may institute proceedings against any undertaking irrespective where the anticompetitive agreement was concluded or a concentration will take place provided that their effects are or may be detected in Poland¹¹². Furthermore, any foreign company may seek protection from the Polish competition authority against any Polish company engaged in anticompetitive behavior¹¹³.

The Act on competition and consumer protection recognizes restrictions of competition allowed by the separate statutes. Such restrictions preclude the antimonopoly authority from intervening¹¹⁴. Furthermore, the Act on competition and consumer protection explicitly exempts certain activities from its scrutiny. The most important are:

1. activities covered by the act on games of chance and mutual bets;
2. offset agreements entered into in connection with an agreement of supply for the purposes of the state defense and security;
3. certain mergers resulting from the Act on restructuring of iron and steel industry.

All exemptions are interpreted strictly so as not to undermine the basic goals of the antimonopoly intervention. It is also necessary to remember that none of the exemptions is of an absolute character and each is applicable within the proscribed limits. Outside those limits the antimonopoly act applies without any constraints¹¹⁵.

Moreover, the antimonopoly act is applied without prejudice to any intellectual property rights. It clearly acknowledges legal monopoly resulting from rights following from provisions concerning the protection of intellectual and industrial property, in particular the provisions on the protection of inventions, utility models and industrial designs, topography of integrated circuits, trademarks, geographical indications, copyright and neighboring rights. However, it does not mean that holders of such rights are exempted from the antimonopoly scrutiny. On the contrary, the competition act explicitly states that it applies to:

1. contracts between undertakings, in particular licences, as well as to practices other than contracts concerning exercising rights mentioned earlier;
2. contracts between undertakings related to:
 - a) technical or technological information,
 - b) principles of organisation and management

- which have not been disclosed to the general public and in relation to which measures have been taken to prevent their disclosure, where such contracts result in an unjustified limitation of the freedom of business activity of their parties or in a significant restriction of competition in the market.

It is hence clear that anticompetitive practices connected to intellectual property rights, such as e.g. refusal to deal or to grant certain license agreements are punishable under the Polish competition law. It should also be noted that exemption regulation has been issued covering certain categories of technology transfer agreements¹¹⁶.

111 R. Stankiewicz, *Zasada eksterytorialnego stosowania przepisów ustawy antymonopolowej do spraw z zakresu nadzoru nad procesami koncentracji przedsiębiorców*, [Principle of extraterritorial application of the antimonopoly act with regard concentrations of undertakings], *Przegląd Prawniczy UW* 2006, No. 1, p. 121.

112 Judgment of the Supreme Court of 10 May 2007, III SK 24/06, nyr.

113 Judgment of the Court of Competition and Consumer Protection of 18 December 2002, XVII Ama 19/01, *Journal of Laws of UOKiK* of 2003, No. 2, item 260.

114 Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, *Wokanda* 1994, No. 5, item 56.

115 Judgment of the Antimonopoly Court of 25 October 2000, XVII Ama 10/00, *Wokanda* 2002, No. 7-8, item 100.

116 Regulation of the Council of Ministers of 30 July 2007 on exemption from the prohibition of competition restricting agreements of certain categories of agreements concerning transfer of technologies, *Journal of Laws* No. 137, item 963.

2.3. Notion of ‘undertaking’

Antimonopoly law regulates only behavior of undertakings. Therefore any restrictions of the competition caused by the activities of consumers are allowed. The particularity of the antimonopoly act is the fact that it defines the undertaking in widest possible way. The antimonopoly act aims at capturing all real market participants¹¹⁷ irrespective of their legal form or function (gaining profits or organizing public services). According to Article 4(1) ‘undertaking’ shall mean an undertaking in the meaning of the provisions of the Act on freedom of business activity¹¹⁸, as well as:

- a) natural and legal person as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or rendering public utility services, which do not constitute business activity in the meaning of the provisions on freedom of business activity,
- b) natural person exercising a profession on its own behalf and account or carrying out an activity as part of exercising such a profession,
- c) natural person having control, in the meaning of subparagraph 4 herein, over at least one undertaking, even if the person does not carry out business activity in the meaning of the provisions on freedom of business activity, if this person undertakes further actions subject to the control of concentrations, referred to in Article 13;
- d) associations of undertakings¹¹⁹ - for the purposes of the provisions on competition-restricting practices and practices infringing collective consumer interests.

The definition captures different legal persons which are not treated as undertakings under separate provisions. a good example is the local government. This is a public authority but under certain circumstances it may be regarded as an undertaking under the antimonopoly act. The decisive criterion is whether the local government executes its public authority or whether it acts as an economic operator. In the later scenario, the local government is treated as undertaking¹²⁰. Furthermore, other forms of associations of individuals taking the form of local government organization (often called liberal profession organizations) are regarded as undertaking within the meaning of the antimonopoly act such as organizations of pharmacists¹²¹, medical doctors¹²², architects¹²³, advocates¹²⁴, notaries¹²⁵, tax advisors¹²⁶, as well as organization of farmers¹²⁷. Analysis of case law proves that the antimonopoly act treats as undertakings: cemetery¹²⁸, building cooperatives¹²⁹, state and private

117 Judgment of the Supreme Court of 7 April 2004, III SK 22/04, OSNP 2005, No. 3, item 46.

118 According to Article 4 of the freedom of business activity act, undertaking is *a natural person, legal person and - if it is endowed with legal personality by force of a separate act - an organizational entity which is not a legal person, but conducts an economic activity in their own name. Partners in a civil partnership are also undertakings to the extent of an economic activity conducted by them. Furthermore, the mentioned act defines that economic activity is a professional profit-gaining activity in the field of production, construction, commerce, services and in the prospecting for, exploration and extraction of minerals from deposits, as well as professional activity conducted in an organized and uninterrupted manner.*

119 “Associations of undertakings” are chambers, associations and other organizations associating undertakings, as well as associations of such organizations.

120 Judgment of the Court of Competition and Consumer Protection of 3 August 2005, XVII Ama 36/04, Wokanda 2006, No. 4, item 52.

121 Decision of the President of the Antimonopoly Authority of 17 August 1993, DO-II-500-8-93/1285, nyr.

122 Decision of the President of UOKiK of 6 April 2005 No. RPZ 10/2005, nyr.

123 Decision of the President of UOKiK of 18 September 2006 No. DOK - 106/06, nyr.

124 Judgment of the Antimonopoly Court of 14 May 1997, XVII Ama 11/97, nyr.

125 Judgment of the Court of Competition and Consumer Protection of 14 May 2003, XVII Ama 55/02, nyr.

126 Decision of the President of UOKiK of 7 June 2006 No. RKT-31/2006, nyr.

127 Decision of the President of UOKiK of 20 April 2007 No. RPZ 24/2007, nyr.

128 Judgment of the Court of Competition and Consumer Protection of 12 January 2006, XVII Ama 105/04, Journal of Laws of UOKiK of 2006, No. 2, item 28.

129 Judgment of the Antimonopoly Court of 24 October 2001, XVII Ama 107/00, Journal of Laws of UOKiK of 2001, No. 3, item 130.

universities¹³⁰, private high schools¹³¹, collective rights management organizations like ZPAF¹³² (pl. *Związek Polskich Artystów Fotografików* - Association of Polish Art Photographers) or ZAIKS¹³³, (pl. *Związek Autorów i Kompozytorów Scenicznych* - Polish *Society* of Authors and Composers) and last but not least churches¹³⁴.

Polish competition law provides for wider definition of the undertaking than European competition law. a good example could be legal status of the public health insurance institutions under the competition law¹³⁵. The status of such undertakings under the European competition law is not always clear and depends on additional factors¹³⁶. Whereas the Polish antimonopoly act has been applied to Healthcare Chambers¹³⁷, as well as to the National Healthcare Fund¹³⁸.

Chapter 3. Public and private enforcement of antimonopoly law

The aim of this chapter is to present institutional framework of public and private enforcement of competition rules in Poland. First, the role and competences of the antimonopoly authority will be discussed. Then the regime and jurisdiction of the courts are presented. The last topic is the private enforcement issue.

3.1. Antimonopoly authority

The President of the Office of Competition and Consumer Protection is the antimonopoly authority in Poland. The antimonopoly authority is the central public administration authority who has two main domains of activity: first 'traditional' antimonopoly matters (such as cartel, antitrust, abuse of dominance and merger control cases) connected with the protection of competition (in the public interest) and the second one connected with protection of consumer interests. Furthermore, UOKiK has competences regarding the state aid monitoring and market surveillance. The President of UOKiK is a permanent member of the committees of the Council of Ministers and thus is authorised to participate in all legislative works of the government, and is additionally obliged to develop draft legal acts on issues within its competence.

The President of UOKiK is primarily responsible for public enforcement of competition rules. This combines functions of investigating and of adjudicating on infringements of the antimonopoly act. UOKiK is a singular post with no advisory or decisive board. There is a legal presumption that all decisions are taken by the same person taking the seat of the President of UOKiK. Activities of the President of UOKiK are supervised by the Prime Minister.

In principle, UOKiK is an independent body and the political influence from other public administration or government bodies is limited. Therefore, any political intervention is

130 Judgment of the Supreme Court of 7 April 2004, III SK 22/04, OSNP 2005, No. 3, item 46.

131 Judgment of the Supreme Court of 9 March 2006, I CSK 135/05, OSNC 2006, No. 12, item 205.

132 Decision of the President of UOKiK of 16 April 2007 No RWA - 10/2007, nyr.

133 Decision of the President of UOKiK of 16 July 2004 No. RWA - 21/2004, nyr.

134 Decision of the President of UOKiK of 18 August 2004 No. RLU-26/2004, nyr.

135 G. Materna, *Publiczne instytucje ubezpieczenia zdrowotnego w świetle prawa antymonopolowego*, [Public healthcare insurers in the light of the antimonopoly law], *Państwo i Prawo* 2005, No. 6, p. 65.

136 Judgments of the Tribunal of Justice of 16 March 2004 - AOK Bundesverband (Cases C-264/01, C-306/01, C-354/01 and C-355/01), *European Court Reports* 2004, p 00000 and Court of First instance of 4 March 2003 - FENIN (Case T-319/99), *European Court Reports* 2003, p. II-00357.

137 Judgment of the Court of Competition and Consumer Protection of 5 February 2003, XVII Ama 18/02, *Journal of Laws of UOKiK* of 2003, No. 2, item 263.

138 Decision of the President of UOKiK of 6 July 2007 No. RLU 28/2007, nyr.

excluded in reference to examination of any case handled by UOKiK. There is no legal basis in the Polish system of competition protection for any other authority to change the decision of UOKiK or impose obligations on the authority. However, the independence of the President of the Office may be questionable in view of the fact that there is no term of the office, the one is appointed by the Prime Minister for indefinite period of time. The Prime Minister nominates the President of the Office from among the persons selected as a result of an open and competitive recruitment process conducted by the recruiting team. There are several requirements to be met by the candidate for this post:

- 1) a Master's or equivalent degree;
- 2) Polish citizenship;
- 3) full public rights;
- 4) not being sentenced with a valid verdict for a deliberate crime or a deliberate fiscal crime;
- 5) possession of managerial abilities;
- 6) minimum 6 years of employment track record, including minimum 3 years on managerial positions;
- 7) possession of education and knowledge in the fields for which the President of the Office is responsible.

As a result of the recruitment process maximum 3 candidates are presented to the Head of the Chancellery of the Prime Minister. Then the Prime Minister may choose either of them. He is also competent to dismiss the President of UOKiK at any time. No reasons are required for such an action. Previous antimonopoly acts provided for formal guarantees of independence such as fixed term or limited grounds for recall from the office. Therefore it is justified to say that the antimonopoly authority was deprived of these guarantees of independence and it became a politicized body under the competition act of 2007, at least from the formal point view.

The most important activities of the President of UOKiK include:

- 1) controlling undertakings' compliance with the antimonopoly act;
- 2) issuing decisions in cases concerning counteracting competition-restricting practices, concentrations of undertakings, infringements of collective consumer interests, as well as other decisions stipulated in the antimonopoly act;
- 3) preparing the draft government programmes for the development of competition and the draft government consumer protection policy, as well as draft legal acts concerning the protection of competition and consumers;
- 4) cooperating with foreign and international consumer and competition protection authorities and organisations;
- 5) cooperating with the local government authorities in the scope resulting from the government consumer policy;
- 6) preparing and editing publications and educational programmes promoting awareness of competition and consumer protection;
- 7) addressing undertakings in matters concerning the protection of rights and interests of consumers;
- 8) fulfilling the international obligations of the Republic of Poland in the scope of cooperation and exchange of information in the field of consumer and competition protection and state aid;

- 9) cooperating with the Head of the National Crime Information Centre in the scope essential for the fulfillment of his statutory tasks;
- 10) performing other tasks defined by the antimonopoly act or by separate acts (Article 31 of the antimonopoly act).

Analysis of those activities shows that the antimonopoly authority is a decision making body and is also responsible for conducting competition policy. Advocacy responsibilities form an important part of workload of UOKiK. The Polish competition authority takes an active part in international initiatives and forums of cooperation for the protection of competition, namely the European Competition Network, Organisation for Economic Cooperation and Development and the International Competition Network. Authority's staff is involved in the work of the working groups of the forums devoted to competition policy. However, UOKiK is not a party to other agreements, which in any way affect the jurisdiction or lay down the rules for cooperation with other competition authorities.

UOKiK is composed of the central office, in Warsaw, and nine regional offices. The central office consists of 21 divisions:

1. Department of Legal Affairs,
2. Department of Competition Protection,
3. Department of Concentration Control,
4. Department of Market Analyses,
5. Department of State Aid Monitoring,
6. Department of Consumer Policy,
7. Department of Market Surveillance,
8. Department of Trade Inspection,
9. Laboratories - there are nine specialized laboratories performing technical analysis connected to tasks performed by the Trade Inspection. They are incorporated all over Poland,
10. Department of International Relations and Communication,
11. Department of Budget and Administration,
12. Office of the Director General,
13. President's Secretariat.

The territorial and substantive jurisdiction of UOKiK regional offices is determined by a regulation of the Prime Minister¹³⁹. Departments are further subdivided into units according to subject matter criteria. Last but not least, the Trade Inspection is subordinated to the President of UOKiK.

Decentralised structure of UOKiK and the division of case-handling tasks between the central office and the regional offices is typical of the organisation of the Polish system of competition protection. The task of the central office consists mainly in handling cases concerning competition-restricting practices that are taking place on the national or even broader scale, as well as all merger cases. The regional offices are responsible for the protection of local and regional markets from anti-competitive practices¹⁴⁰. Among departments in the central office competition protection is a sole domain of department of competition protection and department of merger control. Department of market analyses supports those departments

¹³⁹ Regulation of the Prime Minister of 17 July 2007 on determination of the territorial and substantive jurisdiction of delegations of the Office of Competition and Consumer Protection, Journal of Laws No. 134, item 939.

¹⁴⁰ M. Krasnodębska-Tomkiel, *Perspectives of Competition Policy in Poland: On the 20th Anniversary of UOKiK* [in:] *Changes in Competition Policy over the Last Two Decades*, UOKiK, Warsaw 2010, p. 509..

with economic studies and it conducts market surveys - it performs duties of chief economist unit. Department of competition protection is responsible for proceeding with anticompetitive practices cases of national character. Furthermore, all regional offices conduct antimonopoly proceedings in anticompetitive practices cases. Those cases are usually of local character. Merger cases are dealt exclusively by the department of merger control.

3.2. Courts competent in competition matters

There are two types of courts competent in antimonopoly matters: civil and administrative ones. The primary role serves civil courts adjudicating on appeals from decisions of the antimonopoly authority. In addition to that, administrative courts provide the judicial protection for individuals in antimonopoly cases with regard to specific process acts or failure to act of the antimonopoly authority. Detailed delimitation of jurisdiction of civil and administrative courts is sometimes confusing and leads to jurisdictional disputes¹⁴¹.

3.2.1. The court of competition and consumer protection

The appeals against the rulings of the antimonopoly authority are heard by the antimonopoly court. The official name of the antimonopoly court is the Court of Competition and Consumer Protection¹⁴² (*pl. SOKiK, which stands for: Sąd Ochrony Konkurencji i Konsumentów*). The Court was established by the Minister of Justice as a department of the Voivodeship Court in Warsaw¹⁴³. Formally the antimonopoly court is a civil court. Nonetheless its legal character has been unclear. It was argued that the antimonopoly court cannot be described as a civil court or as an administrative court since the proceedings that are taking place before it consist of elements of civil and administrative procedure¹⁴⁴. The others described the proceedings before the antimonopoly court as an external extraordinary procedure i.e. judicial scrutiny of legality of antimonopoly decisions done by the civil court¹⁴⁵. Even the Antimonopoly Court used to characterize itself as essentially administrative court¹⁴⁶ and a court of administrative nature with strictly defined scope of cognition restricted to hear appeals against decisions and concerning issues which are governed by the antimonopoly act¹⁴⁷. These ambiguous concepts were typical till the early 90's when the Polish antimonopoly law started to develop. At present, the civil nature of the Court of Competition and Consumer Protection and proceedings before it are not being contested.

The Court of Competition and Consumer Protection is also competent to hear:

- a. appeals and complaints against the rulings of the antimonopoly authority issued in the course of other proceedings conducted by virtue of the provisions of the Act of 2000 e.g. in cases of practices violating collective interests of consumers, or pursuant to separate provisions e.g. the Act on unfair competition;

141 Comprehensive discussion of those problems is presented by M. Błachucki, *Właściwość sądów administracyjnych i sądów powszechnych w sprawach antymonopolowych*, [Jurisdiction of civil and administrative courts in the antimonopoly cases], [in.] M. Błachucki, T. Górzyńska (eds.) *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych*, [Current issues in delimitating of jurisdiction of civil and administrative courts], NSA, Warsaw 2011

142 The name was changed in 2002 by the Act of 5 July 2002 on amending the Act on competition and consumers protection, the Act - Civil procedural code and the Act on unfair competition, *Journal of Laws* No. 129, item 1102.

143 Regulation of the Minister of Justice of 30 December 1998 on the establishment of antimonopoly court, *Journal of Laws* No. 166, item 1254.

144 T. Ereciński, *Postępowanie w sprawach o przeciwdziałanie praktykom monopolistycznym*, [Proceedings in the antimonopoly cases], *Państwo i Prawo* 1991, No. 1, p. 33.

145 T. Woś, *Głosa do wyroku SN z dnia 26 listopada 1993 r.*, [Comment on the judgment of the Supreme Court of 26 Nov. 1993], III CZP 63/93, *Państwo i Prawo* 1995, No. 5, p. 104.

146 The judgement of the Antimonopoly Court of 16 July 1991, XVII Amr 8/91, *Wokanda* 1992, No. 4.

147 The judgement of the Antimonopoly Court of 19 September 1991, XVII Amr 9/91, *Wokanda* 1992, No. 6.

- b. complaints against orders issued in the course of execution proceedings conducted in order to enforce obligations resulting from decisions and resolutions issued by antimonopoly authority;
- c. appeals and complaints against the rulings of the President of the Office for Energy Regulation issued in the course of proceedings conducted by virtue of the Act of 10 April 1997 - Energy Law¹⁴⁸ or based on separate provisions;
- d. appeals and complaints against the rulings of the President of the Office for Telecommunications Regulation issued in the course of proceedings conducted by virtue of the Act of 21 July 2000 - Telecommunications Law¹⁴⁹ or based on separate provisions;
- e. appeals and complaints against the rulings of the President of the Office for Rail Transport issued in the course of proceedings conducted by virtue of the Act of 27 June 1997 on rail transport¹⁵⁰ or based on separate provisions.

Analysis of the jurisdiction of the Court of Competition and Consumer Protection proves that this court is a specialized civil court competent in all competition related matters i.e. general and regulatory.

3.2.2. Administrative courts

Administrative courts in Poland consist of two instances: Voivodeship administrative courts and the Supreme Administrative Court. Voivodeship courts hear all the complaints unless something is reserved to the Supreme Administrative Court. The Supreme Administrative Court hears appeals from the rulings of the voivodeship courts and issues resolutions to resolve complex legal problems and resolves jurisdictional disputes between public authorities. Administrative courts review challenged decisions or acts through the prism of principle of legality. They may issue only cassation rulings i.e. either upheld or set aside contested act.

Administrative courts may review all activities of public administration and adjudicate on complaints against:

- 1) administrative decisions,
- 2) administrative orders,
- 3) acts or actions, other than decisions and orders, made within the area of public administration affecting the rights or obligations ensuing from provisions of law,
- 4) local law adopted by the local government,
- 5) acts of supervision over the local government,
- 6) failure to act by the public authorities.

Furthermore, administrative courts resolve jurisdictional disputes between public authorities. In principle administrative courts may control all public authorities.

As it was explained here-above, legislator decided to alter jurisdiction of the administrative courts and empower civil court to control certain activities of public administration authorities. This is the case of competition law matters. Alteration of judicial jurisdiction in antimonopoly law cases raises various problems - ranging from disputes of character and competences of the civil court to denial of judicial protection. There are no patterns why these matters have been allocated to civil courts. On the contrary, this change was accidental and it is hardly impossible to identify reasons for the legislator's choice¹⁵¹.

148 Journal of Laws No. 54, item 348, with further amendments.

149 Journal of Laws No. 73, item 852, with further amendments.

150 Journal of Laws No. 96, item 591, with further amendments

151 M. Błachucki, *Sądownictwo antymonopolowe w Polsce - historia i ustrój*, [The antimonopoly courts in Poland - history and regime], UOKiK, Warsaw 2011, p. 7.

Earlier analysis of the jurisdiction the Antimonopoly Court shows that the antimonopoly court is competent to hear appeals only from decisions and orders of specified public authorities. However, the court may not review other acts or actions taken by those authorities, including President of the UOKiK. Those acts and actions may be controlled by the administrative courts. With respect to competition law matters, administrative courts are thus competent to hear complaints against:

1. failures to act of the antimonopoly authority, such as lack of response to formal notification of potential anticompetitive behavior of market participants or non transfer of files to the antimonopoly court;
2. excessive prolonging of the explanatory proceedings and antimonopoly proceedings in anticompetitive practices cases;
3. some forms of discontinuance of antimonopoly proceedings;
4. returning of merger notification motion.

However, administrative courts are not very eager to hear antimonopoly cases. This is due to the fact that in some instances it is not always clear which court should deal with the case - for example it is unclear which court should control transmission of appeal and case files to the Antimonopoly Court¹⁵². Administrative courts denied their jurisdiction in this case and at the same time the Antimonopoly Court has no legal means to hear such case. As a result, the party has been deprived of the judicial protection¹⁵³. Quite recently administrative courts attempted to change their position and agree to hear complaints against failure to act of antimonopoly authority¹⁵⁴. This is a positive sign but it is too early to say that it is a stable line of case law.

3.3. Private enforcement

Private enforcement attracts growing attention. However, real cases are yet to be seen. a gradual increase of civil suits brought against companies infringing antimonopoly law is generally expected to be seen. This is due to the fact that public enforcement does not entail any compensation to entities who suffered losses as a result of anticompetitive behaviour. Such possibility is offered by the private enforcement. For many years Polish courts were reluctant to admit possibility of private enforcement. Supreme Court ruled that the antimonopoly authority is the only competent authority to determine infringement of the antimonopoly act. Therefore civil courts were obliged to suspend the proceedings until the issuance of the relevant decision by the antitrust institution¹⁵⁵. This jurisprudence is no longer valid. The Supreme Court changed its position and ruled that civil courts should proceed with private antimonopoly claims and not suspend their proceedings until the decision of the Antimonopoly Authority is issued¹⁵⁶. It was confirmed by the later jurisprudence of the Supreme Court¹⁵⁷.

Polish law does not recognize the particular character of antimonopoly claims in terms of calculation of the damage and hence general rules on seeking compensation apply. It means that the burden of proof lies on the plaintiff bringing private claim for the damage suffered as a result of the infringement of the competition rules. Civil court should proceed with the case. No prior decision of the antimonopoly authority is needed. However, it does not mean that the civil court may disregard decisions of the President of UOKiK. On the

152 Order of Voivodeship Administrative Court of 17 February 2009, VI SAB/Wa 91/08, nyr and resolution of the Supreme Administrative Court of 24 February 2010, II GPS 6/09, nyr.

153 For detailed discussion see M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, [The system of antimonopoly merger proceedings], Warsaw 2012, p. 412.

154 The order of the Supreme Administrative Court of 22 May 2012, II GSK 620/12, nyr.

155 The order of the Supreme Court of 27 October 1995, III CZP 135/96, *Orzecznictwo Sądów Polskich* 1996, No. 6, item 112.

156 The judgment of the Supreme Court of 2 March 2006, I CSK 83/05, nyr.

157 Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, *OSNC* 2009, No 7-8, item 107.

contrary, such decisions may play a significant role for civil courts, since courts are bound by the findings of the authority. Principle of *res iudicatae* limits the civil court jurisdiction. However, the judgment of the civil court is not binding for the antimonopoly authority with regard to adjudication on alleged infringement of the antimonopoly act. The judgment of the civil court binds solely the parties and the civil court issuing the judgment¹⁵⁸. Under the Polish law the plaintiff may seek full compensation for losses caused by infringement of the competition rules. However, the civil courts are competent to mitigate the amount of the compensation. So far, no successful private enforcement case has been reported in Poland.

Chapter 4. Anticompetitive practices

From the very beginning counteracting the anticompetitive practices of undertakings has been crucial for the antimonopoly enforcement. The perception of cartels and other anticompetitive behaviour of undertakings has been changing throughout the 20 century but the necessity to combat such activities is not questioned in Poland nowadays. Polish legislation concerning anticompetitive behaviour of undertaking has been drafted in accordance with European competition rules and therefore is harmonised to a large extent with them. Nevertheless, some particularities of Polish antimonopoly law and administrative enforcement may be noticed.

Anticompetitive practices of undertakings may take a form of anticompetitive agreements or unilateral anticompetitive conduct (abuse of a dominant position). Those two forms of anticompetitive behaviour are treated by law separately since they pose different problems and require distinct framework for analysis. Therefore this book also follows this distinction by presenting them case by case.

4.1. Anticompetitive agreements

The antimonopoly act explicitly forbids any agreements which have as their object or effect elimination, restriction or any other infringement of competition on the relevant market (Article 6). This provision introduces general prohibition of such behaviour of undertakings.

It consists of three elements which are vital for its interpretation:

- 1) notion of 'agreement';
- 2) object or effect of the agreement;
- 3) elimination, restriction or any deviation of the competition.

To prove that a particular cooperation of undertaking is anticompetitive all three elements must be established.

Similarly to EU competition law, the antimonopoly act and Polish jurisprudence follow a very broad interpretation of the notion of 'agreement'. Article 4(5) of the antimonopoly act provides for definition of agreement. Under this definition 'agreements' means: *a) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements, b) concerted practices undertaken in any form by two or more undertakings or associations thereof, c) resolutions or other acts of associations of undertakings or their statutory organs.* Analysis of the case law leads to the conclusion that it covers three types of cooperative arrangements of undertakings:

- 1) agreements - anticompetitive agreements may take the form of a contract or any informal consent leading to elimination, restriction or deviation of

¹⁵⁸ The order of the Antimonopoly Court of 3 December 1997, XVII Amz 5/97, nyr.

competition. The Antimonopoly Court explains that *the antimonopoly act presents a very flexible approach towards establishing the existence of an anticompetitive agreement. It only requires proving that any exchange of acts of will of undertakings took place irrespective of their form*¹⁵⁹. Agreement may be concluded orally or in writing. The formal description of the agreement is irrelevant. Free exchange of acts of will of undertakings engaged is crucial to establish the existence of agreement. This exchange may be direct or indirect. The crucial element of agreement is a mutual consent to act together to the detriment of other market participants and against the antimonopoly law¹⁶⁰.

- 2) concerted practice - is a form of anticompetitive coordination where no proper agreement was concluded but undertakings involved consciously coordinate their behaviour. According to the Supreme Court judgment *when three independent undertakings producing the same products set their prices several times on the same days it is enough to presume that it was the result of their concerted and anticompetitive practice*¹⁶¹. Sometimes it is hard to distinguish between concerted practice and parallel behavior of undertakings. Concerted practices rely not on formal agreement but actual behavior aiming at reduction of commercial uncertainty. Whereas parallel behavior is a legal and normal commercial adaptation to changing strategy of competitor¹⁶². Exchange of information may facilitate collusive cooperation which may be a sufficient means to achieve anticompetitive effect without entering into a formal anticompetitive agreement¹⁶³. However, the analysis of the exchange of information between competitors should be done carefully and the conclusions should be economically grounded in order to avoid the problem of over-enforcement¹⁶⁴.
- 3) decisions of associations of undertakings - historically, undertakings tend to create different kinds of association to represent their collective interests and to lobby for them. However, sometimes the protection of interests of a particular group may act to the detriment of public interest. Furthermore, membership of competitors in the same organization may facilitate collusion among them. For instance, it was established in the case law *that the bar of advocates as an association of undertakings may be the party to the antimonopoly proceedings and may be charged with the infringement of the antimonopoly act. The bar limited the competition among advocates by adopting internal resolutions setting up the code of conduct of advocates what led to the violation of the public interest*¹⁶⁵.

This division is not strict and particular types of listed arrangements may overlap. However, when the fact of an anticompetitive cooperation is established, the form of this cooperation plays only subsidiary role in application of Article 6 of the antimonopoly act.

Anticompetitive agreements are the form of cooperation between undertakings which has as their object or effect deviation of mechanism of free competition. The antimonopoly act clearly determines that object and effect of the agreement are not interlinked and either

159 The judgment of the Court of Competition and Consumer Protection of 12 July 2007, XVII Ama 64/06, Journal of Laws of UOKiK of 2007, No. 4, item 46

160 The judgment of the Antimonopoly Court of 15 March 1995, XVII Amr 66/94, Wokanda 1996, No. 3.

161 Judgment of the Supreme Court of 24 April 1996, I CRN 49/96, OSNC 1996, No. 9, item 124.

162 The judgment of the Antimonopoly Court of 11 June 1997, XVII Ama 17/97, nyr.

163 Decision of the President of UOKiK No. DOK-7/2009 of 8 December 2009, nyr.

164 S. Józwiak, *Wymiana informacji między konkurentami jako praktyka ograniczająca konkurencję – kierunki rozwoju analizy prawno-ekonomicznej*, [The exchange of information between competitors as an anticompetitive practice - development of legal and economic patterns of analysis], UOKiK, Warsaw 2011, p. 26.

165 The judgment of the Antimonopoly Court of 14 May 1997, XVII Ama 11/97, nyr.

of them is sufficient to fulfil the premise of Article 6. As a result of such wording of this provision the antimonopoly authority may regard as anticompetitive the agreement under which undertakings obliged themselves to undertake anticompetitive activities but failed to achieve any effect¹⁶⁶, as well as the agreement under which undertakings did not intend to restrict competition but nevertheless did so. In some cases anticompetitive object of the agreement is accompanied by the adverse effects of the cooperation. Therefore, UOKiK investigates both the intention of undertakings and results of cooperation. The object of the agreement may be expressly stated by the undertaking and it may be interpreted indirectly from the provision of the agreement. Some types of anticompetitive agreements constitute hardcore violations of the antimonopoly law. In such situation there is no need to conduct a comprehensive investigation to establish anticompetitive object of the agreement.

The anticompetitive aim or result of the agreement takes a form of elimination, restriction or any other infringement of competition on the relevant market. Elimination of the competition takes place where no free commercial rivalry between actual or potential competitors is possible even though there operate undertakings willing to engage in a competitive fight against the participants to the agreement resulting from the anticompetitive cooperation. Undertakings restrict competition even if some form of a free commercial rivalry is possible but it is limited. Limitation may concern certain goods or their features, as well as certain group of contractors or consumers. Anticompetitive agreements result in constraining market independence of other undertakings. However, it does not cover usual constraints (legal, economic or social) that exist on the market that all market participants face¹⁶⁷. Other infringements of competition are a group consisting of any deviations of the mechanism of competition altering the normal result of free commercial rivalry. Similarly to the notion of agreement, the division is not strict and particular types of analyzed effects may overlap or coexist.

The broad definition of 'agreement' is supplemented by exemplification of anticompetitive agreements. The list is not exhaustive and there might occur other activities of undertakings of anticompetitive character unless they fulfil general definition of anticompetitive agreement. They are as follows:

1. *fixing, directly or indirectly, prices and other trading conditions.* This is one of the hardcore infringements of the antimonopoly law since it affects the basic mechanism of the competitive process that is competition on prices. These practices cover both direct and indirect setting of prices, irrespective of whether the undertakings set the total price or the elements of prices. It is illegal to set prices in horizontal and vertical relations. Price fixing may take the form of setting minimum or predetermined prices. It is not necessary for all competitors to be engaged in price fixing - it suffices to have two parties colluding to qualify such behaviour as an infringement of the antimonopoly act¹⁶⁸. Analysis of the case law of UOKiK proves that resale price maintenance violations form a significant number of investigated cases. Of the recent cases: in 2011 UOKiK fined the distributor and the retailer of clothing, footwear, sports, tourist and climbing equipment, as well as commercial partners of the company¹⁶⁹ and producer of windows and doors together with its distributors – the collusion consisted in fixing prices for sales of windows and balcony door¹⁷⁰. By one of the most recent decisions

166 The judgment of the Antimonopoly Court of 1 March 1993, XVII Amr 37/92, Orzecznictwo Gospodarcze 1993, No. 3, item 63.

167 The judgment of the Antimonopoly Court of 21 May 1992, XVII Amr 13/92, Wokanda 1992, No 12.

168 The judgment of the Antimonopoly Court of 1 March 1993, XVII Amr 37/92, Orzecznictwo Gospodarcze 1993, No 3, item 63.

169 Decision of the President of UOKiK No. RKT-16/2011 of 1 July 2011, nyr.

170 Decision of the President of UOKiK No. RLU 9/2011 of 8 July 2011, nyr.

concerning price fixing in vertical relations, issued in 2012 - Kronopol, (a producer of chip and fibre boards used mainly in furniture industry) was fined for fixing the minimum wholesale resale prices of its products in cooperation with its authorized representatives and warehouses. As a result of the collusion, the selected products of Kronopol were not available for purchase at prices lower than the minimum price agreed by undertakings. Agreements provided for deterrence mechanisms for distributors. If authorized distributors applied prices lower than the fixed ones they could face imposition of financial sanctions by the Kronopol¹⁷¹. Akuna Polska was fined for fixing retail prices at which distributors were obliged to sell products to consumers. Moreover, Akuna was hindering its trading partners to select their contractors freely - instead, it forced contractors to trade goods only with selected partners¹⁷². There may be identified some sectors where undertakings engage in price-fixing more often than in the others. For example, this refers to taxi companies, operating on the same local market, which were fined in 2011¹⁷³ and subsequently in 2012¹⁷⁴. This seems to be true especially for construction market in a broad sense;

2. *limiting or controlling production or sale as well as technical development or investments*. The analysed practice aims at restricting the supply which eventually should lead to higher prices. This may take a form of specializing agreement where participants decide to specialize in production of certain goods leaving other goods to remaining participants. It may also lead to restriction on investments or reduction of existing output of participating undertakings. The peculiar form of this type of anticompetitive agreements are crisis cartels where during an economic downturn competitors agree to limit production in order to stay on market. Polish antimonopoly act outlaws this form of cooperation. The good example of this practice is the cartel of companies providing outdoor advertisement services. Those undertakings publicly announce that in order to face the economic crisis they decided to 'optimize' the network of billboards. They agreed to reduce the number of available billboards and set a minimum price for renting one. The agreement was found anticompetitive and eventually was terminated by the antimonopoly authority¹⁷⁵. Similarly the agreement between ironworks and their main contractors on limiting the number of suppliers for ironworks was found illegal. This agreement was aimed at restricting the export of scrap-metal¹⁷⁶. Another example of this practice is the agreement concluded between two national producers of petrol in Poland on refraining from production of certain type of petrol. Decision to stop the production was rational since the market for this type of petrol was declining and new environmental laws would make in a few years the production impossible. However, the antimonopoly authority questioned the way in which this decision was taken. The crucial element of the agreement was that both producers agreed to simultaneously stop the production securing each other that neither of them would continue the production and dominate the market for a few remaining years¹⁷⁷;
3. *dividing markets of sale or purchase*. Market division may be done according to various criteria: geographic (undertakings are limited to certain areas), product (undertakings are limited to certain products) or subjective (undertakings are limited to certain customers or contractors). All of these division criteria are

171 Decision of the President of UOKiK No. DOK 8/2012 of 27 December 2012, nyr.

172 Decision of the President of UOKiK No. DOK 7/2012 of 27 December 2012, nyr.

173 Decision of the President of UOKiK No. RBG-9/2011 of 8 July 2011, nyr.

174 Decision of the President of UOKiK No. RBG - 29/2012 of 26 November 2012, nyr.

175 Decision of the President of UOKiK No. RPZ - 21/2002 of 22 October 2002, nyr

176 The judgment of the Antimonopoly Court of 8 May 1996, XVII Amr 15/96, Wokanda, 1997, No. 8.

177 Decision of the President of UOKiK No. DOK 99/2007 of 31 December 2007, nyr.

illegal under the antimonopoly act. The antimonopoly authority and court found illegal agreement under which one undertaking was granted the exclusive right to sell one special type of vodka i.e. kosher vodka¹⁷⁸. Furthermore, the pharmacists association was found guilty of infringing the antimonopoly act by issuing negative recommendations¹⁷⁹ for establishing new pharmacies, even though those pharmacies met the requirements of pharmaceutical law¹⁸⁰. One of the recent cases involved agreement on the insurance market concluded between insurer and broker – the undertakings divided the market of group accident insurances for children, youth and personnel of education centres in one voivodeship. For the conclusion of anticompetitive agreement, the companies were fined with nearly PLN 57 million¹⁸¹;

4. *applying to equivalent agreements with third parties onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition.* Discriminatory agreements aim at putting parties to the agreement in a privileged position *vis a vis* their competitors. They are usually concluded in vertical relations and result in market foreclosure for undertakings outside the agreement. a good example of this practice would be an agreement concluded by Philips Poland with one of its distributors Brabork. Under this agreement Philips Poland put in a privileged position one of its distributors by granting Brabork higher rebates. The antimonopoly authority proved that there was no objective justification for such a privileged position of one distributor and as a result it deteriorated conditions of competition for other distributors¹⁸²;
5. *making conclusion of an agreement subject to acceptance or fulfilment by the other party of another performance, having neither substantial nor customary relation with the subject of such agreement.* Tying agreements are much more frequent in the case of abuse of dominance, but may be result of anticompetitive agreements, as well. The gist of this practice is forcing a contractor to buy additional product or service which they would not normally buy or buy on different conditions and on different markets. The aim of this agreement is facilitating the new market entry for the parties to the agreement or leveraging their position;
6. *limiting access to the market or eliminating from the market undertakings which are not parties to the agreement.* This anticompetitive agreement may take a form of exclusive dealing arrangements or of collective boycott. Exclusive dealing should be assessed with caution since it is not illegal but it may be treated as such in given circumstances¹⁸³. Therefore the antimonopoly authority should limit its intervention to these agreements which pose a threat to the public interest and are not covered by the block exemption¹⁸⁴. The goal of this anticompetitive practice is to restrict or remove from the market an undertaking not being party to the agreement. An interesting example of this practice may be the agreement concluded by Polish Football Association (PZPN) and Canal+. PZPN owns exclusive rights to broadcast Polish premier football league. Under the agreement PZPN granted Canal+ precedence in acquiring the exclusive licence to broadcast premier football leagues on television. The result of this agreement was elimination from the market of other tv operators¹⁸⁵. In 2012, UOKiK detected

178 The judgment of the Antimonopoly Court of 8 November 1993, XVII Amr 27/93, Wokanda 1994, No. 5.

179 Such positive recommendations were of decisive character in the process of establishing the pharmacy in Poland.

180 The judgment of the Antimonopoly Court of 6 July 1994, XVII Amr 8/94, Wokanda 1995, No. 3.

181 Decision of the President of UOKiK No. RBG-28/2011 of 30 December 2011, nyr.

182 Decision of the President of UOKiK No. DOK 87/2006 of 1 August 2006, nyr.

183 The judgment of the Antimonopoly Court of 10 September 1992, XVII Amr 21/92, Wokanda 1993, No. 2.

184 The judgment of the Antimonopoly Court of 27 October 1992, XVII Amr 21/92, Wokanda 1993, No. 3.

185 Decision of the President of UOKiK No. DOK 49/2006 of 29 May 2006, nyr.

anticompetitive agreement concluded by public hospitals aiming at eliminating private hospitals and healthcare providers from the market for publicly financed medical treatment. Public hospitals exclusively provide certain highly specialized medical tests. In order to get a contract from the public health insurer any hospital or healthcare provider must secure all variety of medical tests, including those highly specialized ones. Those tests may be conducted by the provider itself or be outsourced. By restriction of access to those highly specialized tests public hospitals intended to remove private hospitals from the market for publicly financed medical treatment since they would not be able to get a contract from the National Health Fund¹⁸⁶;

7. *collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.* This type of anticompetitive agreement consists in cooperation between bidders in order to deviate the auction process. As a result the contract is not attributed to the best offer and the the tender holder pays more than assumed in the competitive auction process. Collusive tendering may take place in horizontal relations (between undertakings presenting offers in the tender) and vertical relations (between the tender holder and one of the bidders). In 2012 there was an interesting case where the consortium was treated as a form of anticompetitive cooperation involved in bid rigging. The decision¹⁸⁷ concerned the tender for the collection and disposal of municipal waste. The consortium of two undertakings submitted the winning bid. They were two largest enterprises operating in the area and the only ones which provided services to municipality before. The undertakings established the consortium, which stemmed from their alleged technical limitations making it impossible for them to submit two separate bids. However, the investigation proved that the cooperation of the said undertakings (consisting in using the equipment, e.g. dustcarts) was in fact non-existent. Therefore, creating the consortium was merely a means to allow the undertakings to maintain their current market shares with the exclusion of competition mechanisms¹⁸⁸.

Prohibition of anticompetitive agreements is not of absolute character. The antimonopoly act provides for two sets of exemptions from the prohibition introduced by Article 6. First, there is a self-assessment *de minimis* exemption. Second, there are individual and block exemptions. These exemptions may be perceived as a rationalization of the system of competition protection. They enable the antimonopoly authority to concentrate on the most serious infringements of competition rules.

De minimis rule is based on the assumption that some agreements, even though they are anticompetitive, they are too minor to induce any detectable effect. Under the *de minimis* rule agreements are exempted from the general prohibition of anticompetitive agreements providing that:

1. competitors whose combined market share in the calendar year preceding the conclusion of the agreement does not exceed 5%;

¹⁸⁶ Decision of the President of UOKiK No. RLU-31/2012 of 18 December 2012, nyr.

¹⁸⁷ Decision of the President of UOKiK No. RLU-38/2012 of 31 December 2012, nyr. This is the first decision by the Polish antimonopoly authority where the cooperation of undertakings within a consortium - which in principle is not prohibited - has been put into question. UOKiK decided to refrain from imposing a fine on the undertakings concerned. The decision is to be of preventive nature, aimed at pointing undertakings whose practices can be regarded as anticompetitive in respect of cooperation when bidding.

¹⁸⁸ The law allows for joint bidding of independent undertakings during a tender. However, whenever the entities have a possibility to render services on their own, and there is no necessity to cooperate with competitors - then establishing a consortium raises doubts of undertakings' unlawful and competition-restricting cooperation. Therefore, UOKiK found that the undertakings involved concluded a prohibited anticompetitive agreement.

2. undertakings which are not competitors, if the market share of any of them in the calendar year preceding the conclusion of the agreement does not exceed 10%.

De minimis rule does not apply to hardcore restrictions of competition. Therefore price fixing, market sharing, production restriction and collusive tendering are always punishable under the Polish antimonopoly law.

The second important exemption is a result of application of individual exemption. This exemption is based on the assumption that some anticompetitive agreements may lead to positive results which outweigh adverse effects of anticompetitive coordination. Article 8(1) of the antimonopoly law exempts anticompetitive agreements which at the same time fulfil four cumulative premises. First two premises are positive and the remaining two are negative. Those four premises are:

1. contribution to improvement of the production, distribution of goods or to technical or economic progress;
2. allowing the buyer or user a fair share of benefits resulting thereof;
3. non-imposition upon the undertakings concerned such impediments which are not indispensable to the attainment of these objectives;
4. not affording these undertakings the possibility to eliminate competition in the relevant market in respect of a substantial part of the goods in question.

When applying the individual exemption, the burden of proof lies upon the undertaking concerned. The burden of proof is high since all exemptions should be interpreted very strictly in order not to undermine general goals of the antimonopoly act¹⁸⁹.

The second set of exemptions from the prohibition of anticompetitive agreements consists also of block exemptions. The rationale of this exemption is the same as with regard to individual exemption. The Council of Ministers has issued five block exempting regulations:

1. Regulation of the Council of Ministers of 13 December 2011 on exemption from the prohibition of competition restricting agreements of certain specialization agreements and research - development agreements¹⁹⁰.
2. Regulation of the Council of Ministers of 30 March 2011 on the exemption of certain types of vertical agreements from the prohibition of competition restricting agreements of certain vertical agreements¹⁹¹.
3. Regulation of the Council of Ministers of 8 October 2010 on the exemption of certain vertical agreements in the motor vehicle sector from the prohibition of competition-restricting agreements¹⁹².
4. Regulation of the Council of Ministers of 30 July 2007 on the exemption from the prohibition of competition restricting agreements of certain categories of agreements concerning transfer of technologies¹⁹³.
5. Regulation of the Council of Ministers of 22 March 2011 on the exemption from the prohibition of competition restricting agreements of certain categories of agreements concluded between the undertakings conducting insurance business activity¹⁹⁴.

189 The judgment of the Antimonopoly Court of 23 April 1992, XVII Amr 5/92, Wokanda 1992, No. 4.

190 Journal of Laws No. 288, item 1691.

191 Journal of Laws No. 81, item 441.

192 Journal of Laws of 2010, No. 198, item 1315.

193 Journal of Laws No. 137, item 963.

194 Journal of Laws No. 67, item 355.

4.2. Abuse of a dominant position

The antimonopoly act prohibits the abuse of a dominant position. It is clear that the dominant position is not forbidden and it shows the success of the business strategy of the undertaking. However, any form of excessive exercising of such market power restricting competition is outlawed. The dominant undertaking may freely increase their market share on various markets provided that the instruments they are using to achieve this goal are not contrary to the antimonopoly act¹⁹⁵. The antimonopoly act provides for definition of market dominance. An undertaking enjoys market dominance when it has a market position which allows it to prevent effective competition in a relevant market thus enabling it to act to a significant degree independently of its competitors, contracting parties and consumers. Furthermore, it is assumed that an undertaking holds a dominant position if their market share in the relevant market exceeds 40%. This presumption is only formal and it is rebuttable¹⁹⁶. Market dominance may be established with regard to some periods of time. Temporary changes of market shares or market power being a result of changing market strategies or shocks do not allow for establishing market dominance¹⁹⁷. Market dominance may be unilateral and collective - both forms are captured by the Polish antimonopoly act.

Abuse of a dominant position may take a form of an action or failure to act¹⁹⁸. The gist of the abuse of dominance is deprivation of independence of other market participants. As a result of such practice they are forced to conduct their business on less profitable conditions or completely disappear from the market¹⁹⁹. The result of the abuse of a dominant position may be also exploitation of other undertakings or consumers by the dominant company. When interpreting the notion of 'abuse' the emphasis should be put on the reality of a threat posing a serious and potential risk of a serious loss. This forces the undertaking to accept contract terms that would not be acceptable under the normal circumstances. It is not relevant whether the threat was fulfilled at the end by the dominant undertaking²⁰⁰.

The antimonopoly act does not define the notion of 'abuse' of market dominance but it provides for examples of such abuse. The list is not exhaustive and there may exist other activities of undertaking constituting the abuse of dominance. In practice, it is often the case that the behaviour of a dominant undertaking infringes more than one of listed violations of the antimonopoly law. They are as follows:

1. *direct or indirect imposition of unfair prices, including excessive or predatory pricing, delayed payment terms or other trading conditions.* The analyzed practice covers all strategies regarding the abuse of a dominant position that lead to price manipulation to the detriment of contractors or consumers. This outlawed price strategy consists in charging prices regardless of the commercial value of the good or service offered. Such prices deviate substantially from the level that would be established if the market was competitive²⁰¹. Diversity of prices should not be perceived negatively. On competitive markets price differences stimulate competition and result in elimination of inefficient undertakings²⁰². To establish such abuse of dominance it is necessary to compare the cost of production and the price. It is also advisable to compare prices on neighbouring competitive markets to examine the prices of similar products²⁰³. In practice, this may be really

195 The judgment of the Antimonopoly Court of 12 February 1993, XVII Amr 33/92, Wokanda 1993, No. 7.

196 The order of the Antimonopoly Court of 3 October 1994, XVII Amr 5/93, Wokanda 1995, No. 9.

197 The judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 73/94, Wokanda 1996, No. 4.

198 The judgment of the Antimonopoly Court of 15 May 1996, XVII Amr 21/96, Wokanda 1997, No. 8.

199 The judgment of the Antimonopoly Court of 10 May 1993, XVII Amr 6/93, Wokanda 1993, No. 9.

200 The judgment of the Antimonopoly Court of 1 March 1995, XVII Amr 59/94, Wokanda 1996, No. 1.

201 The judgment of the Antimonopoly Court of 26 February 1993, XVII Amr 35/93, Wokanda 1993, No. 7.

202 The judgment of the Antimonopoly Court of 15 September 1992, XVII Amr 18/92, Wokanda 1993, No.3.

203 The judgment of the Antimonopoly Court of 25 June 1992, XVII Amr 10/92, Wokanda 1992, No.12.

difficult to provide convincing proof of such strategy of undertaking. Therefore, for instance if the dominant undertaking offers goods at prices lower than the cost of production of the competitor, it is not sufficient ground to establish predatory pricing. On the contrary, it may be a sign of the economy of scale or other economic efficiencies enjoyed by the dominant undertaking²⁰⁴. a good example of this practice is the case against the National Health Fund who was fined for forcing providers of dental services to accept prices of those services that were below the cost of their provision. The National Health Fund is a monopolist who contracts healthcare services financed from the public money. The antimonopoly authority found that contracts for provision of dental services contained prices which were below the cost of provision. An expert witness was called upon who independently calculated costs and proved that prices offered by the National Health Fund did not cover costs barred by dentists. As a result of the proceedings, the fund has refrained from the practice²⁰⁵;

2. *limiting production, sale or technological progress to the detriment of contracting parties or consumers.* This practice covers all strategies of dominant undertakings aiming at exploiting contractors or consumers by depriving them of access to goods or services. The example of such practice may be refusal to deal or refusal to access the infrastructure network in the absence of economical, technical or other objective explanation. Some exclusive dealing arrangements may also be treated as the analyzed infringement if they unduly foreclose the market. However, the refusal to deal may be rational and admissible behaviour of a dominant undertaking. The undertaking is not obliged to enter into or prolong the contract with the party which did not pay for the services previously provided²⁰⁶. Similarly, the dominant undertaking would not be obliged to enter into agreement with the undertaking which was found guilty of committing unfair competition practices against it in the past²⁰⁷. However, a dominant undertaking cannot refuse to provide services without any objective justification if it is capable of providing such services. This was the case of Polskie Górnictwo Naftowe i Gazownictwo (PGNiG) who is an incumbent monopolist and owns approximately 98 percent of share on the retail natural gas market in Poland. PGNiG refused to transfer gas imported by the independent trader Bartimpex. The antimonopoly authority proved that there existed technical conditions to provide this service by PGNiG but the undertaking refused to enter into agreement with Bartimpex. The aim of restriction of gas transfer was clearly to secure the monopolistic position of PGNiG against any potential undertaking willing to sell gas in the territory of Poland²⁰⁸;
3. *application to equivalent agreements with third parties onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition.* The analyzed practice is of discriminatory character. By differentiating contract terms a dominant undertaking puts some of contractors in a privileged position versus the others. This provision must be interpreted with caution since the antimonopoly act does not require dominant undertakings to offer the same contract terms to all their contractors. However, the differences in contract terms should have an objective justification. The antimonopoly court found that the term consisting in additional fee levied on some contractors in exchange for a guarantee of further shipments was not justified. At the same time, the provision concerning the selective additional fee levied for the delay

204 The judgment of the Antimonopoly Court of 12 October 1994, XVII Amr 30/94, Wokanda 1995, No.8.

205 Decision of the President of UOKiK No. DOK - 28/2007 of 7 March 2007, nyr.

206 The judgment of the Antimonopoly Court of 8 November 1995, XVII Amr 38/95, nyr.

207 The judgment of the Antimonopoly Court of 3 August 1994, XVII Amr 18/94, Wokanda 1995, No. 5.

208 Decision of the President of UOKiK No. DOK - 91/2005 of 9 August 2005, nyr.

in payment was found admissible²⁰⁹. When proving this discriminatory practice, entire contracts should be carefully examined along with the accompanying commercial circumstances. The inability to supply all the contractors in full may not be approached as an excuse for discrimination. Especially, in case of shortages in supply it is important for dominant undertakings to reasonably and fairly distribute goods among all contractors²¹⁰. Rebates schemes are among the most frequent scrutinized business strategies under this provision. This type of practice is often committed by the local government authorities. For instance, UOKiK found that a municipality charged non-municipal funeral undertakings with the additional administrative fee for providing service on the municipal cemetery which put a municipal funeral company in a privileged position²¹¹;

4. *making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of the agreement.* Tying and bundling strategies aim at foreclosing the market for competitors offering their products or services which are substitutes of tied or bundled product or services. When analyzing this practice the relation between the additional product or service with the principal one is of crucial importance. The substantial relation concerns the physical or functional link between the two contracted products which is natural or typical under certain circumstances. Customary relation relates to links between the products that are results of commercial customs and traditions. The example of this practice is behaviour of the municipality which made estate connection to the municipal water and sewage system conditional upon incurring the charge for the municipality²¹² or the behaviour of municipal water supply company which imposed on recipients the cost of damage repair, maintenance and renovation of connections beyond the estate owners' plot²¹³. Another case regards the relation between licensors and licensees. The antimonopoly authority prohibited phonographic licensors to impose on licensees an obligation to bear the cost of production of hologram²¹⁴, thus vesting themselves with the right to terminate the licence agreement whenever the licensee refused to bear this cost²¹⁵;
5. *counteracting formation of conditions necessary for the emergence or development of competition.* Incumbent monopolists or undertaking enjoying the dominant position for a long time may undertake strategies to petrify such market structure and counteract any new entrants or market change. Competitors are affected only indirectly since the results of applying such strategy by the dominant undertaking are rather structural. a typical example of such practice would be cross-subsidization which constitutes an infringement of the antimonopoly act²¹⁶. The example of such practice is the case where the heating company obliged the consumers to use meters produced by the selected company, whereas there were no technical reasons for this. The antimonopoly court found that such behaviour adversely affected other undertakings producing meters, preventing them from entering the local market²¹⁷. Similarly, the gas supplier was found guilty of infringing the antimonopoly law by forcing contractors and consumers to buy materials necessary to build a gas line exclusively from him under the threat that

209 The judgment of the Antimonopoly Court of 13 November 1996, XVII Amr 41/96, Wokanda 1997, No.12.

210 The judgment of the Antimonopoly Court of 22 October 1997, XVII Ama 23/97, nyr.

211 Decision of the President of UOKiK No. RWR-10/2011 of 17 June 2011, nyr.

212 Decision of the President of UOKiK No. RKR-10/2011 of 20 April 2011, nyr.

213 Decision of the President of UOKiK No. RLO-14/2011 of 20 June 2011, nyr.

214 Holograms are used to certify the originality of purchased copy of phonographic recording.

215 The judgment of the Supreme Court of 20 June 2006, III SK 8/06, OSNP 2007, No. 13-14, item 208.

216 The judgment of the Antimonopoly Court of 23 March 1994, XVII Amr 59/93, Wokanda 1994, No. 8.

217 The judgment of the Antimonopoly Court of 27 October 1992, XVII Amr 22/92, Wokanda 1993, No. 4.

the gas undertaking would not connect the newly build gas line to the existing gas network²¹⁸. Furthermore, the administrator of municipal cemeteries may not choose only one undertaking to offer cemetery services when there operate other undertakings offering the same quality services²¹⁹;

6. *imposition of onerous agreement terms and conditions, yielding to this undertaking unjustified profits.* This practice is a typical exploitative practice under which the dominant undertaking forces the other undertaking to agree on contract terms which are not equivalent and hard to follow in order to gain additional profits. Those profits would be impossible to gain but for the coercion of the contracting party. Those profits should be gained at the expense of the contracting party and constitute a direct result of the onerous terms forced by the dominant undertaking²²⁰. Onerous terms are terms which are harder than terms typical of this kind of contract. Objective criteria should be used to assess it. The antimonopoly authority may also use counterfactual to predict the level of competitive prices²²¹. Such practices are often committed by natural monopolists. The antimonopoly authority fined municipal undertakings for imposing unfair prices by municipal water supply company on consumers, e.g. including the cost of the meter reading in the price for services provided to the persons who did not possess the measurement equipment²²² or for imposing charges for keeping bus stops inadequate, inter alia, to frequency of using them by carriers; excessive rates enabled municipal transport company to cover most expenditures related to the maintenance of these stops²²³;
7. *dividing the market according to territorial, product, or entity-related (subjective) criteria.* To establish division of the market according to territorial criteria, it is not enough to show that the undertaking offers the same products at different prices on different local markets. Such price differentiation may be justified by the features of offered product or local trading conditions²²⁴. Furthermore, territorial or entity-oriented division of the market may not necessarily consist of charging higher prices. However, when the prices are varied according to subjective criteria aiming at preventing competitors from effective competition, such practices constitute an abuse of market dominance²²⁵. The antimonopoly court found that municipality has abused its monopolistic position by dividing the market according to product and territorial criteria when it adopted the local law differentiating the market fee and levying the lower fee on markets operated by the municipality itself and higher fees for markets operated by independent undertakings²²⁶. Similarly, when the operator of the only one in the area dissecting-room offers to waive the storage fee for clients who contract his funeral services he is dividing the market according to entity-related criteria²²⁷.

The prohibition on abuse of dominance is of absolute character. Unlike in the case of anticompetitive agreements, the antimonopoly act does not provide for any exemptions.

218 The judgment of the Antimonopoly Court of 27 October 1992, XVII Amr 20/92, Wokanda 1993, No. 4.

219 The judgment of the Antimonopoly Court of 14 April 1994, XVII Amr 53/93, Wokanda 1994, No. 10.

220 The judgment of the Antimonopoly Court of 24 January 1991, XV Amr 2/90, Wokanda 1992, No. 2.

221 The judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 63/93, Wokanda 1994, No. 7.

222 Decision of the President of UOKiK No. RKR-18/2011 of 3 June 2011, nyr.

223 Decision of the President of UOKiK No. RLU-8/2011 of 6 July 2011, nyr.

224 The judgment of the Antimonopoly Court of 12 October 1994, XVII Amr 30/94, Wokanda 1995, No. 8.

225 The judgment of the Antimonopoly Court of 28 May 1997, XVII Amr 13/97, nyr.

226 The judgment of the Antimonopoly Court of 11 May 1994, XVII Amr 64/93, Wokanda 1994, No. 12.

227 The judgment of the Antimonopoly Court of 11 May 1994, XVII Amr 61/93, Wokanda 1994, No. 12.

4.3. Decisions of the antimonopoly authority

Separate chapter of the antimonopoly act is devoted to the procedure of issuance of decisions in cases of anticompetitive practices. The President of UOKiK issues administrative decisions, as a result of completion of antimonopoly proceedings, instituted upon Articles 6-9 or upon Article 101 or 102 of the TFEU. The antimonopoly authority may deliver several types of decisions. They are as follows:

1. assessment of the practice as restricting the competition and order to refrain from such practise - such decision is taken if the market behaviour of the undertaking infringes the provisions of Articles 6 and 9 or upon Articles 101 and 102 of the TFEU;
2. assessment of the practice as restricting the competition and declaration of discontinuance of the practices - such decision is taken if the undertaking no longer infringes the prohibitions specified in Articles 6 and 9 or upon Articles 101 and 102 of the TFEU. The burden of proof of desistance of the practice lies upon the undertaking;
3. commitment decision - such decision is taken if in the course of the antimonopoly proceedings, it has been rendered plausible - on the basis of the circumstances of a given case, information comprised in the notification or information forming the basis for instituting *ex officio* proceedings - that the prohibition referred to in Articles 6 and 9 or upon Articles 101 and 102 of the TFEU has been infringed, whereas the undertaking being charged with having infringed such prohibition has agreed to take or discontinue certain actions aiming at preventing those infringements. Under this decision the antimonopoly authority imposes upon the undertaking an obligation to exercise the undertaken commitments.

The antimonopoly authority is always open to conclude proceedings with a commitment decision. In order to increase awareness among undertakings and to facilitate the process of adopting commitment decisions the antimonopoly authority issued *Clarifications on issuing the commitment decision in cases of competition restricting practices and practices infringing collective consumer interests*.

In 2012, UOKiK delivered 38 commitment decisions. Two of those cases are good examples of issuing commitment decisions.

The first case regards Polskie Górnictwo Naftowe i Gazownictwo (PGNiG) who abused its dominant position by forcing contracting parties to accept onerous terms. PGNiG is an incumbent monopolist and owns approximately 98 percent of share on the retail natural gas market in Poland. The proceedings against the company were instituted in July 2011. The clauses applied in contracts allowed PGNiG to withdraw from the fuel supply contract in case of changing the seller. According to these provisions, filing a statement regarding contract withdrawal after 30th September of a given year resulted in dissolving the contract at the end of subsequent year at the earliest. Such long terms of notice, even up to 15 months, may have discouraged business partners of PGNiG to resign from the contract and choose services rendered by other entities. During the investigation, PGNiG committed to change the contested practice. Consequently UOKiK issued a decision obliging the undertaking to fulfil specific commitments. In new agreements, PGNiG had to shorten the contract term of notice (whenever a party intends to change the gas seller) till the end of a subsequent month after which the contract withdrawal statement was filed (e.g. when a recipient resigns from the contract in July, then the agreement is binding till the end of August). Furthermore, the company was obliged to propose its customers new draft contracts in line with newly established terms and conditions. PGNiG had three months to introduce new contracts and present annexes to them. PGNiG was obliged to periodically submit reports concerning the stage of fulfilling the commitment. Additionally, till the end of January 2013, PGNiG had to

provide information either on recipients who changed the contract or on parties who denied accepting the annex²²⁸.

The second case concerned Mennica Polska who is the sole distributor of public transport tickets in Wrocław. UOKiK challenged several clauses in contracts concluded by Mennica Polska with its sellers. They concerned mainly the unequal liability for improper contract performance. One of them provided for a sanction for delay in payment. Mennica Polska restricted the right to block the terminal for selling tickets without any prior warning, and in the case of threefold delay and blockade, to terminate the contract without delay. Pursuant to the Civil Code, before withdrawal from a contract, the creditor should indicate the debtor the time limit for repayment of financial liabilities. Moreover, severe fines were provided in the event of disclosure of confidential information by retail sellers as regards the agreement concluded with Mennica Polska which were found to have been disproportionate. The President of UOKiK ordered Mennica Polska to discontinue the said practices and imposed on the undertaking a fine amounting to nearly PLN 160 000. In the course of proceedings the company committed to change three other clauses of discriminatory nature to its trading partners. One of them concerned unequal fines for failure to perform the contract properly. For causing damages in this respect, the sellers had to pay the full amount of fine, whereas Mennica Polska restricted its liability to a fixed amount. The President of UOKiK accepted the obligation undertaken by Mennica Polska and ordered the company to delete this clause from new agreements²²⁹.

The table below presents the number of decisions of the antimonopoly authority issued in antitrust cases in the years 2011 and 2012²³⁰:

	Horizontal agreements		Vertical agreements		Abuse of dominance	
	2011	2012	2011	2012	2011	2012
Decisions finding the practice to be competition-restricting and ordering its discontinuation	7	3	4	4	26	19
Decisions finding the practice to be competition-restricting and recognizing that it has been discontinued	5	5	8	6	17	11
²³¹ Other decisions	1	1	3	1	29	43
Total	13	9	15	11	72	73
Proceedings discontinued in total including:	3	1	1	0	8	1
Finding no competition-restricting practice	2	1	1	0	7	3
Other reasons	1	0	0	0	1	3

228 Decision of the President of UOKiK No. DOK 1/2012 of 13 April 2012, nyr.

229 Decision of the President of UOKiK No. RWR 29/2012 of 5 July 2012, nyr.

230 Data taken from the annual reports of UOKiK's activity.

231 The statistics include: commitment decisions, decisions concerning imposing a fine on an undertaking and decisions recognizing no application of a practice (issued pursuant to provisions of the previous Act on competition and consumer protection of 15 December 2000).

Chapter 5. Merger control

5.1. Brief characteristics of the system

Merger control system has been functioning in Poland since 1990. At the moment, it largely corresponds to the standards maintained in the OECD and the ICN. Merger control is a part of competition policy together with separate anticompetitive practices provisions. The merger control includes all concentrations, which might affect the territory of Poland and meet the turnover criteria set out in the Act on competition and consumer protection. Merger control system in Poland is mandatory, and undertakings have an obligation to refrain from carrying out the transaction until its evaluation by the antitrust authority. Evaluation of concentration is based on the SIEC test. The wording of the test and its fundamental interpretation is consistent with the European law. An additional and complementary test to assess the concentration is a public interest test, which allows for authorizing anticompetitive mergers, if it is in other overriding public interest, such as national security. All transactions are treated in the same manner. There are no separate rules for cross-border transactions. Transactions must be notified using a special form, which also determines what kind of documents should be submitted. Notification applications are subject to a fee²³².

5.2. The notion of ‘concentration’

The Polish antimonopoly law does not introduce the definition of concentration, but indicates what kinds of transactions are considered as concentrations. This solution is far from being perfect as it does not take due account of the plurality of forms business concentrative transactions may take. In some instances mergers may take the form of combination of listed types of transactions and sometimes it is difficult to distinguish between transactions (for example between joint venture and acquisition of joint control). Proper designation of specific type of notified merger since wrong indication of the type of transaction may result in returning the notification motion. Pursuant to Article 13(2), concentrations covered by the antimonopoly act are as follows:

1. merger of two or more independent undertakings;
2. takeover - by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way obtaining direct or indirect control over one or more undertakings by one or more undertakings;
3. creation by undertakings of one joint undertaking;
4. acquisition by the undertaking, of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10,000,000.

When analyzing types of notifiable transactions, defining of joint ventures is not always clear. Contrary to EU law, Polish antimonopoly act does not distinguish between concentrative and cooperative joint ventures. As a result, all joint ventures irrespective of their permanent or temporary character are subject to notification. It is difficult to find any rationale of legislator for such a wide scope of notification obligation since the antimonopoly authority reviews even transitory and short-term transactions²³³. Attempting to clarify the issue, the President of

²³² Around EUR 1,250.

²³³ R. Stankiewicz, *Joint ventures w prawie antymonopolowym*, [Joint ventures in the antimonopoly law], Przegląd Prawa Handlowego 2007, No. 8, p.16.

UOKiK explains as follows: *the obligation to notify the intention of concentration consisting in creation of the joint undertaking refers both to the situation where participants of concentration (founding undertakings) establish, for this purpose, a new joint undertaking and to the situation where, for example, in order to create the joint undertaking, one of participants will establish a new company and then other participants will purchase or take up its shares/stocks. To establish the joint undertaking, participants of concentration may also use the existing undertaking (the joint undertaking is established, e.g. on a basis of a company functioning within the capital group of one of founders)*²³⁴. This interpretation is assumed to clarify the situation when a transaction constitutes the creation of joint venture and when it is an acquisition of joint control. Such distinction is of crucial importance since there are some differences in calculating turnover for the purposes of distinct types of transactions (especially the exemption from Article 14(1) applies only to the acquisition of joint control). In practice, the decisive factor will be the will of the parties to the transaction expressed in the document or action constituting the intention to merge. Furthermore, the rationale of the transaction may indicate the type of transaction²³⁵. The timing of transaction will be important, as well²³⁶. All those factors may help to distinguish between those two types of concentrations. However, in case of serious doubts it is always advisable to contact the antimonopoly authority in advance.

5.3. Turnover thresholds

The Polish system of merger control is based on compulsory notification of all transactions meeting the notification criteria. The criteria are objective in nature and are based on the turnover of enterprises engaged in concentration. Pursuant to Article 13(1) of the antimonopoly law, the concentration is subject to notification if:

1. the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1,000,000,000, or
2. the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50,000,000.

Both criteria are independent of each other and the transaction may fulfil just one of them. It is worth underlining that, it is not required for the transaction to take place in Poland in order to be notified, unless the worldwide turnover criterion is met. Notification turnover thresholds were significantly increased over the past 10 years. Because of this, all cross-border transactions, which even slightly could affect the markets in the Polish territory are subject to notification. The increase of turnover thresholds served to reduce business transaction costs by limiting the obligation of notification. However, a problem can be noticed that by increasing the turnover thresholds and adapting them to transnational transactions, they have become too high for certain transactions of a purely local nature. The result is that it may be reasonable to reinstate the notification criteria based on subjective indicators, such as the market share. Furthermore, worldwide threshold serves no rational purpose if there is no domestic turnover of undertakings concerned²³⁷.

When calculating turnover, one should remember to include the turnover of undertakings

234 Point 2.4. of Clarifications concerning criteria and procedure of merger notifications to the President of UOKiK.

235 If a transaction involves the change of business activity of the target company, it may be indicated that this is a partial acquisition, not the joint venture.

236 After a year from the date of establishment of an undertaking it would be hard to treat a new investor as a party to joint venture.

237 M. Blachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, [The system of antimonopoly merger proceedings], UOKiK, Warsaw 2012, p. 158-159.

directly participating in the concentration as well as of the remaining undertakings participating in the capital groups to which undertakings directly taking part in the concentration belong. There is only one exception to this rule. When applying exemption from the notification obligation (Article 14(1)), solely the turnover of the target undertaking is taken into account. Detailed rules of calculating the turnover are set in Regulation of the Council of Ministers of 17 July 2007 concerning the method of calculation of the turnover of undertakings participating in the concentration²³⁸.

5.4. Exemptions from the notification obligation

Notification criteria are based on formal premises and derived from substantive factors. Therefore there is a need to relax these formal premises by introducing exemptions. Those exemptions aim at eliminating from the scrutiny transactions which are insignificant or by their nature it is unlikely that may cause any competitive problems. Article 14 indicates that the obligation to notify the intention of concentration shall not apply where:

1. the turnover of the undertaking over which the control is to be taken in accordance with Article 13(2)(2) did not exceed in the territory of the Republic of Poland in any of the two financial years preceding the notification, the equivalent of EUR 10 000 000;
2. the financial institution, the normal activities of which include investing in stocks and shares of other undertakings, for its own account or for the account of others, acquires or takes over, on a temporary basis, stocks and shares with a view to reselling them provided that such resale takes place within one year²³⁹ from the date of the acquisition or taking over, and that:
 - a) this institution does not exercise the rights arising from these stocks or shares, except for the right to dividend, or
 - b) exercises these rights solely in order to prepare the resale of the entirety or part of the undertaking, its assets, or these stocks and shares;
3. the undertaking acquires or takes over, on a temporary basis, stocks and shares with a view to securing debts, provided that such undertaking does not exercise the rights arising from these stocks or shares, except for the right to sell;
4. the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over by a competitor or a participant of the capital group to which the competitors of the to-be-taken undertaking belong;
5. the concentration applies to undertakings participating in the same capital group.

All exceptions are of absolute character. If a transaction fulfils any of premises set out in Article 14, it is exempted from the scrutiny of the antimonopoly authority even if it is or may be anticompetitive. The most important is the first exemption. Together with special rules on calculating the turnover,²⁴⁰ it constitutes the most frequent situation when undertakings are exempted from the obligation to notify the merger. When interpreting the fourth exemptions, it should be remembered that it applies only to insolvency proceedings taking place in Poland and conducted according to Polish provisions. Furthermore, it is limited solely to one form of concentration i.e. takeover.

²³⁸ Journal of Laws of 2007, No. 134, item 934 and 935.

²³⁹ The time period may be extended by one year if the institution proves that resale of stocks or shares was not possible or economically justified before the lapse of one year from the date of their acquisition.

²⁴⁰ See the previous paragraph.

5.5. Merger tests

A merger test is the heart of the merger control system. It is a set of legal premises that enables the competition authority to distinguish between pro- and anticompetitive concentrations. It is based on economic theories and it allows the antimonopoly authority to foresee the consequence of notified merger²⁴¹. Pursuant to Article 18 of the antimonopoly act: *The President of the Office shall, by way of decision, issue consent to implement a concentration, which shall not result in significant impediments to competition in the market, in particular by the creation or strengthening of a dominant position in the market.* Upon analyzing this provision it is possible to conclude that it is the test of significant impediment to competition. It is a two-step test. In the first step the influence of concentration on the market is analyzed. The Office analyzes the extent of the impediment to competition by the merger. In the second step it is examined whether an undertaking will achieve a dominant position or whether it will be strengthened. The introduction of the SIEC test constitutes an important process change in the merger analysis. It is no longer necessary to prove the dominant position for the purpose of possible blocking a concentration. In the new test the whole market environment of the undertaking and also influence on competitors, contractors and consumers is being analyzed to a much greater extent. In the dominance test, the central point was the undertaking and the aim of the analysis was to prove the entity's dominant position. In the course of the examination of the merger, the Polish competition authority analyzes prospective efficiencies connected with the studied concentration. In concentration cases hitherto undertakings very rarely resorted to efficiency defence. The policy of the Polish competition authority within the scope of accepting the existence of such efficiencies is very cautious.

Analysis of judicial decisions provides arguments that for the purpose of interpretation of the concept of significant impediment competition test, the following circumstances are taken into consideration (the list is not exhaustive):

1. Market structure - market shares of an undertaking and its competitors, changes of market shares over time²⁴²,
2. Concentration of suppliers, the existence of significant purchasing power on the part of the contractors²⁴³,
3. Entrance and exit barriers, possible new entrances and exits of the market²⁴⁴,
4. The value and changes of market concentration ratio and HHI²⁴⁵,
5. Market maturity, the role of innovativeness and market transparency²⁴⁶,
6. Symmetry between competitors²⁴⁷,
7. Homogeneity of the sold goods and services²⁴⁸,
8. Links between competitors and other mechanisms conducive to cooperation (collusion)²⁴⁹.

241 M. Błachucki, *Ewolucja regulacji testów oceny koncentracji w polskim prawie antymonopolowym*, [The evolution of merger control tests in the Polish antimonopoly law], [in:] *Europeizacja publicznego prawa gospodarczego*, [Europeanisation of the public economic law], H. Gronkiewicz-Waltz i K. Jaroszyński (red.), C.H. Beck, Warsaw 2011, p. 38.

242 Decision of the President of UOKiK No. DKK -52/2008 of 3 July 2008, nyr.

243 Decision of the President of UOKiK No. DKK -67/09 of 8 October 2009, nyr.

244 Decision of the President of UOKiK No. DKK -76/2008 of 24 September 2008, nyr.

245 Decision of the President of UOKiK No. DOK -123/05 of 30 September 2005, nyr.

246 Decision of the President of UOKiK No. DKK -5/08 of 4 January 2008, nyr.

247 Decision of the President of UOKiK No. DKK -11/09 of 17 March 2009, nyr.

248 Decision of the President of UOKiK No. DKK -17/09 of 8 April 2009, nyr.

249 Decision of the President of UOKiK No. DKK -5/08 of 4 January 2008, nyr.

The evidence of growing economization of the SIEC test is the acceptance and regulation of the specific efficiency defence problems. Apart from the usual analysis of the effects of concentration and potentially related efficiencies, the Polish competition authority may take into consideration some special effects of the qualified efficiency gains of undertakings. Pursuant to Article 20(2)(1) even when concentration leads to the significant impediment to competition, it may be implemented (cleared) *if it contributes to economic development or technical progress*. Therefore during merger review, a party may try to prove the existence of these special efficiencies. The burden of proof lies upon the undertaking. The standard of proof in such a case is exceptionally high and is connected with the need to prove beyond any doubt the increase of consumer welfare. Obviously efficiencies of this type will only relate to specific markets while the achieved benefits should relate to the widest possible group of consumers. It is justifiable to assume that possible significant impediment to competition should be of temporary nature and the entrepreneur should prove the existence of possible conditions for the market to come back to the equilibrium in the future. Despite the fact that this provision has been in force for years, it has never been the actual basis for examination of a case.

The test used at present is fully adequate to the needs of counteracting anticompetitive concentrations of undertakings and for achieving goals of the antimonopoly act. It comprises both the situation when concentration results in unilateral and coordinated effects. It means that there is a prospect of counteracting the creation of both single and collective dominant position. It is worthwhile to stress at this point that in any of the cases examined so far, the possibility of creating a collective dominant position as a result of the implementation of the concentration and the existence of coordinated effects has not occurred. Therefore, in Polish competition law, the concept of a collective dominant position is still a theoretical concept and there is no applicable case law. Similarly, no guidelines related to how this concept might be understood by the Polish competition authority have been issued.

Furthermore, it is worth emphasizing that the significant impediment to the competition test is supplemented by the public interest test. Pursuant to Article 20(2)(2) of the antimonopoly act: *the President of the Office shall issue, by way of a decision, consent for the implementation of the concentration as a result of which competition in the market will be significantly impeded, in particular by the creation or strengthening of a dominant position, in any case that the desistance from banning concentration is justifiable, and in particular it may exert a positive impact on the national economy*. It is necessary to stress, however, that this test is rarely used. Not even one case has been examined on the basis of this test in the years 2011 and 2012. In the previous years the total number of cases did not exceed 5²⁵⁰. When applying the public interest test, the burden of proof rests entirely on the undertaking while the standard of proof is exceptionally high²⁵¹.

5.6. Decisions in merger cases

After conducting merger investigation, the antimonopoly authority may issue four types of decisions:

1. Clearance - if merger does not lead to significant impediment to competition, UOKiK is obliged to grant consent for such transaction.
2. Conditional clearance - when analysis of possible consequences of the notified transaction proves that it would restrict competition but those restrictions are

250 These cases concerned exclusively state-owned enterprises from the sectors having strict links with national security, i.e. energy, fuel and military.

251 M. Blachucki, R. Stankiewicz, *Decyzja zezwalająca na dokonanie koncentracji z naruszeniem testu istotnego ograniczenia konkurencji (art. 20 ust. 2 ustawy antymonopolowej)*, [Decision of the antimonopoly authority clearing anticompetitive merger (Article 20(2) of the antimonopoly act)], *Przegląd Ustawodawstwa Gospodarczego* 2010, No. 6, p. 5.

removable and not essential to the transaction, UOKiK grants consent together with imposition of necessary remedies.

3. Extraordinary clearance - if merger is anticompetitive, but there is an overriding public interest the antimonopoly authority may grant its extraordinary consent for such transaction.
4. Prohibition - when analysis of notified transaction process indicates that the merger is anticompetitive and no remedies may change that, UOKiK is obliged to intervene and prohibit the merger.

Apart from decisions based on substantive analysis, antimonopoly proceedings may be concluded on the formal basis without adjudicating on the merits of the case:

1. Return of the notification form - the form is returned if there is a formal obstacle precluding the antimonopoly authority from adjudicating on the case. In principle, UOKiK returns the notification form if it is incomplete or it wasn't corrected and supplemented on time. Furthermore, the notification form is returned if the notified transaction is exempted by Article 14 of the antimonopoly act. Moreover, the antimonopoly authority returns the form if the notification is premature (transaction is highly unlikely or speculative) or the wrong party filed the form or the form lacks most of the required information²⁵². The notification forms are not returned too often and it usually does not exceed 10% of all notifications (in 2011-12 and in 2012-16 forms were returned).
2. Discontinuance of proceedings - proceedings are discontinued if they became groundless for any reason - for example as a result of withdrawal of the notification form by the parties or referral of the case to the Commission. Merger proceedings are discontinued very rarely (in 2011 - 3 and in 2012 - 0 proceedings were discontinued).

The table below indicates the intervention ratio of the antimonopoly authority in merger cases²⁵³. It concerns only substantive based decisions²⁵⁴.

Year	Number of proceedings	Proceedings concluded	Clearance	Decisions with remedies	Prohibitions
2012	194	155	136	1	0
2011	206	187	166	3	2
2010	222	188	147	2	0
2009	144	123	97	1	3
2008	197	177	153	2	0
2007	310	263	203	2	0
2006	310	265	215	1	1
2005	378	329	265	0	2
2004	256	218	175	1	2
2003	194	151	149	2	0
2002	203	169	168	1	0

252 M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, [The system of antimonopoly merger proceedings], UOKiK, Warsaw 2012, p. 311-312.

253 Data taken from the annual reports of UOKiK's activity.

254 Decisions on discontinuance of proceedings or return of the notification forms are omitted. Due to difficulties in obtaining relevant and accurate data, statistics regarding extraordinary clearances are not included, as well.

Year	Number of proceedings	Proceedings concluded	Clearance	Decisions with remedies	Prohibitions
2001	592	542	n/a	n/a	n/a
2000	1262	1107	911	0	0
1999	1238	1079	917	0	0
1998	1872	1511	1510	0	1
1997	1387	1227	1225	0	2
1996	469	378	377	0	1
1995	384	333	333	0	0
1994	405	405	404	0	1
1993	537	537	513	13	7
1992	740	740	718	9	9
1991	974	974	895	63	4
1990	192	192	167	17	8

Decisions in merger cases are valid 2 years from the day of issuance. During this time parties may proceed and complete the transaction. If the transaction is not consummated within this time, the party is obliged to notify the transaction once more. However, it is possible to extend the said period with 1 year. Party may apply for such extension and is obliged to prove that market conditions did not change and that transaction would not have an adverse effect on competition. Such motion should be filed within the reasonable time before the expiration of the merger decision so as to allow the antimonopoly authority to carry out explanatory proceedings if necessary. The party bears all negative consequences of late application. If the antimonopoly authority finds that there have been relevant changes in market condition, it refuses to prolong the validity of merger decision. a refusal is issued in the form of order and is not subject to appeal.

5.7. Remedies in merger cases

Polish procedures in merger cases are a one-stage process. The absence of two-stage proceedings means that there is no clear transition between the initial findings of the existence of competition concerns and an extended, in-depth investigation. Parties have the right to actively participate in all fact-finding activities at all stages of the proceedings. That right also includes the possibility of submitting commitments to eliminate identified competition concerns. It means that both the party and the competition authority have the right and the opportunity to propose remedies. In practice, due to the absence of two-stage proceedings, it is the President of UOKiK that comes forward with the initiative and the proposal of remedies. In that situation the undertaking is notified about the conclusions of the market investigation and the potential competition concerns only at the very end of the proceedings. Based on those findings, the competition authority presents the undertaking with the proposed remedies and at the same time sets a date for him to respond to those proposals. Usually such deadline is set at 14 days. The deadline may be extended if necessary. Proposals of the competition authority initiate the negotiations process. During that process, the undertaking has both the opportunity to discuss the functionality and validity of the assessment of competition concerns caused by the merger, as well as the content and scope of the proposed conditions. Findings of the competition authority made on the basis of the market survey set the framework for negotiations. Negotiations take place at the head

office of the competition authority and involve representatives of the undertaking and case handlers which conduct the proceedings.

The Polish competition authority enjoys a wide discretionary power when deciding on remedies in merger cases. These remedies can be both structural and behavioral, as well as any combinations thereof, for example hybrid conditions. In practice, the decisions issued by the President of UOKiK show an unequivocal preference for structural conditions. This is explained by the general observation that mergers produce permanent changes in the structure of the market, which means that preventing their negative impact requires the use of structural means. Structural conditions are usually easier to apply and do not require an expanded monitoring mechanism. In addition to structural conditions, the Polish competition authority also applies behavioral conditions, as well as mixed, or hybrid conditions. The application of a specific condition depends on the nature of the merger and the type of competition concerns found. For example, in the case of a merger between two manufacturers, or the merger of two retail chains, the most frequent conditions are structural conditions, consisting of the disposal of the factory or a production line, or specific stores. Of course, there may be situations when the subject of the transaction is indivisible, for example when it is a single factory; this opens up new opportunities with respect to the terms and conditions. Different types of concerns produced by horizontal and vertical consolidation also affect the type of conditions applied by the Polish competition authority. Due to the fact that vertical consolidation usually leads to various types of market foreclosure, the conditions applied should be aiming to preserve the openness of the distribution or supply channels. Such nature of the competition concerns may be eliminated by applying behavioral conditions which oblige the undertaking to maintain the openness of the distribution network. Such situation did take place in the case of the Carey Agri/Polmos Bialystok²⁵⁵ merger on the alcohol market, the merger between the biggest alcohol distributor and the biggest maker of flavored vodkas. One of the conditions imposed on the undertaking in this transaction was the requirement to maintain distribution of alcohols of other producers at a specific level, which guaranteed the openness of the wholesale distribution channel.

When deciding to apply structural sanctions, an analysis is made to identify to what extent a part of the business subject to remedies would be able to perform its functions independently and effectively conduct business operations, exerting true competitive pressure. From that point of view, standalone business units of the undertaking stand the best chance. They do not require significant spinoff-related expenses and can be transferred to another undertaking within a relatively short period of time. In certain situations, it is possible to impose structural conditions on parts of the business, or a set of assets of the undertaking that was not a standalone entity. Such moves are possible provided that spinning them off from the remaining assets is possible to achieve and the time needed to do so is not excessive. Often such carved out assets are accompanied by intellectual property rights. A good example would be the merger of jam producers Agros Nova and Kotlin²⁵⁶, where competition disposal conditions were imposed on one production line, together with rights to brand names, contracts and the essential human resources. Combining all of these elements produced a chance that the potential and value of the jam production line would be preserved in the future and would serve as an effective competitor with respect to jams made by Agros Nova.

The Polish competition authority has seldom applied behavioral remedies. In most cases they were imposed with respect to vertical mergers as an attempt to prevent market foreclosure. They had the form of commitments to maintain a fixed level of turnover generated by selling goods from independent vendors and supplemented by fair-dealing clauses.

255 Decision of the President of UOKiK No. DOK - 123/05 of 30 September 2005, nyr.

256 Decision of the President of UOKiK No. DKK - 9/09 of 25 February 2009, nyr.

The main instrument of control of the execution of remedies by undertakings is the reporting obligation imposed on them. These consist of requiring the undertaking to periodically present the reports about progress on the execution of those terms and conditions. Whenever doubts arise as to the proper execution of those provisions, the Polish competition authority may launch explanatory proceedings and conduct an on-site inspection at the undertaking. The inspection on the fulfillment of conditional clearance is conducted by the same people, who have conducted the proceedings related to that specific merger. There are no separate officials responsible solely for the inspection of the fulfillment of remedies.

5.8. Merger control undertaken by other public authorities in Poland

It should be noted, however, that in addition to control of mergers exercised from the perspective of competition protection, there is a possibility of such control under other legislation. For example, the Financial Supervisory Authority also controls the concentration of undertakings from the financial sector in terms of transaction safety and consumer protection. Those two perspectives, do not necessarily lead to the same conclusions. Such a situation occurred in relation to the concentration of Unicredito/HVB²⁵⁷.

Chapter 6. Sanctions for infringements of the antimonopoly act

6.1. Introduction

An efficient competition policy requires an adequate system of sanctions. Antimonopoly law creates additional transaction costs for undertakings, resulting in some instances in prohibiting certain commercial arrangements. Those antimonopoly limitations to the freedom of enterprise may form some encouragement for companies to attempt to escape from the antimonopoly scrutiny. Therefore the antimonopoly sanctions should outweigh profits from potential deviation from the competition law provisions. The type and the intensity of sanctions should depend on the type of misconduct of the company and reflect the danger for the public interest coming from such behaviour. Polish antimonopoly act distinguishes between procedural and substantive antimonopoly infringements. Furthermore, different sanctions apply to infringing provisions on prohibition of anticompetitive practices (anticompetitive agreements and abuse of a dominant position) and on merger control. Polish antimonopoly law expressly prohibits anticompetitive practices (collective and unilateral). If such a practice is undertaken, then it is void as a whole or in part. If an anticompetitive practice is proven, the antimonopoly authority orders the undertaking to refrain from it. This is the basic administrative law sanction. In case of merger control all transactions remain valid even if they were not notified²⁵⁸. Only administrative intervention from the antimonopoly authority may legally block the execution of such transaction.

In Poland, the antimonopoly act is a part of economic administrative law. It determines the character of liability and types of sanctions governed by this statute. Liability arising from infringement of the antimonopoly law constitutes the administrative law liability. Administrative law liability is distinct from the civil law or criminal law liability. Such

²⁵⁷ Case No. COMP/M.3894 - UNICREDITO/HVB.

²⁵⁸ S. Gronowski, Glosa do postanowienia Sądu Najwyższego z dnia 27 października 1995 r., [Comment to the order of the Supreme Court of 27 October 1995], III CZP 135/95, OSP 1996, No. 6, item 112.

liability is executed when companies violate their duties resulting from the antimonopoly law. The President of UOKiK is the only public authority competent to impose fines and sanctions for infringements of the Act on competition and consumer protection. During the court proceedings the antimonopoly court enjoys this competence, as well²⁵⁹. Furthermore, liability for the infringement of antimonopoly law is of objective nature, irrespective of the guilt or awareness of the person who violates the rules²⁶⁰. Subjective elements of the infringement of the antimonopoly act are essential only when determining the actual amount of the fine²⁶¹.

In order to give the full picture of sanctions, it should be mentioned that the basic civil law sanction for the infringement of the antimonopoly act is a sanction of invalidity. All agreements which have as their object or effect elimination, restriction or any other infringement of competition on the relevant market are in their entirety or in the respective part null and void (unless they are exempted by the *de minimis* rule or the rule of reason). Similarly, it applies to the consequences of the abuse of a dominant position, but the said invalidity is of absolute character in the unilateral conduct cases. It means that all above agreements and legal actions are invalid *ex ante*. Therefore a decision of the antimonopoly authority is a declaratory one.

Neither the antimonopoly act nor any criminal law act provide for any criminal liability for infringement of the Polish competition law. However, it should be noted that bid rigging is a separate and independent criminal offence and is punishable under Article 305 of the Criminal code²⁶². This provision provides for sanction up to 3 years of imprisonment for collusive tendering. It should be noted that this crime regards only natural persons and is independent of liability of undertakings under the antimonopoly law.

6.2. Financial sanctions

The antimonopoly act provides for sanctions that may be imposed both on undertakings and natural persons. Undertakings are the primary target of sanctions provided in the antimonopoly act, since they aim at counteracting anticompetitive behavior of undertakings. However, the auxiliary sanctions may be imposed on natural persons, as well. Until now, no natural person has ever been fined for antimonopoly practices. As mentioned before, all sanctions are of administrative not of criminal nature²⁶³. However, the nature of financial sanction is disputable in the light of the jurisprudence of the European Court of Human Rights. Some authors claim, based on this jurisprudence, that financial sanctions under the Polish antimonopoly act should be regarded as criminal within the meaning of Article 6 of European Convention of Human Rights²⁶⁴.

6.2.1. Sanctions for undertakings

Basic sanctions for infringing the antimonopoly act are financial sanctions. In principle, imposition of all fines lies within administrative discretion of the antimonopoly authority. In practice, this discretion is quite limited and the antimonopoly authority hardly ever desists

259 T. Lawicki, Glosa do postanowienia Sądu Najwyższego z dnia 22 lutego 1994 r., [Comment to the order of the Supreme Court of 22 February 1994], I CRN 238/93, Państwo i Prawo 1995, No. 7, p. 101 and 102.

260 M. Krasnodębska-Tomkiel, *Perspectives of Competition Policy in Poland: On the 20th Anniversary of UOKiK* [in:] *Changes in Competition Policy over the Last Two Decades*, UOKiK, Warsaw 2010, p. 518 and 519.

261 Judgment of the Supreme Court of 21 April 2011, III SK 45/10, nyr.

262 The Act of 6 June 1997 - Criminal Code, Journal of Laws No. 97, item 553, with further amendments.

263 M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, [The system of antimonopoly merger proceedings], UOKiK, Warsaw 2012, p. 325.

264 A. Błachnio-Parzych, *The nature of responsibility of an undertaking in antitrust proceedings and the concept of „criminal charge” in the jurisprudence of the European Court of Human Rights*, Yearbook of Antitrust and Regulatory Studies Vol. 2012, 5 (6), p. 54.

from imposing the fine when it identifies the infringement of the antimonopoly act. Sanctions may be imposed for violation of substantive and procedural rules. In the first case, the sanctions are more severe since the possible effects of such violations could be more harmful to the public interest. The latter group provides for sanctions for procedural infringements whose gravity is adjusted to the nature of those infringements.

The antimonopoly authority may impose a maximum fine of 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed, if the undertaking, even if unintentionally:

1. infringed the general prohibition of undertaking anticompetitive practices set out in Articles 6 and 9;
2. infringed Article 101 or 102 of the TFEU;
3. completed the concentration without a consent of the President of UOKiK;

This is the most important set of fines designed to sanction the elementary infringements of antimonopoly law. The *ne bis in idem* principle applies²⁶⁵.

Procedural infringements are subject to fines of up to EUR 50 000 000 on an undertaking. They may be imposed if an undertaking, even unintentionally:

1. provided false data in the application for extension of validity of merger decision as referred to in Article 23 or in the notification merger form as referred to in Article 94(2);
2. failed to provide information requested by the President of the Office pursuant to Articles 12(3), 19(3) or 50, or provided false or misleading information;
3. does not collaborate during the inspection performed within proceedings pursuant to Article 105a subject to Article 105d(2).

Procedural fines intend to ensure the appropriate course of process actions. They are levied for the behaviour that is contrary to a procedural obligation irrespective of whether this procedural duty was subsequently fulfilled²⁶⁶.

Furthermore, the antimonopoly authority may fine an undertaking with up to EUR 10,000 for each day of delay in execution of the decisions issued pursuant to Articles 10, 12(1), 19(1), 20(1), 21(2), 21(4), 26, 28(1), 89(1), 89(3) and 105g(1) or court judgements in cases concerning competition-restricting practices, practices violating collective interests of consumers and concentration; the fine shall be imposed as of the date specified in the decision. Those fines constitute measures of administrative execution character. They are independent of other fines and they may be imposed several times (the *ne bis in idem* principle does not apply).

6.2.2. Fines for natural persons²⁶⁷

The principal liability regards undertakings. Nonetheless, natural persons may also be sanctioned for violations of the antimonopoly act. Those are mainly procedural infringements affecting the effectiveness of antimonopoly proceedings. Natural persons may not be held liable for the substantive infringements of the antimonopoly act such as anticompetitive

265 M. Sachajko, *Istota i charakterystyka prawna antymonopolowych kar pieniężnych*, [Concept and legal characteristics of antimonopoly financial penalties], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2002, No. 1, p. 51.

266 *Ibidem*, p. 71.

267 Since natural persons may be treated as undertakings in certain situations it should be stressed that they are not covered here. This section refers only to situations where natural persons do not perform function of undertakings.

agreements or abuse of a dominant position. Article 108 is the legal basis for fining two categories of natural person. First, a maximum fine of fifty-fold the average remuneration may be imposed upon a person holding a managerial post or being a member of a managing authority of the undertaking, should such a person, intentionally or unintentionally, have not:

1. executed any of the decisions, resolutions or judgements referred to in Article 107;
2. notified an intention of concentration referred to in Article 13;
3. provided information, or have provided unreliable or misleading information, as required by the President of UOKiK pursuant to Article 50.

This category refers to the personal liability for serious procedural infringements of the antimonopoly act. Second, the same financial sanction may be imposed on:

1. persons authorised by the inspected party referred to in Article 105a(6), holders of apartments, premises, buildings or means of transportation referred to in Article 91(1) and the persons referred to in Article 105a(7) for:
 - a) failure to provide information or providing incorrect or misleading information requested by the President of UOKiK,
 - b) failure to collaborate during an inspection held within proceedings pursuant to Article 105a;
2. witnesses for refusal to make testimony without valid reason.

The second group of financial sanctions may be imposed for procedural infringements of the antimonopoly act. Despite the legal possibility, the antimonopoly authority has never decided to issue any fine upon natural persons. It is surprising since foreign experiences show that personal liability of natural persons has a significant deterrent effect²⁶⁸.

The state of law and administrative practice described above may change, though. The new draft on the amendment of the antimonopoly law provides for extension of liability of natural persons under the antimonopoly act. According to the draft Amendments, a fine up to Euro 500.000 could be imposed on the key managers, whose acts or negligence led the undertaking to breach Article 6 (1) 1-6 of the Competition Act or 101 (1) a-e of the Treaty on the Functioning of the European Union. This possibility is not limited to cartels, but will also cover all horizontal and vertical agreements. Both fines - on an undertaking and an individual would be imposed within the same proceedings before the President of UOKiK. Furthermore, it is worth noting that under the proposal, the individuals would be eligible for the *leniency*. Consequently, introducing such measure will provide the Office with access to the new sources of information, as individuals would take part in the leniency “race against the clock” next to undertakings. These proposals aim at increasing effectiveness of counteracting against the most serious substantive infringements of the antimonopoly law. However, this proposal raised initially a great deal of skepticism among stakeholders.

6.3. Directives of fines assessment

All of described financial sanctions are of facultative character. The antimonopoly authority is obliged to assess the grounds for fining the undertakings or natural persons for infringements of the antimonopoly act. As indicated earlier, the President of UOKiK hardly ever desists from fining undertakings if they violated the antimonopoly law. The antimonopoly act determines maximum amounts of fines and leaves a wide margin of discretion to the antimonopoly

268 R. Molski [in:] *Ustawa o ochronie konkurencji i konsumentów. Komentarz, [Act on competition and consumer protection. Commentary]*, T. Skoczny, A. Jurkowska, D. Miąsik (eds.), C.H. Beck, Warsaw 2009, p. 1650.

authority to decide on the amount in each case. The minimum amount is not defined what means that in each case the antimonopoly authority may impose even a symbolic fine or abstain from fining the undertaking.

The wide margin of administrative discretion does not mean that the antimonopoly authority imposes fines in a completely arbitrary manner. The limitations of administrative discretion are set by the antimonopoly act itself (Article 111 in particular), case law and soft law documents issued by the antimonopoly authority. First, the antimonopoly act sets forth that the antimonopoly authority calculating the amount of the fines referred to in Articles 106 to 108 should take into account in particular: the duration, gravity and circumstances of the infringement of the provisions of the antimonopoly act, as well as the previous infringements of the act. These four factors are obligatory criteria applied by the antimonopoly authority when setting up the amount of fines. The list of applicable criteria is not exhaustive, though. Article 111 explicitly states that the catalogue of directives is open and it indicates only four most important.

Second, the courts in many cases indicated circumstances which the antimonopoly authority is obliged to take into account when calculating the amount of fine. Those circumstances are as follows:

1. extent of threat to the public interest²⁶⁹;
2. duration, gravity and circumstances of the previous infringement of the provisions of the antimonopoly act;
3. intentionality and unintentionality;
4. financial profits from the infringement of the antimonopoly act;
5. refraining from the prohibited practise²⁷⁰;
6. irreversible market changes²⁷¹;
7. income of the undertaking²⁷².

Not all of those circumstances will be applicable in each case. Sometimes it will depend on the specific provisions of the antimonopoly act and the other time it will depend on the character of the case.

Third, the antimonopoly authority has issued the *Guidelines on setting fines for competition-restricting practices*. One should note that the said document refers only to fines imposed for the anticompetitive practices. Financial sanctions in merger cases are quite rare and the antimonopoly authority reserved the possibility for a case by case approach when calculating them.

When levying a fine upon the undertaking, the antimonopoly authority should clearly state all established facts and present adequate legal reasoning²⁷³.

6.4. The leniency programme

To increase the effectiveness of the antimonopoly intervention, the leniency programme has been introduced into the Polish competition law. The leniency programme allows the antimonopoly authority to grant immunity or reduction from fines to the undertaking which undertook cooperation with the authority and provided evidence of an existence of an

269 S. Gronowski, *Polskie prawo antymonopolowe (zarys wykładu)*, [Polish antimonopoly law], Wydawnictwo ZPP, Warsaw 1998, p. 250.

270 The judgment of the Antimonopoly Court of 16 November 1994, XVII Amr 31/94, Wokanda 1995, No. 9.

271 The judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 74/94, Wokanda 1996, No. 5.

272 For detailed presentation of each directive see M. Król-Bogomińska, *Kary pieniężne w prawie antymonopolowym*, [Financial penalties in the antimonopoly law], Konieczny i Kruszewski, Warsaw 2001, p. 87-102.

273 The judgment of the Antimonopoly Court of 1 March 1995, XVII Amr 63/94, Wokanda 1996, No. 2.

anticompetitive agreement. The *leniency* programme is open for participants of all kinds of anticompetitive agreements, irrespective of their horizontal or vertical nature. The powers of UOKiK and the rights of enterprises under the *leniency* programme are set forth in the antimonopoly act and the Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from fines or their reduction²⁷⁴. Furthermore, the antimonopoly authority has issued *Guidelines of the President of the Office of Competition and Consumer Protection on the Leniency Programme* (the procedure of submitting and handling applications for immunity from or reduction of a fine 'leniency applications') which describe the course of actions under the *leniency* procedure.

Article 109 of the antimonopoly act sets several conditions that should be met jointly by the undertaking in order to benefit from the *leniency* programme. Those are as follows:

1. the applicant applies for the *leniency* as the first from the participants of the agreement, and:
 - a) provides the President of UOKiK with information concerning the existence of such a prohibited agreement, as may suffice for instituting antimonopoly proceedings, or
 - b) presents to the President of UOKiK, upon its own initiative, evidence sufficient to issue a decision referred to in Article 10 or 11 - provided that the President of UOKiK did not already have information or evidence sufficient for instituting antimonopoly proceedings or issuing a decision referred to in Article 10 or 11;
2. the applicant is fully co-operating with the President of UOKiK in the course of the proceedings, providing the President with any and all evidence at their disposal, or the ones they may have at their disposal, and promptly giving any information relating to the case, upon its own initiative or upon demand of the President of UOKiK;
3. the applicant has ceased participating in the agreement not later than as of the day on which it notified the President of UOKiK, the existence of an agreement or presented evidence referred earlier;
4. the applicant was not the initiator of the agreement and did not induce other undertakings to participate in the agreement.

If the applicant fulfils all of above conditions, they may enjoy full immunity from fines. The antimonopoly act indicated also a situation when the applicant does not meet all conditions qualifying for full immunity. In such a case, they may enjoy reduction of fines. The exact amount of fine reduction depends on the number of conditions laid down in Article 109(1) of the antimonopoly act.

In the event that an undertaking participating in an agreement referred to in Article 6(1) or in Article 101 of the TFEU, appears not to be meeting all the above-mentioned requirements, then the antimonopoly authority may decrease the fine being imposed on that undertaking, should the undertaking have jointly fulfilled the following conditions:

1. the applicant has presented to the President of UOKiK, upon their own initiative, evidence which to an essential extent will contribute to issuing a decision referred to in Article 10 or 11;
2. the applicant has ceased participating in the agreement not later than as of the day on which it presented the evidence referred to in Article 109(1);

²⁷⁴ Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines, Journal of Laws of 2009, No. 20, item 109.

3. the applicant has fully cooperated with the antimonopoly authority during proceedings.

In such a case the President of UOKiK shall impose a fine:

1. being not in excess of 5% of the revenue earned in the accounting year preceding the year within which the fine is imposed - upon the undertaking which has first met the conditions referred to in Article 109(2). As explained in the *leniency* guidelines, the fine may be reduced up to 50% of the maximum fine;
2. being not in excess of 7% of the revenue earned in the accounting year preceding the year within which the fine is imposed - upon the undertaking proving to be the second to have met the conditions referred to in Article 109(2). As explained in the *leniency* guidelines, the fine may be reduced up to 30% of the maximum fine;
3. being not in excess of 8% of the revenue earned in the accounting year preceding the year within which the fine is imposed - upon other undertakings which have met the conditions referred to in Article 109(2). As explained in the *leniency* guidelines, the fine may be reduced up to 20% of the maximum fine.

As indicated earlier, the Council of Ministers adopted the regulation regarding the procedure to be followed in the event when undertakings have applied for the *leniency* programme. The regulation determines the method of accepting and considering undertakings' requests for fine immunity and the obligation of the antimonopoly authority of informing the undertaking about the outcome of the *leniency* scrutiny. Leniency applications should be submitted personally at the Office of Competition and Consumer Protection in Warsaw, to an Office's official for the record, by post, fax or e-mail²⁷⁵. In the two latter cases, the original application must be delivered to the Office within 3 days²⁷⁶.

The number of *leniency* applications is moderate and it has been changing over the last decade²⁷⁷. The exact numbers are as follows:

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number of <i>leniency</i> applications	0	2	3	6	3	6	8	2	16

Before 2012, there was a relatively insignificant number of *leniency* applications. Nonetheless, they proved to be effective tools in detecting anticompetitive behavior of undertakings. Thanks to intensive advocacy initiatives and information campaigns of UOKiK, the *leniency* programme has gained significance and the year 2012 witnessed a record number of applications.

Several decisions have been issued using the *leniency* applicant information. Recent decisions of the antimonopoly authority under the *leniency* programme include:

1. Cement cartel - the most important antitrust case settled with the information provided by *leniency* applicant was the cement cartel. The antimonopoly authority established that 7 companies were engaged in the market sharing and price fixing practices for over 11 years. Two of them decided to blow the whistle on the cartel. Another interesting issue is that the legal basis of the proceedings were both national and European law (Article 81 of the Treaty). On 28th December 2006, UOKiK instituted antimonopoly proceedings and examined alleged anticompetitive

²⁷⁵ leniency@uokik.gov.pl.

²⁷⁶ Official helpline of the leniency programme (+48 22) 55 60 555.

²⁷⁷ Data taken from the annual report on UOKiK's activity.

agreement concluded by the producers of grey cement - Lafarge Cement, Górażdże Cement, Grupa Ożarów, Cemex, Dyckerhoff, Cementownia Warta and Cementownia Odra - the combined market share of which amounted to almost 100 percent. As a result of the 3-year investigation, as well as the biggest dawn-raid in the history of UOKiK, robust evidence had been collected, which was subsequently completed by the information furnished by the undertakings involved in the agreement. On the basis of this evidence, the President of the Office concluded that at least from 1998 the undertakings were sharing the national market for grey cement, when agreeing on freezing the market shares of each company, as well as fixing minimum prices of the cement, by *inter alia* fixing the minimum prices, the timetables, the amounts and the order of applying the increases in prices. To this end, during numerous multilateral and bilateral meetings the producers were exchanging confidential commercial information, *inter alia* on the sales volumes. The investigation revealed, that the cartelists did realize that the practices they were engaged in were illegal. They selected a limited number of persons directly taking part in the information exchange, as well as a coordinator of the information exchange (an employee of one of the producers). The coordinator was responsible for passing on the data to the cement producers and contacting selected employees of the cement mills via a pre-paid telephone. Two *leniency* applications were filed in the case, the President of UOKiK refrained from imposing a fine on Lafarge Cement and reduced by 50% a fine imposed on Górażdże Cement. The remaining cartelists - Grupa Ożarów, Cemex, Dyckerhoff, Cementownia Warta and Cementownia Odra - were fined with the maximum penalties possible, totaling to PLN 411 586 477 (around EUR 100 million). This is the highest fine ever imposed in the 20-year history of UOKiK²⁷⁸;

2. IMS Sofa, furniture manufacturer, was fixing with its distributors prices for the company's selected products for nearly 9 years. The company obliged its trading partners to apply the minimum resale prices that it fixed. There was a possibility to decrease the price only by a discount not exceeding 3%. Moreover, the company controlled these distributors who wanted to use lower rates. This conduct meant that furniture prices by Sofa could not be lower than the imposed ones. The information indicating the prohibited agreement was collected during the inspection with search at the premises of IMS Sofa, and also directly from the company which applied for the *leniency* in the course of proceedings. Due to the fact the company was the agreement's initiator, it could not expect a full immunity from fine, but it was possible to have the sanction decreased. The undertaking provided the Office with a lot of evidence, such as the actual lifespan of the collusive agreement, which was not previously known by the Office and contributed significantly to issuance of the decision. For this reason the President of UOKiK decided to reduce by half the fine imposed on the company. As a result, the sanction amounted to nearly PLN 330 thousand²⁷⁹;
3. Makton was the participant of the agreement concluded between the manufacturer of meat and cold meat products – JBB and its distributors. The agreement contained anticompetitive resale price maintenance clauses which obliged all distributors of JBB products to maintain minimum prices. The evidence provided by Makton enabled the issuance of the decision. The undertaking was not the initiator of the collusion, ceased participation in it, and therefore the antimonopoly authority refrained from imposing a fine on Makton²⁸⁰;

278 Decision of the President of UOKiK No. DOK-7/2009 of 8 December 2009, nyr.

279 Decision of the President of UOKiK No. RBG-19/2012 of 30 August 2012, nyr.

280 Decision of the President of UOKiK No. DOK-12/2011 of 28 December 2011, nyr.

4. Inco-Veritas was fixing minimum resale prices of its products for 10 years with distributors of household chemicals and garden fertilisers. During the proceedings, the company actively cooperated with the antimonopoly authority under the *leniency* programme, and therefore it obtained a significant reduction of the financial penalty. Finally, the fine amounted to over PLN 2 million²⁸¹;
5. Euromark Polska and its distributors concluded an agreement and obliged all distributors of Euromark products to maintain minimum prices. The undertaking is producing sports and tourist clothes and equipment. Euromark was the initiator of a prohibited agreement with its business partners. The undertaking decided to cooperate with the Office by submitting the *leniency* application, therefore the penalty was reduced by half. Finally, it amounted to over PLN 42 thousand²⁸²,

A particularity of the Polish *leniency* programme is that the vast majority of the applications concern anticompetitive vertical agreements. This may be perceived as an unexpected phenomenon, since the programme was initially designed to counteract the hardcore restrictions on a horizontal level.

6.5. Structural sanctions in merger cases

Apart from financial sanctions the antimonopoly authority may impose structural sanctions for infringements of competition rules on merger control. The antimonopoly act does no longer provide for structural sanctions to be applicable in antitrust cases²⁸³. A structural sanction may be imposed if:

1. a merger decision was based on unreliable information for which undertakings participating in the concentration were responsible;
2. the party did not comply with remedies agreed;
3. concentration has not been notified to the President of UOKiK;
4. prohibition decision to proceed with a merger decision has not been respected.

The structural sanction may be applied only if the concentration has been already implemented and the restoration of market competition is otherwise impossible. The antimonopoly authority enjoys the administrative discretion in determining the mode of implementation and the type of the structural sanction to be executed. The antimonopoly act provides only for the most typical categories of structural sanctions, such as:

1. separation of the merged undertaking under conditions defined in the decision;
2. disposal of the entirety or part of the undertaking's assets;
3. disposal of stocks or shares ensuring the control over the undertaking or undertakings, or dissolution of the company over which the undertakings have joint control.

The list of structural sanctions is open and it is for the antimonopoly authority to decide on the case by case basis which sanction would be the most appropriate in the given case.

Application of the structural sanction has one important limit. Structural sanctions may be imposed only within 5 years from the day the concentration was implemented. This limitation aims at providing legal certainty for undertakings. It should be highlighted that

281 Decision of the President of UOKiK No. DOK-10/2011 of 28 November 2011, nyr.

282 Decision of the President of UOKiK No. RKT-22/2011 of 12 August 2011, nyr.

283 M. Błachucki, S. Józwiak *Sankcje strukturalne w prawie antymonopolowym jako sankcje administracyjnoprawne*, [Structural sanctions in the antimonopoly law as administrative law sanctions], [in:] *Sankcje administracyjne*, [Administrative law sanctions], R. Lewicka, M. Lewicki, M. Stahl (red.), Wolters Kluwer, Warsaw 2011, p. 451.

the expiration of 5-year-time limit does not preclude the antimonopoly authority from imposing financial sanctions.

The antimonopoly act secures the implementation of the structural sanctions. Article 99 of the antimonopoly act empowers the antimonopoly authority, in case of non-execution of the decision imposing structural sanction, to order a compulsory division of the undertaking. During the separation process, the antimonopoly authority takes over the competence of managerial bodies of undertaking participating in the division. Finally, the President of UOKiK may apply to the court for the annulment of the agreement or for adopting other legal measures aimed at restoring the status before the merger.

To this date, no structural sanction has been applied by the Polish antimonopoly authority under the present antimonopoly act.

Chapter 7. Antimonopoly proceedings - course of actions

7.1. Introduction

Procedural provisions of the present antimonopoly act are well-developed in comparison to previous statutes and they constitute 2/3 of all provisions. Pursuant to the antimonopoly act - antimonopoly procedure can take a form of proceedings in the cases of anticompetitive practices and of merger control. Formal antimonopoly proceedings may be preceded by the explanatory proceedings. There are some differences in regulation of each proceedings, though not of a great importance. Therefore, the general antimonopoly procedure is discussed and the exceptions are presented whenever it is necessary.

7.2. Decision making process - overview

Decision-making process is rather typical of the Polish public administration. All cases are dealt by one or two case handlers - the latter concerns complex cases. The case handler is responsible for preparing all documents during the proceedings including draft decisions. The parties may contact the case handler directly, and if necessary, the head of unit or the director of the department. Holding meetings with the parties is not integral part of the standard rules of conduct - the authority decides on the case by case basis whether such meetings are from its perspective useful for the proceedings.

All documents prepared by the case handler are verified by the head of unit and ultimately approved and signed by the director of the department or regional office. When preparing a decision, the legal department and department of market analyses (economic unit) are consulted. All draft decisions must be checked and approved by the President of the Office. As stated earlier, all decisions are issued on behalf of the President of UOKiK. If the decision is appealed against by the party, the case handler prepares the documents for the court proceedings and stands before the court to defend the case. During the court process the case handler is assisted by the legal counsel from the legal department.

7.3. Explanatory proceedings

The antimonopoly act establishes two types of proceedings taking place before the antimonopoly authority:

- a. explanatory investigation;
- b. antimonopoly proceedings.

Those proceedings are independent of each other, although the explanatory investigation may precede the antimonopoly proceedings. Both types of proceedings are instituted only *ex officio* (with the exception of merger cases, where the parties' request to initiate proceedings is required), by way of an order of the antimonopoly authority. Explanatory investigation is instituted where the circumstances indicate a possibility that the provisions of the antimonopoly act have been infringed, as to matters regarding a given branch of economy, or as to matters regarding the protection of consumer interests, and in any other cases as provided for by the antimonopoly act. There are five potential goals of explanatory procedure:

- a. initial determination whether an infringement of the provisions of the antimonopoly act has occurred, such as may justify the institution of antimonopoly proceedings, including whether the case is of an antimonopoly nature;
- b. initial determination whether an infringement of the provisions of the antimonopoly act has occurred, such as may justify the institution of proceedings regarding the use of practices violating the collective interests of consumers;
- c. conducting market inquiry, including the determination of the structure and degree of concentration thereof;
- d. initial determination whether an obligation exists to notify an intended merger;
- e. determination whether an instance of the violation has occurred, of any consumer interest being protected by the law, such as may justify the undertaking of actions.

In practice explanatory proceedings are instituted to initially verify signals and notifications or information gathered by the antimonopoly authority about possible infringements of the antimonopoly act and to conduct sector inquiries.

Regulation of the explanatory investigation is very limited (governed by only two articles). However, due to the ancillary character of this procedure, there is no need for more comprehensive regulation. The specific feature of the explanatory procedure is that there are no parties to these proceedings. Therefore no one except the authority has access to the files of the explanatory proceedings²⁸⁴ nor anybody has the right to question the outcome of these proceedings.

The explanatory proceedings should be concluded within 30 days in standard and within 60 days in complex cases. Finding of the explanatory proceedings may give grounds for institution of the antimonopoly proceedings. It is important to remember that the result of explanatory proceedings is not conclusive and nobody's rights nor obligations may be affected with the result of this procedure.

7.4. Party to the proceedings

Only an undertaking may be a party to antimonopoly proceedings²⁸⁵. The antimonopoly act introduces two definitions of a party depending on the type of antimonopoly proceedings. Article 88 stipulates that in cases of anticompetitive practices the party to the proceedings is any person against whom the proceedings concerning the application of provisions prohibiting anticompetitive practices are instituted. The proceedings in those cases may be instituted only *ex officio*. Until 2007, there was a legal possibility to institute antimonopoly proceedings upon the motion of undertaking who suffered from the infringement of the antimonopoly act, but it was eliminated with the adoption of the present antimonopoly act.

284 G. Materna, *Ograniczenie prawa wglądu do materiału dowodowego w postępowaniach przed Prezesem UOKiK*, [Limitation of the right to access the files during the antimonopoly proceedings before the President of UOKiK], *Przegląd Prawa Handlowego* 2008, No. 4, p. 28.

285 The notion of 'undertaking' was analyzed in chapter 2.

Regulation of the legal status of a party in cases of merger control is much more detailed. Article 94 of the antimonopoly act determines that every person who notifies the intention of concentration shall be a party to the proceedings. There is an enumerative list of persons who are both entitled and obliged to notify the intention of concentration:

- a. merging undertakings jointly;
- b. undertaking taking over the control;
- c. jointly all undertakings participating in creation of a joint venture;
- d. undertaking acquiring part of another undertaking's property.

It is also noticeable that the legal concept of a party in concentration cases is more narrow in its scope than a concept of participant in such cases²⁸⁶. Contrary to the European competition law, in Polish antimonopoly proceedings, only the active party to the transaction is the party to the proceedings. Furthermore, neither competitors nor contractors or consumers are parties to the merger proceedings²⁸⁷. As a consequence, none of those entities has the right to access the case files or to challenge the merger decision.

7.5. Public interest intervenients

Polish administrative law provides for extensive possibilities for public interest interventions during the administrative proceedings. Such public interest intervenients are called persons vested with the rights of the party. Their legal position is very similar to the position of the party to the proceedings, although their rights are limited. This regulation applies to the antimonopoly proceedings, as well. There are three categories of public interest intervenients: Public Prosecutor, Ombudsman and social organization.

Administrative procedural code stipulates in Article 182 that the prosecutor is vested with the right to demand from the competent public administration authority the initiation of proceedings in order to eliminate the situation that is contrary to binding law. This provision applies to the antimonopoly proceedings. a prosecutor is not a party to the proceedings, but it is vested with all rights of a party. The Ombudsman holds a similar position. The difference is that the Ombudsman is entitled to execute his rights, in administrative proceedings, only if civil rights or liberties have been infringed²⁸⁸.

A Prosecutor and the Ombudsman do not have a legal status of a party in administrative proceedings. They are characterized as persons vested with rights of a party. Their legal classification is very similar, though not identical, to a status of a party. The basic difference is that the said persons do not have individual legal interest in the proceedings but they act on behalf of public interest²⁸⁹. They are granted with the rights of a party but those are only procedural rights. Therefore such persons cannot e.g. conclude an administrative settlement²⁹⁰ or apply for commitment decision.

There is one more entity vested with rights of a party - social organization. The social organization may demand initiation of proceedings or admittance to the pending proceedings if it is justified by the mission as specified in the organizational charter of the organization and by the social interest. Such demand of institution of proceedings may concern only the

286 E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów*. Komentarz, [Act on competition and consumer protection. Commentary], Twigger, Warsaw 2002, p. 309.

287 The order of the Antimonopoly Court of 11 March 1991, XVII Amr 5/91, *Wokanda* 1992, No. 4, item 37.

288 Art. 14 of the Act of 15 July 1987 on the Commissioner of Civil Rights Protection, *Journal of laws* of 2001, No.14, item 147, with further amendments.

289 B. Adamiak, J. Borkowski, *Polskie postępowanie administracyjne i sądowniczoadministracyjne*, [Polish administrative procedure and administrative litigation], Wydawnictwa Prawnicze PWN, Warsaw 1997, p. 106.

290 W. Dawidowicz, *Zarys procesu administracyjnego*, [The outline of the administrative proceedings], PWN, Warsaw 1989, p. 34.

proceedings that may be initiated exclusively on *ex officio*²⁹¹ basis. It is highly controversial whether social organizations are legitimated to initiate the proceedings where there is an enumerative list of authorized persons. It would be contrary to the prime objective of the antimonopoly act which is to limit the number of participants in the proceedings, and to protect the business secrecy in the proceedings²⁹². The social organization may take part in the proceedings in another procedural role - it may present the opinion on the case. Such activity of social organization does not equalize its participation in proceedings as a person vested with rights of a party²⁹³.

In practice, public interest interventions are very rare. Under the present antimonopoly act there has never been a case where social organization was admitted to the proceedings, nor did Ombudsman intervene in any case. There was only one intervention of the Public Prosecutor who challenged one decision taken in an anticompetitive agreement case²⁹⁴.

7.6. Initiation of the antimonopoly proceedings

The antimonopoly act stipulates that all antimonopoly proceedings may be initiated *ex officio* or upon a motion. General rule may be drawn, that proceedings aiming at sanctioning of infringements of the antimonopoly act are instituted *ex officio* and proceedings where the party applies for the authorization of the transaction may be instituted upon the motion. The first group concerns the antimonopoly proceedings in cases of anticompetitive practices or other infringement proceedings. As it was mentioned earlier until 2007, there was a legal possibility to institute antimonopoly proceedings upon the motion of undertaking who suffered from the infringement of the antimonopoly act but it was eliminated with the adoption of the present antimonopoly act. Merger proceedings may be instituted exclusively upon a motion of the undertaking. If the merger is implemented and the undertaking notifies the antimonopoly authority of such a merger, the notification is returned and the antimonopoly authority initiates proceedings to levy a fine for failure to notify the merger.

Even though no person may effectively demand to initiate antimonopoly proceedings in anticompetitive cases, the antimonopoly act provides for possibility of formally informing the antimonopoly authority of possible infringement of the competition rules. Article 86 of the antimonopoly act stipulates that any person may submit to the President of UOKiK a written notification concerning a suspicion that anticompetitive practices have been applied. Such notification may include in particular:

1. indication of the undertaking which is accused of applying anticompetitive practices;
2. description of the facts being the basis of the notification;
3. indication of the provision of the antimonopoly act or the TFEU that is to be infringed;
4. making the infringement of the provisions of the TFEU plausible;
5. identification data of the notification submitter.

Furthermore, a person submitting notification may attach any evidence essential in assessing the facts indicated in the notification. The antimonopoly authority is obliged to verify the notification and inform the person submitting notification on the result of this verification.

291 B. Adamiak, J. Borkowski, *Polskie postępowanie ...*, op. cit, 108.

292 This tendency to limit the number of participants in the proceedings before the antimonopoly authority was criticized by J. Olszewski, *Nowa ustawa o ochronie konkurencji i konsumentów cz. I*, [New act on competition and consumer protection. Part I], *Monitor Prawniczy* 2001, No. 14, p. 725.

293 The order of the Supreme Administrative Court of 7 December 1983, II SA 1605/83, *Orzecznictwo Naczelnego Sądu Administracyjnego* 1983, No. 2, item 104.

294 Decision of the President of UOKiK No. DOK-97/2007 of 12 December 2007, nyr.

The verification process should not take more than 2 months in complicated cases or 30 days in simple ones. Information provided by the antimonopoly authority does not constitute an administrative decision and it cannot be challenged by the person submitting notification²⁹⁵.

The antimonopoly act provides prescription periods for the possibility of instituting the proceedings in cases of practices restricting competition. The proceedings in those matters are not to be initiated where since the end of the year in which they have been abandoned one year has elapsed (Article 93 of the antimonopoly act). This time limit is perceived as an extremely short²⁹⁶. It is important to remember that the time limit concerns only the institution of proceedings and it does not preclude the President of the Office from adjudication if proceedings have been initiated before the limit elapsed. The time limit in other cases is 5 years since the end of the year when:

- a. infringement of the provisions of the antimonopoly act took place;
- b. decision about imposition of fine became legally binding (Article 76 of the antimonopoly act).

Merger proceedings are instituted upon the merger notification of the undertaking. Detailed conditions of the notification of intention of concentration are ascertained by the Regulation of the Council of Ministers²⁹⁷. The notification form is uniform - there is neither short nor complete version²⁹⁸. It is the result of the fact that Polish merger proceedings are uniformed and one-staged and there are no simplified or second phase procedures. One notification form applies to all types of concentrations. The merger notification is subject to a fee amounting to PLN 5,000²⁹⁹.

7.7. Statutory duration of antimonopoly proceedings

Determining the time limits to finalize the proceedings depends on the type of proceedings in question. The antimonopoly act sets 5-month time limit for antitrust proceedings and 2-month time limit for merger proceedings. The difference is consequence of the fact that antimonopoly cases are usually complex and that regular time limits proved to be inadequate. There is, however, more substantial difference between those time limits. Time limits prescribed in the antimonopoly act or administrative procedural code are set using regular days, not working days as it is in Regulation 1/2004 or in many national competition laws.

The time limit in the antitrust proceedings has an instructive character only. It means that the lapse of time limit does not deprive the antimonopoly authority of a competence to adjudicate the case and all actions undertaken later are legally binding³⁰⁰. Non-observance of time limit creates an obligation of the antimonopoly authority to notify a party of any case not being settled within the appropriate time limit. Such notification must state the reasons for not respecting the time limit and it must indicate a new time limit for settling the case. The antimonopoly authority is subject to identical obligation if the time limit is not observed

295 The order of the Supreme Administrative Court of 12 July 2011, II GSK 1035/11, nyr

296 T. Skoczny, *Konsekwencje przyszłego systemu stosowania art. 81 i 82 TWE dla prawa i orzecznictwa w zakresie ochrony konkurencji w Polsce (cz. II)*, [Consequences of the development of application of Articles 81 and 82 of TEC for the competition law and jurisprudence in Poland (Part II)], *Prawo Unii Europejskiej* 2001, No. 9-10, p. 4.

297 Regulation of the Council of Ministers of 17 July 2007 concerning the notification of the intention of concentration of undertakings, *Journal of Laws* of 2007, No. 134, item 936 and 937.

298 Detailed presentation analysis of the notification form, see *Guidelines on the criteria and procedure of notifying the intention of concentration to the President of UOKiK*, p. 3.4.

299 Around EUR 1,250.

300 The judgment of the Supreme Administrative Court of 24 February 1987, IV SA 915/86, *Orzecznictwo Naczelnego Sądu Administracyjnego* 1987, No. 1, item 19.

for reasons independent of such authority. There aren't any provisions regulating this new time limit. Therefore the antimonopoly authority has a discretionary power to indicate the said limit.

In merger proceedings, the time limits are of substantive character and if they lapse it creates a legal obstacle for the antimonopoly authority to adjudicate the case³⁰¹. If a merger decision is not issued within the prescribed statutory time limit, it is presumed that the antimonopoly authority issued a positive merger decision. Although merger proceedings should be concluded within 2 months, in practice they may last longer, in particular in more complex cases. This is due to "stop the clock" provisions applicable in merger proceedings. The clock stops whenever the antimonopoly authority asks the party for additional information and supplementation of the notification form. In practice, simple merger cases are handled within 2 months and most complicated ones within 6-9 months³⁰².

7.8. Evidence proceedings

7.8.1. Means of evidence

The antimonopoly procedure is a dedicated administrative procedure. Distinctiveness of these proceedings is particularly visible in relation to the rules on evidence. Pursuant to Article 84 to the matters concerning the evidence Articles 227-315 of the Civil procedural code apply to the matters concerning the evidence proceedings. The present antimonopoly act provides for a very formal model of evidence proceedings. It is necessary since the President of the Office is vested with far-reaching investigatory competences, even of police nature. Therefore to the matters on search and inspection, the provisions of the Penal procedural code apply accordingly.

There are several types of evidence usually produced in the antimonopoly proceedings:

- a. documents;
- b. testimony of witnesses;
- c. opinions of experts or a scientific or scientific-research institutes;
- d. interrogation of the parties;
- e. other evidence.

The first three types of means of evidence are, to some extent, regulated by the antimonopoly act. To the rest relevant provisions of civil procedural code apply. The antimonopoly act introduced very strict rules in relation to documents. Only the documentary evidence, it may serve only the original document or its copy certified by a public administration body, notary, attorney at law, legal adviser or an authorised employee of the undertaking may serve as an evidence. Such formalism is contrary to the general principle of a discovery of objective truth and it miscomprehends that, in practice, it is very difficult to discover e.g. original or cartel agreements³⁰³.

The next type of evidence is the testimonies of a witness. The party adducing witness evidence is obligated to precisely indicate facts subject to confirmation by the testimony of individual witnesses. This type of evidence is not common and it is produced only during the antitrust proceedings.

301 The resolution of the Supreme Court of 26 November 1993, III CZP 63/93, *Orzecznictwo Sądu Najwyższego - Izba Cywilna* 1994, No. 4, item 13. See also the comment of T. Woś to this resolution, *Państwo i Prawo* 1995, No. 1.

302 In 2012, the average duration of merger proceedings was 58.3 days

303 R. Janusz, M. Sachajko, T. Skoczny, *Nowa ustawa o ochronie konkurencji i konsumentów*, [New act on competition and consumer protection], *Kwartalnik Prawa Publicznego* 2001, No. 3, p. 204.

The expert is a person having special information that is necessary for proper interpretation of facts. This is a basic difference between the institution of expert and witness. The former reports the facts, the later provides their interpretation. The subject of the opinion can only be facts, it can never be the law³⁰⁴. The opinion of an expert should contain its justification. The experts may submit their joint opinion. Apart from natural persons, a scientific or scientific-research institute may issue an opinion.

Since the list of evidence is not exhaustive, the civil procedural code creates a wide margin of appreciation, for the antimonopoly authority, in relation to producing other types of evidence e.g. tapes, video tapes, drawings, plans or billings etc. The earlier evidence is primary evidence. The interrogation of the parties is an auxiliary evidence³⁰⁵. The antimonopoly authority uses it if there is no other evidence available or the available evidence is insufficient and there are still some important elements to identify which are necessary to decide the case. If a party is a legal person - the persons working in the body entitled to represent the legal person are interrogated.

7.8.2. Collecting evidence

There are three methods of collecting evidence:

- a. request to provide all necessary information (Article 50 of the antimonopoly act);
- b. inspection of each undertaking or association thereof (Article 105a of the antimonopoly act);
- c. search of the premises or things (Article 105c of the antimonopoly act).

The basic method of collecting evidence is the request to provide all necessary information. The undertaking or the association thereof is obliged to follow the request. Such request indicates the scope of requested information and the relevant time period, the object of the request, time limit for providing information and the instruction about sanctions for non-compliance with the request. The scope of the request cannot be complained by the undertaking³⁰⁶. Such complaint may be contained within the appeal to the antimonopoly court. However, the antimonopoly authority cannot demand information unnecessary for the adjudication of the case³⁰⁷. Moreover, the antimonopoly authority cannot demand from the undertaking to perform special analyses or studies which are not required by the law, since such materials are to be done by the authority³⁰⁸. The undertaking has a duty to provide requested information. They may refuse by invoking provisions on the right of a party to refuse to make statements. Similarly, other public administration bodies are obliged to cooperate. They are under obligation to render accessible to UOKiK the files being in their possession as well as information relevant to the pending antimonopoly proceedings.

The second method of collecting evidence is an inspection of an undertaking or an association thereof. The inspector has several rights e.g. to enter the premises, buildings, to request to render accessible files, books and all kinds of documents or to request, to provide oral explanations relevant for the subject of inspection. The inspection has always a limited character - it concerns only selected activities of the undertaking. Finally, the antimonopoly authority may decide to search the premises or possessions of the undertaking or the association thereof. It is an extraordinary measure and therefore only the Antimonopoly Court may issue an order on conducting a search. The antimonopoly authority files a relevant

304 J. Jodłowski, Z. Resich, J. Lapiere, T. Misiuk-Jodłowska, *Postępowanie cywilne*, [Civil procedure], LexisNexis, Warsaw 2005, p. 379-380.

305 Ibidem, p. 382.

306 The judgment of the Antimonopoly Court of 16 December 1998, XVII Ama 62/98, Wokanda 2000, No. 4.

307 The judgment of the Antimonopoly Court of 19 November 1992, XVII Amr 24/92, Wokanda 1993, No. 5.

308 The judgment of the Antimonopoly Court of 6 September 1993, XVII Amr 22/93, Wokanda 1994, No. 2.

motion to the court and the court has 48 hours to decide upon this motion. Moreover, in the course of the search the inspectors may be assisted by officials of other state control bodies or the Police. The inspected party is obliged to cooperate. They may refuse to provide information only in the event it would expose their undertakings or spouses, ascendants, descendants, siblings and related in the same line or degree as well as persons being with this party in the relation of adoption, custody or guardianship, to a penal liability.

7.8.3. Burden and quality of proof

The antimonopoly act does not regulate the problem of burden of proof comprehensively. There are some legal presumptions (such as presumption of market dominance when the market share of the undertaking equals or exceeds 40%) introduced by the antimonopoly act, but the act lacks general rules regulating this subject. The Antimonopoly Court states that before levying an antimonopoly fine, the undertaking must be proven guilty of infringing the antimonopoly act. The undertaking is not obliged to prove otherwise and it may remain silent throughout the whole process³⁰⁹. According to the Antimonopoly Court, the burden of proof rests upon the party initiating the antimonopoly proceedings i.e. UOKiK. Therefore, the antimonopoly authority may not shift the burden of proof upon the party and demand from it to present exculpatory evidence³¹⁰. Even though the party is not obliged to actively participate in the antimonopoly proceedings, it is in its own best interest. The party may submit evidence or demand production of one by the antimonopoly authority. Furthermore, inactivity of the party will expose it to the risk that the authority will rely only on selected incriminatory evidence³¹¹. Administrative courts point that the authority conducting administrative investigation is not obliged to search for exculpatory evidence, especially when the party is passive and does not cooperate during the proceedings³¹².

Particularity of antimonopoly proceedings is that the antimonopoly authority often does not have access to direct evidence. It is not disputable though, that in the event of lack of direct evidence, the conclusion of anticompetitive agreement may be proved with the application of indirect evidence by relying on economic evidence and factual presumptions³¹³. When relying on factual presumption and economic evidence, it is necessary not only to demonstrate the resemblance of the parallel behavior of alleged participants of anticompetitive agreement, but the antimonopoly authority must show that there is no other rational economic explanation of such behavior³¹⁴. Furthermore, when producing such evidence, it is necessary to show and analyze all relevant market circumstances to establish whether market behavior of the undertaking concerned was economically rational or resulted from the prior illegal cooperation³¹⁵.

7.9. Access to files

Right of the party to access the files is a fundament right in the antimonopoly proceedings. The antimonopoly proceedings are of inquisitorial character and public hearing takes place very rarely. Without access to files the party would not be able to present and defend their position and would be deprived of effective grounds for challenging the action of the authority. Therefore, it is so important to guarantee the access of the party to case files. If

309 The judgment of the Antimonopoly Court of 21 December 1994, XVII Amr 47/94, nyr.

310 The judgment of the Antimonopoly Court of 10 September 1992, XVII Amr 15/92, Wokanda 1993, No. 2.

310 The judgment of the Supreme Administrative Court of 20 May 1998, I SA/Ka 1605/96, nyr

312 The judgment of the Supreme Administrative Court of 10 July 1996, SA/Ka 1171/95, nyr.

313 The judgment of the Antimonopoly Court of 11 December 1996, XVII Ama 62/96, nyr.

314 The judgment of the Antimonopoly Court of 1 March 1993, XVII Amr 37/93, Orzecznictwo Gospodarcze 1993, No. 3, item 63.

315 The judgment of the Supreme Court of 6 March 1997, I CKN 44/97, OSNCP 1997, No. 6-7, item 91.

the authority fails to secure this right of the party, it is treated as a grave violation of the procedural rules and it may lead to invalidity of the proceedings³¹⁶.

There is no legal definition of the case files. In practice, case files are understood as any materials showing the course of actions during the antimonopoly proceedings. They cover all evidence produced, as well as any other material that was collected during those proceedings³¹⁷. The case files are the basis for establishing the relevant facts of the case.

The right to access the files is laid down in Articles 72 and 73 of the administrative procedural code. It includes:

1. Right to examine the files - the antimonopoly authority is obliged to provide conditions under which the party may examine the files. Such examination may take place only in the building of the authority with the case handler present during the examination³¹⁸.
2. Right to make notes and copies of the files - this right is interpreted broadly. Under this right, the party may reproduce the information contained in the files with any technical measure available. The only limit is that the reproduction may not interfere with physical condition of the material reproduced.
3. Right to certify notes and copies of the files - the party may ask the antimonopoly authority to certify the copies. Such certification proves that the reproduction is the true copy of the original contained in files. The certification applies exclusively to documentation contained in the files. The undertaking may not demand from the authority to certify copies of documents remaining in their possession.

The right to access the files fully applies to the party and public interest intervenients. In practice, it is only the party who exercises this right. Sometimes, files may be presented to the expert in order to allow them to issue opinions. The above list of rights and persons entitled to access the files is exhaustive and no statutes provide for any additional rights of the parties with regard to access the files. However, there is a possibility to gain access to some information contained in case files under the Act of 6 September 2001 on the access to public information³¹⁹. However, it should be stressed that the mentioned act does not provide access to all files but only to those materials that contain public information³²⁰.

The party may access the files at any time during the antimonopoly proceedings or at any time after the conclusion of the proceedings. The only condition regards the prior consultation with the case handler on technical conditions for presenting the files to the party. Should the files be transferred to the court - it is the court who is obliged to provide access to them to the party.

316 G. Rząsa, *Nieważność postępowania sądownoadministracyjnego jako podstawa skargi kasacyjnej*, [Invalidity of administrative court proceedings as a basis for the cassatory appeal], C.H. Beck, Warsaw 2011, p. 310.

317 M. Błachucki, *Dostęp do akt sprawy administracyjnej na podstawie Kodeksu postępowania administracyjnego a dostęp do informacji publicznej znajdującej się w aktach sprawy administracyjnej*, [Access to files on the basis of the Administrative Procedural Code and the access to public information contained in the administrative files], [in:] *Dostęp do informacji publicznej w Polsce i w Europie - wybrane zagadnienia prawne*, [Access to public information in Poland and Europe - selected legal issues], E. Pierzchała, M. Woźniak (eds), Uniwersytet Opolski, Opole 2010, p. 139.

318 Z. Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, [Administrative Procedural Code. Commentary], Wydawnictwo Prawnicze PWN, Warsaw 1995, p. 185.

319 Journal of Laws of 2001 No. 112, item 1198 with further amendments.

320 M. Błachucki, *Dostęp do akt sprawy administracyjnej na podstawie Kodeksu postępowania administracyjnego a dostęp do informacji publicznej znajdującej się w aktach sprawy administracyjnej*, [Access to files on the basis of the Administrative Procedural Code and the access to public information contained in the administrative files], [in:] *Dostęp do informacji publicznej w Polsce i w Europie - wybrane zagadnienia prawne*, [Access to public information in Poland and Europe - selected legal issues], E. Pierzchała, M. Woźniak (eds), Uniwersytet Opolski, Opole 2010, p. 135.

Special rules on the access to files regard documents received from the *leniency* applicants. Those documents are not accessible until the conclusion of the evidence proceedings. When all evidence is produced, parties may gain access to *leniency* documents under general rules. Nevertheless, *leniency* applicants may waive the right for protection and make all documents available to other undertakings. After conclusion of the antimonopoly proceedings, *leniency* documents may still be protected against any access of the third parties due to business secrets contained. The proposed amendment of the antimonopoly act provides for additional protection of the *leniency* documents, what may be regarded as a response to recent European court judgment in *Pfleiderer* case (C-360/09).

7.10. Transparency of the antimonopoly proceedings

Access to files is important but this is only one of the means designed to guarantee the transparency of the antimonopoly proceedings. The other important means regard information flow between the antimonopoly authority and the party to the proceedings. It is especially important in two situations. First, when communicating the party which particular behavior of the undertaking gave grounds to institute antitrust proceedings. Second, when informing about the competition concerns identified during the merger investigation. On both occasions proper and accurate information should enable the party to explain the position and produce relevant evidence. It is noteworthy, that Polish antimonopoly act differs in this respect from the European regulations.

First of all, there is no formal Statement of Objections (the so-called “SO”) issued by the antimonopoly authority when instituting the proceedings. However, it does not mean that the party is not informed what behavior triggered formal actions of the antimonopoly authority. The order issued to initiate the antimonopoly proceedings plays the role similar to SO. This order contains indication of the legal basis of the proceedings together with description of the alleged anticompetitive behavior of the undertaking being the subject of the proceedings. In comparison to SO, it is shorter and more synthetic, but it usually serves the same purpose.

As regards merger proceedings, the situation is more complex. Under the present antimonopoly act, there is no obligation to inform the party about the competition concerns identified. In practice, the party is informed about the competition problems when the antimonopoly authority proposes remedies. This situation is not comfortable neither to the antimonopoly authority nor to the parties. Therefore, the draft of the amendment of the antimonopoly act provides for the introduction of the obligation to inform the party about the identified market problems. Such information will be presented to the party whenever the antimonopoly authority decides to open a thorough investigation and initiate the second phase of the merger proceedings.

Apart from this, the antimonopoly authority may organize informal meetings to discuss the status of the case with the party. The party itself may also ask for such an informal meeting. Such exchange of information and views on the case may speed up the process and allow for better understanding of the case. In principle, such informal meetings are organized when it is necessary to clarify issues that occurred during the antimonopoly proceedings.

Last but not least, the party is informed who is the case handler and may contact them at any time. It should be stressed that only informal contacts are possible *via* e-mail or phone. Any formal communication between the antimonopoly authority and the party and *vice versa* may only take place in writing.

7.11. Protection of business secrets

During the antimonopoly proceedings business secrets are protected. The antimonopoly act relies on the existing definition of “business secret” as regulated in Article 11(4) of the Act on counteracting unfair competition. Business secret means the trade secret within the meaning of technical, technological, organizational information or other information of the economic value, undisclosed to the public, towards which the undertaking has taken necessary measures in order to keep their confidentiality. In practice of the antimonopoly authority, the following information is usually regarded as business secrets: market shares, data showing the volume of production and sales as well as sources of supply and sale, tax declarations, data contained in financial statements, information on discounts and pricing formulas.

The restriction of access to files may be different in relation to different entities. For example, such restriction may take place between the parties to the proceedings or even between the party to the proceedings and their mother company.

Determination of the fact whether the document contains business secret depends on cooperation between the antimonopoly authority and the undertaking. Access to business secrets may be restricted upon the motion of the undertaking and *ex officio*. Restriction of access to the files takes place in a form of an order which may be appealed against. Undertaking should always indicate whether information provided to the antimonopoly authority contains business secret. The effective motion of the undertaking to restrict access to business secrets requires the interested party to provide:

1. justification that information fulfills the definition of the business secret;
2. non-confidential version of the document which does not contain any protected information.

The motion of the undertaking is evaluated by the antimonopoly authority.

The President of UOKiK may also restrict the access to business secrets on the *ex officio* basis. It happens when the undertaking fails to submit a motion and the evaluation of documents leads to the conclusion that they contained business secrets. Moreover, the employees of the antimonopoly authority are under obligation to protect business secrecy and other secrets which they acquired during the proceedings (Article 71 of the antimonopoly act).

The information acquired in the course of the proceedings cannot be used for other proceedings conducted on the basis of separate provisions, excluding the following:

1. other proceedings conducted by the President of the Office;
2. the exchange of information with the European Commission and competition protection authorities of the European Union Member States pursuant to Regulation No. 1/2003/EC;
3. the exchange of information with the European Commission and competent authorities of the European Union Member States pursuant to Regulation No. 2006/2004/EC;
4. providing competent authorities with information which may indicate the infringement of separate provisions.

7.12. Costs of antimonopoly proceedings

The costs of proceedings are the expenses of the antimonopoly authority and other participants of the proceedings borne by them in connection with the said proceedings. The general rule is that the payment of the costs depends on the result of the case. The undertaking who is found liable for the infringement of the antimonopoly act is obliged to bear the costs of the

proceedings. There are few exemptions from the above rules. In particularly justified cases, the antimonopoly authority may impose upon the losing party the obligation to reimburse only a part of the expenses or desist from charging the costs. Regardless of the result of proceedings, the President of the Office may impose upon a party the obligation to reimburse expenses due to its unreliable or clearly unfair behaviour. This will take place in relation to particular costs resulting from avoidance to give explanation or submitting untruthful explanation, concealment or delayed presentation of the evidence. Furthermore, in merger cases undertakings are obliged to bear the cost of issued expert opinions.

The antimonopoly authority decides upon the costs by way of order, which may be included in the decision terminating the proceedings. This order may not be appealed.

7.13. Legal remedies and change of final decisions

The antimonopoly act guarantees that the party may challenge all decisions issued by the antimonopoly authority. An appeal is the basic legal remedy available to the party to challenge non-final decisions of the antimonopoly authority. Similarly, an order of the antimonopoly authority may be challenged with an objection by the party. However, the objection is available only when the antimonopoly act or the administrative procedural code provides so. In practice, most of orders may be objected. The appeal procedure is the same with relation to appeals and objections and takes place before the court and it is described in the next chapter.

When discussing legal remedies, the problem of changing final decisions of the antimonopoly authority may arise. Decisions of the antimonopoly authority are final when the time limit for appeal lapsed or the court upheld the decision³²¹. One of the most important principles of administrative procedure is stability of administrative decisions. The administrative procedural code provides for guarantee that final decisions may not be changed except for extraordinary situations. Such extraordinary occasions are regulated in Articles 145-156 of the code. Those situations include possibility of resumption of proceedings, revocation, change or assessment of invalidity of final decisions issued by the public authority. The analyzed principle is even strengthened in relation to decisions of the antimonopoly authority.

First, final decisions of the antimonopoly authority may not be changed by any other public authority except for the antimonopoly authority itself. Second, the party may not effectively demand from the antimonopoly authority to initiate proceedings regulated in Articles 145-156 of the administrative procedural code in order to change the final decision. It is well established in the antimonopoly act (Article 82) and confirmed by the antimonopoly court³²². The only exception is that party may demand to prolong validity of a merger decision. Such decisions are valid for two years but their validity may be extended by one year upon the motion of the party. The antimonopoly authority grants extension if the market conditions have not changed since the issuance of the decision.

Therefore, final decisions of the antimonopoly authority may be changed only *ex officio* exclusively by UOKiK. The grounds are provided in Articles 145-156 of the administrative procedural code and include possibility of resumption of antimonopoly proceedings, revocation, change or assessment of invalidity of final decisions issued by the antimonopoly authority. Change of final decision lies within discretion of the antimonopoly authority. If decision is changed it may be challenged by the party with an appeal. However, it should be noted that the antimonopoly authority hardly ever exercises this competence.

321 M. Szubiakowski, *Pojęcie decyzji ostatecznej i charakter wniosku o ponowne rozpatrzenie sprawy*, [The notion of final decision and the legal character of the motion to reconsider the case] [in:] *Kodeks postępowania administracyjnego po zmianach w latach 2010-2011*, [The administrative procedural code after amendments of 2010-2011], M. Błachucki, T. Górczyńska, G. Sibiga (eds.), NSA, Warsaw 2012, p. 94-97.

322 The judgment of the Antimonopoly Court of 25 June 2001, XVII Ama 31/01, nyr.

Chapter 8. Appeal proceedings before the courts

8.1. The course of actions before the antimonopoly court

There is no second administrative instance in the course of antimonopoly proceedings. Decisions and orders of the antimonopoly authority may be challenged before the court of competition and consumer protection. The party is obliged to respect time limits: 14 days to challenge the decision and 7 days to challenge the order. Non-observance of time limits will result in disregarding the appeal by the court. Time limits may not be extended either by the antimonopoly authority or by the court³²³. However, under certain circumstances they may be restored by the court³²⁴. The appeal may be based on the alleged defects in legal reasoning or in establishing on which the decision was made by the antimonopoly authority. The party may challenge the decision in whole or in part. Furthermore, the party may appeal against the operative part of the decision (the sentence of the decision) or just against the reasoning of the antimonopoly authority³²⁵. The reasoning may adversely affect reputation of the undertaking or may create an obstacle in conducting freely the business activity and the party may seek to challenge such opinion of the antimonopoly authority³²⁶. The appeal should respect all formal requirements set by the Civil procedural code for all party's writing before the civil courts and the stamp fee should be paid, as well³²⁷.

Lodging an appeal (against the decision) or an objection (against the order) institutes proceedings before the antimonopoly court. Appeal and objection should not be lodged directly to court but through intermediary of the antimonopoly authority. Lodging the appeal directly to the court does not take any legal effect and the party may risk that time limit for lodging the appeal will elapse³²⁸. The proceedings before the antimonopoly court are governed by the Civil procedural code. Especially important are Articles 479²⁸ - 479³⁵. When the appeal is lodged to the antimonopoly authority, UOKiK should transmit it together with case files to the court without delay. However, the antimonopoly authority may find the appeal justified and change the decision on its own. In order to verify the grounds for appeal, the antimonopoly authority may conduct supplementary evidence proceedings. In case a new decision is issued, the party may challenge it, as well (Article 81 of the antimonopoly act). When handling and transmitting the appeal the antimonopoly authority may not disregard it or find inadmissible - it is the sole competence of the court.

Parties to the proceedings before the Court of Competition and Consumer Protection are the antimonopoly authority, a person being a party to the antimonopoly proceedings as well as a person lodging an appeal or an objection. Proceedings before the antimonopoly court are civil proceedings and follow civil law principles. Both parties are equally entitled to participate in the proceedings and lodge motions. It should be noted that the burden of proof lies on the claiming party. All evidence is produced upon the motion of the parties. The antimonopoly court does not conduct, by itself, evidence proceedings at this stage. Parties may produce new evidence - different from evidence produced during the proceedings before the antimonopoly authority. However, all evidence should be indicated in the appeal.

323 The order of the Antimonopoly Court of 4 April 2000, XVII Amo 5/99, nyr.

324 The order of the Antimonopoly Court of 11 June 1997, XVII Ama 26/97, nyr.

325 The resolution of the Supreme Court of 7 April 1994, III CZP 35/94, Przegląd Sądowy 1998, No. 2, p. 111.

326 The order of the Antimonopoly Court of 22 June 1994, XVII Amr 45/93, Wokanda 1995, No. 5.

327 The order of the Antimonopoly Court of 9 September 1992, XVII Amr 25/92, Wokanda 1993, No. 2.

328 The order of the Antimonopoly Court of 8 October 1997, XVII Ama 49/97, nyr.

Subsequent evidence motions may not be admitted by the court. It is a discretionary power of the court to decide on the admissibility of such late motions. Civil procedural code allows admitting of all evidence that may be relevant to the case and are not contrary to law. The catalogue of evidence is open and there is no hierarchy of means of evidence. In practice, the court usually relies on evidence collected during the administrative proceedings. While surprising, antimonopoly court hardly ever calls for any expert opinions, e.g. on economics of the case. In most cases evidence proceedings before the antimonopoly court are limited to exchange of positions of parties in relation to the evidence already collected that served as the basis for the challenged decision.

Similarly to the antimonopoly proceedings, business secrecy is protected in the course of proceedings before the antimonopoly court. This issue is particularly important since proceedings before the court are generally open to the public. Parties may demand hearing in camera for fear of revealing their business secrets. The antimonopoly court may, by way of an order, disclose to the party to the proceedings the information that was protected in the proceedings before the antimonopoly authority as business secrecy of another party solely where:

1. circumstances giving grounds to issuance by the President of the Office of the resolution restricting the right to inquiry into evidence attached by the parties into the case files have changed significantly;
2. party whose business secrecy is protected has expressed its consent.

The court, upon request of the party or *ex officio*, may to the necessary extend restrict the remaining parties' right to inquire into the evidence attached to the case files in the course of proceedings, where rendering this material accessible would threaten with a disclosure of the business secrecy. This restriction of the right to inquire into the evidence does not apply to the antimonopoly authority. The mentioned orders are not subject to complaint.

The court of competition and consumer protection is obliged to assess the case to the merits to the same extent as the first instance authority. It has been confirmed that the court may not limit itself to a mere review of the challenged decision³²⁹. The appeal sets the limits of the adjudication of the court and the court is limited by the subject of appeal³³⁰. However, the appeal may not extend the subject of adjudication beyond matters settled in the challenged decision of the antimonopoly authority³³¹. The antimonopoly court takes into consideration all changes of facts or law that was passed after the issuance of the challenged decision. Therefore the court is obliged to evaluate any new piece of evidence produced during court proceedings. After conducting proceedings, the antimonopoly court may reach three types of judgments:

1. disregard the appeal when it is inadmissible i.e. it was lodged after the lapse of the time limit or the appeal was lodged by the person who was not entitled to do so;
2. dismiss the appeal when it is not justified and the challenged decision was found to have been grounded;
3. quash the challenged decision and change it in its entirety or in part. In case where the court reaches different conclusions than the antimonopoly authority, it is obliged to rule on the merits and replace the challenged decision by the judgement.

³²⁹ The judgment of the Court of Appeal of 21 June 2006, VI ACa 142/06, Journal of UOKiK of 2007, No. 1, item. 13.

³³⁰ The judgment of the Court of Appeal of 24 July 2008, VI ACa 12/08, Journal of UOKiK of 2008, No. 4, item. 41.

³³¹ The order of the Antimonopoly Court of 9 January 2002, XVII Ama 11/01, nyr.

When issuing the judgment, the court is obliged to rule *ex officio* whether the challenged decision was issued by the antimonopoly authority without any legal basis or with the manifest legal error. If the antimonopoly court finds such a defect of the challenged decision it serves as a ground for claiming compensation from the authority if any loss occurred as a result of this decision.

The Court of Competition and Consumer Protection provides the written reasoning of its judgments *ex officio* within 2 weeks from the day of the adjudication. The party receives a written copy of the judgment along with the reasoning, upon a motion that should be submitted within 1 week from the day when the judgment was announced. Judgments of the antimonopoly court are subject to appeal to the Court of Appeal. There is no specialized unit in this court to deal with the competition or regulatory matters. Furthermore, judgments of the Court of Appeal may be challenged before the Supreme Court with cassatory appeal. Cassatory appeal is an extraordinary remedy with strict and limited grounds. Moreover, the Supreme Court enjoys wide discretion when deciding on hearing the cassatory appeals.

The table below presents the statistics of civil court judgments in competition judgments delivered in 2011 and 2012³³²:

	Court of Competition and Consumer Protection		Court of Appeal		Supreme Court	
	2011	2012	2011	2012	2011	2012
total number of judgments issued in competition cases	58	60	30	29	3	2
vertical agreements	17	29	3	8	1	0
horizontal agreements	8	8	7	5	0	0
abuse of a dominant position	30	19	18	15	2	2
merger control	3	4	2	1	0	0

The majority of cases concern vertical agreements and abuse of dominance. On the other hand, merger cases are not common - hardly any reached the Supreme Court in 2011 and 2012.

When analyzing the substance of those judgments it turns out that in most cases courts uphold the decisions of the antimonopoly authority. Courts' intervention ratio in competition cases in 2011 was as follows:

1. Overruling the decision of the President of UOKiK - 3
2. Changing the decision of the President of UOKiK - 11
3. Dismissing the appeal of an undertaking - 44

The situation has not changed substantially in the following year. Courts' intervention ratio in competition cases in 2012 was as follows:

1. Overruling the decision of the President of UOKiK - 3
2. Changing the decision of the President of UOKiK - 10
3. Dismissing the appeal of an undertaking - 47

³³² Data taken from the annual report of UOKiK's activity.

The most important problem concerning proceedings before the antimonopoly court is their duration. Usually it takes about two years for the court to have the first hearing of the case. The proceedings before the Court of Appeal take usually 9-18 months. If the cassatory appeal is granted by the Supreme Court, it takes additional several months for the court to hear the case. Such a long waiting period adversely affects parties' rights for an effective judicial protection. This problem is particularly serious in merger cases. Adjudicating on prohibition of merger by the antimonopoly court two years after the challenged decision was issued, is regarded by many as no real remedy for the party since in most merger transactions after such a long lapse of time the transaction will not be implemented for commercial reasons, even if the court eventually clears it. In the light of the above, it should be carefully considered how this issue could be properly addressed in the future in order to streamline the court review process, in particular in merger cases.

8.2. The course of actions before the administrative courts

In limited number of situations administrative courts may provide judicial protection for participants of antimonopoly proceedings. They are competent to hear complaints against the failure to act as well as extensive and long-lasting conduct of antimonopoly proceedings by the antimonopoly authority. By 'extensive and long-lasting conduct of antimonopoly proceedings' one understands a situation where the antimonopoly authority not only does not observe time limits for concluding the proceedings but also the actions undertaken seem to be illusory and not demonstrating the real intention to efficiently close the case. Administrative court proceedings begin on the day when the complaint is lodged. Court proceedings are contradictory by nature and therefore two parties will be taking part in the process i.e. the complainant and the public authority whose act or activity is being contested. After conducting proceedings, the administrative court may oblige the authority to issue an act within specified time limit or to perform an action, or to declare or recognize the right or obligation resulting from provisions of law. When issuing a judgment, the administrative court is obliged to rule whether the failure to act or extensive and long-lasting conducting of antimonopoly proceedings constitutes a manifest legal error. If the court finds such error, it may serve as grounds for demanding compensation from the authority. The authority is bound by the final judgment of the administrative court. The judgment is final and valid if no appellate measure was lodged and the time limit for lodging such measure has elapsed.

In all such cases, complaints against action of the antimonopoly authority are heard by the Voivodeship Administrative Court in Warsaw. Judgments of this court may be appealed against to the Supreme Administrative Court. Administrative court proceedings are much more efficient in comparison to civil courts. It usually takes around 6 months to set the first hearing by the Voivodeship Administrative Court in Warsaw and the next 12 months for the Supreme Administrative Court to adjudicate on cassatory appeal.

In 2012, administrative courts issued 4 judgments in cases related to the antimonopoly proceedings. One of them was delivered by the Supreme Administrative Court and three were issued by the Voivodeship Administrative Court in Warsaw. Three of those judgments regarded access to files of the antimonopoly proceedings where the claims were based on the act on the access to public information³³³. One case regarded extensive and long-lasting conducting of antimonopoly proceedings by the antimonopoly authority.

First case regarded the motion to access the notification form filed by the undertaking during a merger investigation. The antimonopoly authority denied such access to a third party

³³³ Act of 6 September 2001 on the access to public information, Journal of Laws No. 112, item 1198 with further amendments.

claiming that this was not a piece of public information since it had been produced by the private party, not by the public authority. The Voivodeship Administrative Court ruled against the decision of UOKiK claiming that files of the administrative case are covered by the notion of 'public information' irrespective of who produced particular documents being a part of the case files³³⁴. The antimonopoly authority appealed and the Supreme Administrative Court quashed the said judgment stating that the notification form is not a public document as a whole, even though it may contain pieces of public information. Therefore the Voivodeship Administrative Court should examine the notification form and decide which parts of the form could be accessible to third parties³³⁵. In 2011, there was a similar case but the third party asked for the contracts that were collected during the antimonopoly investigation in an antitrust case. In that case the Supreme Administrative Court ruled that any document collected during the administrative investigation and being part of case files is covered by the notion of 'public information'³³⁶. The analysis of these judgments leads to the conclusion that administrative courts still do not have a standing line of case law in the discussed issue.

The other public information case regarded the motion of the third party to access the expert testimony being a part of case files. However, the antimonopoly authority denied the access pointing out that the case along with the files was at that time being adjudicated by the antimonopoly court. Therefore the authority did not have the information requested and the motion should have been directed to the court. The Voivodeship Administrative Court agreed with the antimonopoly authority and reminded the complainant that the public authority is obliged to give access to the public information that remains in its possession³³⁷.

The last case regarded the extensive and long-lasting conducting of antimonopoly proceedings by the antimonopoly authority. The Voivodeship Administrative Court ruled that conducting the antimonopoly investigation within the period exceeding 5 years violates the time limits foreseen in the antimonopoly act and in the administrative procedural act. Furthermore, handling the antimonopoly case by UOKiK for so long constitutes a manifest violation of procedural law³³⁸. The judgment is also important because it confirms the jurisdiction of administrative court in cases of failure to act of the antimonopoly authority, which was disputable before.

Chapter 9. The future of the Polish antimonopoly legislation

The present antimonopoly act was adopted in 2007. Five years is a good review period. Therefore the antimonopoly authority has publicized draft proposals for changes in May 2012³³⁹. Those proposals reflect the experiences gained when enforcing the antimonopoly act and interactions with business entities during antimonopoly proceedings as well as tend to introduce some of experiences gained by foreign competition authorities. The first round of the consultation process ended in June 2012. Based on the outcome of the consultation, the amended draft was prepared in November 2012. The main objectives of the amendments proposed are: to simplify the merger control system and boost the effective detection of prohibited agreements in particular by modernizing the *leniency* programme. Those areas were identified by the antimonopoly authority as crucial for more effective competition protection.

334 The judgment of the Voivodeship Administrative Court of 29 March 2012, II SAB/Wa 485/11, nyr.

335 The judgment of the Supreme Administrative Court of 25 October 2012, I OSK 1696/12, nyr.

336 The judgment of the Supreme Administrative Court of 11 June 2011, I OSK 490/11, nyr.

337 The judgment of the Voivodeship Administrative Court of 11 October 2012, SAB/Wa 310/12, nyr.

338 The judgment of the Voivodeship Administrative Court of 7 August 2012, VII SAB/Wa 134/12, nyr.

339 Proposals are only in Polish and they are available at <http://www.uokik.gov.pl/>.

In the area of mergers, UOKiK's proposals seek to introduce a two-stage merger proceedings. At present merger proceedings are one-staged and should be concluded within two months regardless of the complexity of investigation. As clarified by UOKiK, this time limit proves to be too long for non-complex transactions and too short to examine cases of high complexity. For this reason the antimonopoly authority proposes that non-complex mergers should be cleared within 30 days and more complex cases would be reviewed within four months. Furthermore, UOKiK intends to improve the transparency of the merger investigation to the notifying parties. This could be achieved by introducing an obligation for the authority to provide the notifying party with a reasoned notice on competition concerns that the notified transaction raises. In consequence, during proceedings in complex cases UOKiK will inform undertakings on any reservations and doubts it has with regard to the transaction under scrutiny. As a consequence, undertakings will have an opportunity to express their view on the competitive assessment made by the authority prior to issuance of the final decision. Minor changes will concern formulation and publication of remedies. UOKiK proposes not to disclose in the decision the deadlines provided for the fulfillment of remedies. This proposal reflects the requests of undertakings, who emphasized the fact that providing the public with information on the deadline for divesting control over a dependent undertaking, or part of its assets, does significantly weaken the bargaining position of the seller, and consequently can be commercially detrimental to them.

The second area of changes concerns increasing the efficiency of eliminating prohibited agreements. New procedural tools are proposed, i.e. *settlements* procedure. The procedure is designed on the basis of similar regulations existing in antimonopoly law systems of particular EU Member States and the European Commission. Under this procedure the antimonopoly authority could offer *settlement* whenever the circumstances of a given case provide for this solution. An undertaking will be allowed to benefit from it in turn for receiving a 10% fine reduction. UOKiK aims at accelerating the antimonopoly proceedings. Furthermore, UOKiK's proposals include possibility of imposing remedies in the decision concluding antimonopoly proceedings in the anticompetitive practices cases. In this decision, the President of UOKiK will have a chance to indicate to an undertaking what measures must be taken to eliminate the impacts of infringement or discontinue the prohibited practice. This will allow for effective restoration of competition.

The third area of amendments regards fining policy. UOKiK proposes introduction of the *leniency plus* institution. Under this procedure undertakings could obtain even more significant fine reductions for participation in anti-competitive agreement as long as they provide the authority with information on other undetected agreements. Furthermore, the antimonopoly authority proposes introduction of natural persons' liability for infringement of selected substantive provisions of the antimonopoly act. In the opinion of UOKiK, these sanctions will perform both repressive and preventive functions and will provide the office with access to the new source of information. This will be possible through opening of the *leniency* programme also to natural persons.

The draft amendment proposes to prolong the time limit to lodge the appeal against the decision of the antimonopoly authority up to 30 days (14 days at present). It has been initially proposed and lobbied by numerous stakeholders claiming that the existing time limit is too short given the complexity of the antimonopoly decisions. Furthermore, the draft intends to amend the Civil procedural code in order to empower civil courts to provide universal control over all activities of the antimonopoly authority (administrative courts would be deprived of any competence to control UOKiK's actions).

Selected bibliography

1. B. Adamiak, J. Borkowski, *Polskie postępowanie administracyjne i sądownoadministracyjne*, [Polish administrative procedure and administrative litigation], Wydawnictwa Prawnicze PWN, Warsaw 1997.
2. C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawno-ekonomiczne)*, [Competition and consumer protection in Poland and European Union (legal and economic studies)], UOKiK, Warsaw 2005.
3. C. Banasiński (ed.), *Prawo konkurencji - stan obecny oraz przewidywane kierunki zmian*, [Competition law - the current state and foreseeable developments], UOKiK, Warsaw 2006.
4. C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, [Act on competition and consumer protection. Commentary], LexisNexis, Warsaw 2009.
5. M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, [Procedural fairness in the proceedings before the competition authority], Wydział Zarządzania, Warsaw 2011.
6. A. Błachnio-Parzych, *The nature of responsibility of an undertaking in antitrust proceedings and the concept of 'criminal charge' in the jurisprudence of the European Court of Human Rights*, Yearbook of Antitrust and Regulatory Studies Vol. 2012, 5 (6).
7. M. Błachucki, *Dostęp do akt sprawy administracyjnej na podstawie Kodeksu postępowania administracyjnego a dostęp do informacji publicznej znajdującej się w aktach sprawy administracyjnej*, [Access to files on the basis of the Administrative Procedural Code and the access to public information contained in the administrative files], [in:] *Dostęp do informacji publicznej w Polsce i w Europie - wybrane zagadnienia prawne*, [Access to public information in Poland and Europe - selected legal issues], E. Pierzchała, M. Woźniak (eds), Uniwersytet Opolski., Opole 2010.
8. M. Błachucki, *Ewolucja regulacji testów oceny koncentracji w polskim prawie antymonopolowym*, [The evolution of merger control tests in the Polish antimonopoly law], [in:] *Europeizacja publicznego prawa gospodarczego*, [Europeisation of the public economic law], C.H. Beck, Warsaw 2011.
9. M. Błachucki, *Sądownictwo antymonopolowe w Polsce - historia i ustrój*, [The antimonopoly courts in Poland - history and regime], UOKiK, Warsaw 2011.
10. M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, [The system of antimonopoly merger proceedings], UOKiK, Warsaw 2012.
11. M. Błachucki, *Właściwość sądów administracyjnych i sądów powszechnych w sprawach antymonopolowych* [Jurisdiction of civil and administrative courts in the antimonopoly cases], [in:] M. Błachucki, T. Górzyńska (eds.) *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych*, [Current issues in delimitating of jurisdiction of civil and administrative courts], NSA, Warsaw 2011.
12. M. Błachucki, S. Józwiak, *Sankcje strukturalne w prawie antymonopolowym jako sankcje administracyjnoprawne*, [Structural sanctions in the antimonopoly law as administrative law sanctions], [in:] *Sankcje administracyjne*, [Administrative law sanctions], R. Lewicka, M. Lewicki, M. Stahl (red.), Wolters Kluwer, Warsaw 2011.

13. M. Błachucki, R. Stankiewicz, *Decyzja zezwalająca na dokonanie koncentracji z naruszeniem testu istotnego ograniczenia konkurencji (art. 20 ust. 2 ustawy antymonopolowej)*, [Decision of the antimonopoly authority clearing anticompetitive merger (Article 20(2) of the antimonopoly act)], *Przegląd Ustawodawstwa Gospodarczego* 2010, No. 6.
14. Z. Brodecki (ed.), *Konkurencja*, [Competition], LexisNexis, Warsaw 2004.
15. A. Brzezińska, *Zakaz nadużycia pozycji dominującej we wspólnotowym i polskim prawie antymonopolowym*, [Prohibition of abuse of a dominant position in the Community and Polish antimonopoly law], TNOiK, Toruń 2008.
16. *Consumer Protection and Competition Policy - working together?*, UOKiK, Warsaw 2006.
17. W. Dawidowicz, *Zarys procesu administracyjnego*, [The outline of the administrative proceedings], PWN, Warsaw 1989.
18. T. Ereciński, *Postępowanie w sprawach o przeciwdziałanie praktykom monopolistycznym*, [Proceedings in the antimonopoly cases], *Państwo i Prawo* 1991, No. 1.
19. J. Gościński, *Poskramianie monopolu*, [Combating monopolies], *Prawo i Życie* 1983, No. 12.
20. T. Gosztyła, *Wybrane problemy regulacji i orzecznictwa antymonopolowego*, [Selected problems of antimonopoly enforcement and jurisprudence], *Radca Prawny* 1993, No. 2.
21. S. Gronowski, *Glosa do postanowienia Sądu Najwyższego z dnia 27 października 1995 r.*, [Comment to the order of the Supreme Court of 27 October 1995], III CZP 135/95, *OSP* 1996, No. 6, item 112.
22. S. Gronowski, *Polskie prawo antymonopolowe*, [Polish antimonopoly law], ZPP, Warsaw 1998.
23. S. Gronowski, *Zmiany w ustawie antymonopolowej*, [Changes of the antimonopoly act], *Monitor Prawniczy* 1999, No. 2.
24. Z. Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, [Administrative Procedural Code. Commentary], Wydawnictwo Prawnicze PWN, Warsaw 1995.
25. R. Janusz, M. Sachajko, T. Skoczny, *Nowa ustawa o ochronie konkurencji i konsumentów*, [New Act on competition and consumer protection], *Kwartalnik Prawa Publicznego* 2001, No. 3.
26. J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, *Postępowanie cywilne*, [Civil procedure], LexisNexis, Warsaw 2005.
27. J. Jończyk, *Prawo kartelowe [Cartel law] [in:] Historia państwa i prawa Polski 1918-1939*, [History of Polish law and state 1918-1939], Part I, PWN, Warsaw 1962.
28. S. Józwiak, *Wymiana informacji między konkurentami jako praktyka ograniczająca konkurencję – kierunki rozwoju analizy prawno-ekonomicznej*, [The exchange of information between competitors as an anticompetitive practice - development of legal and economic patterns of analysis], UOKiK, Warsaw 2011.
29. A. Jurkowska, T. Skoczny (eds.), *Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce*, [Block exemptions from prohibition of anticompetitive agreements in the European Community and Poland], Wydawnictwa Naukowe WZ UW, Warsaw, 2008.

30. K. Kohutek *Praktyki wykluczające przedsiębiorstw dominujących. Prawidłowość i stosowalność reguł prawa konkurencji*, [Exclusionary practices of dominant undertakings. Correctness and applicability of competition law rules], Wolters Kluwer, Warszawa 2012.
31. K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], Wolters Kluwer, Warsaw 2008.
32. M. Kolasiński, *Obowiązek współpracy gospodarczej w prawie antymonopolowym*, [Duty to cooperate in the antimonopoly law], TNOiK, Toruń 2009.
33. E. Kosiński, *Rodzaje i zakres sektorowych wyłączeń zastosowania ogólnych reguł ochrony konkurencji*, [Types and scope of sectoral exemptions from general competition rules], Wydawnictwo Naukowe UAM, Poznań 2007.
34. K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych - w kierunku unifikacji standardów proceduralnych w UE*, [Right to be heard in the European antimonopoly proceedings - towards the unification of procedural standards in the EU], Wolters Kluwer, Warsaw 2012.
35. M. Krasnodębska-Tomkiel (ed.), *Changes in Competition Policy over the Last Two Decades*, UOKiK, Warsaw 2010.
36. M. Krasnodębska-Tomkiel, *Wspólnotowe prawo konkurencji. Skutki dla Polski*, [Community competition law. Conclusions for Poland], UOKiK, Warsaw 2006.
37. M. Król-Bogomilska, *Kary pieniężne w polskim prawie antymonopolowym na tle europejskiego prawa wspólnotowego*, [Financial penalties in the Polish antimonopoly law from the perspective of the European law], Państwo i Prawo 1998, No. 7.
38. M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, [Financial penalties in the antimonopoly law], KiK, Warsaw 2001.
39. M. Król-Bogomilska, *Zasady procedury cywilnej w postępowaniu przed Urzędem Antymonopolowym cz. I*, [Principles of the civil procedure in the proceedings before the Antimonopoly Authority. Part I], Glosa 1995, No. 8.
40. M. Król-Bogomilska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, [Combating cartels in the antimonopoly and criminal law], Scholar, Warsaw 2013.
41. Z. Landau, *Rozwój ustawodawstwa kartelowego w Polsce międzywojennej na tle polityki kartelowej rządu*, [Development of cartel legislation in the interwar Poland from the perspective of government cartel policy], Kwartalnik Historyczny 1972, No. 1.
42. T. Ławicki, *Glosa do postanowienia Sądu Najwyższego z dnia 22 lutego 1994 r.*, [Comment to the order of the Supreme Court of 22 February 1994], I CRN 238/93, Państwo i Prawo 1995, No. 7.
43. G. Materna, *Ograniczenie prawa wglądu do materiału dowodowego w postępowaniach przed Prezesem UOKiK*, [Limitation of the right to access to files during the antimonopoly proceedings before the President of UOKiK], Przegląd Prawa Handlowego 2008, No. 4.
44. G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*, [The notion of undertaking in Polish and European competition law], Wolters Kluwer, Warsaw 2009.

45. G. Materna, *Publiczne instytucje ubezpieczenia zdrowotnego w świetle prawa antymonopolowego*, [Public healthcare insurers in the light of the antimonopoly law], Państwo i Prawo 2005, No. 6.
46. D. Miąsik, *Controlled Chaos with Consumer Welfare as the Winner - a Study of the Goals of Polish Antitrust Law*, Yearbook of Antitrust and Regulatory Studies 2008, vol. 1(1).
47. D. Miąsik, *Reguła rozsądku w prawie antymonopolowym*, [Rule of reason in the antimonopoly law], Wolters Kluwer, Warsaw 2004.
48. D. Miąsik, *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej*, [The relationship between competition law and intellectual property law], Wolters Kluwer, Warsaw 2012.
49. E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], Twigger, Warsaw 2002.
50. J. Olszewski, *Nadzór nad koncentracją przedsiębiorców jako forma prewencyjnej ochrony konkurencji*, [Supervision over concentration of undertakings as a form of preventive competition protection], URZ, Rzeszów 2004.
51. J. Olszewski, *Nowa ustawa o ochronie konkurencji i konsumentów cz. I i II*, [New act on competition and consumer protection. Part I and II], Monitor Prawniczy 2001, No. 15.
52. J. Olszewski, *Uwagi o zmianach i propozycje dalszego reformowania prawa antymonopolowego*, [Remarks on changes and proposals for further reforms of the antimonopoly law], Rejent 2000, No. 3.
53. R. Pasiak, *Niektóre skutki ostatnich zmian ustawy o przeciwdziałaniu praktykom monopolistycznym dla spółek publicznych*, [Selected effects of the latest amendments to the Act on combating monopolistic practices for public undertakings], Prawo Spółek 1999, No. 6.
54. E. Piontek, *Znaki zapytania*, [Question marks], Prawo i Życie 1986, No. 6.
55. R. Poździk, *Dystrybucja produktów na zasadzie wyłączności w Polsce i Unii Europejskiej*, [Exclusive distribution of products in Poland and the European Union], Verba, Lublin 2006.
56. W. Rakoczy, *Podmiotowy zakres stosowania ustawy o przeciwdziałaniu praktykom monopolistycznym*, [Subjective scope of application of the Act on combating monopolistic practices], Przegląd Prawa Handlowego 1993, No.15.
57. W. Rakoczy, *Zastosowanie instrumentów demonopolizacyjnych w restrukturyzacji gospodarki*, [Application of demonopolization legal instruments in restructuring the economy], Przegląd Ustawodawstwa Gospodarczego 1993, No. 11.
58. M. Rogala, *Kontrola koncentracji przedsiębiorców w nowej ustawie antymonopolowej*, [Merger control in the new antimonopoly law], Prawo Spółek 2001, No. 9.
59. K. Róziewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, [Proceedings before the President of the Office of Competition and Consumer Protection in antitrust cases], Wolters Kluwer, Warsaw 2011.

60. G. Rzaša, *Nieważność postępowania sądownoadministracyjnego jako podstawa skargi kasacyjnej*, [Invalidity of administrative court proceedings as a basis for the cassatory appeal], C.H. Beck, Warsaw 2011.
61. M. Sachajko, *Istota i charakterystyka prawna antymonopolowych kar pieniężnych*, [Concept and legal characteristics of antimonopoly financial penalties], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2002, No. 1.
62. T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], Wolters Kluwer, Warsaw 2009.
63. T. Skoczny, *Konsekwencje przyszłego systemu stosowania artykułów 81 i 82 TWE dla prawa i orzecznictwa w zakresie ochrony konkurencji w Polsce (cz. II)*, [Consequences of the development of application of Articles 81 and 82 of TEC for the competition law and jurisprudence in Poland (Part II)], *Prawo Unii Europejskiej* 2001, No. 9-10.
64. K. Sobczak, *Niektóre aspekty grupowania przedsiębiorstw oraz ochrony antymonopolowej*, [Selected aspects of grouping undertakings and antimonopoly protection], *Przegląd Ustawodawstwa Gospodarczego* 1986, No. 6.
65. S. Sottysiński, *O potrzebie ustawodawstwa zwalczającego praktyki monopolistyczne i nieuczciwą konkurencję*, [On the need of adopting legislation on combating monopolistic practices and unfair competition], *Państwo i Prawo* 1982, No. 12.
66. S. Sottysiński, *Sankcje w ustawie o przeciwdziałaniu praktykom monopolistycznym w gospodarce narodowej*, [Sanctions in the Act on the combating monopolistic practices in the national economy], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1987, No. 4.
67. S. Sottysiński, J. Trojanek, *Proces koncentracji produkcji i usług a zagadnienie ochrony interesów konsumenta w PRL*, [Process of concentration of production and services and the problem of protection of consumer interests in the People's Republic of Poland], *Studia Prawnicze* 1978, No. 1.
68. R. Stankiewicz, *Joint ventures w prawie antymonopolowym*, [Joint ventures in the antimonopoly law], *Przegląd Prawa Handlowego* 2007, No. 8.
69. R. Stankiewicz, *Zasada eksterytorialnego stosowania przepisów ustawy antymonopolowej do spraw z zakresu nadzoru nad procesami koncentracji przedsiębiorców*, [Principle of extraterritorial application of the antimonopoly law with regard to concentrations of undertakings], *Przegląd Prawniczy UW* 2006, No. 1.
70. A. Stawicki (ed.), E. Stawicki (ed.), J. Baehr, J. Kreuger, T. Kwieciński, M. Radwański, B. Turno, A. Wędrzychowska-Karpińska, A. Wiercińska-Krużewska, A. Wierciński, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on competition and consumer protection. Commentary], Wolters Kluwer, Warsaw 2010.
71. M. Stefaniuk, *Publicznoprawne reguły konkurencji*, [Public law rules of competition], Verba, Lublin 2005.
72. D. Sylwestrzak, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów*, [Proceedings before the President of the Office of Competition and Consumer Protection], LexisNexis, Warsaw 2012.

73. W. Szpringer, *Koncepcja „przyjaznych” i „wrogich” fuzji kapitałowych w prawie spółek i prawie rynku kapitałowego*, [The concept of friendly and hostile takeovers in the company law and capital market law], *Przegląd Prawa Handlowego* 1993, No. 7.
74. M. Szubiakowski, *Pojęcie decyzji ostatecznej i charakter wniosku o ponowne rozpatrzenie sprawy*, [The notion of final decision and the legal character of the motion to reconsider the case] [in:] *Kodeks postępowania administracyjnego po zmianach w latach 2010-2011*, [The administrative procedural code after amendments of 2010-2011], M. Błachucki, T. Górzyńska, G. Sibiga (eds.), NSA, Warsaw 2012.
75. M. Szydło, *Nadużywanie pozycji dominującej w prawie konkurencji*, [Abuse of dominance in competition law], Wolters Kluwer, Warszawa 2010.
76. J. Trojanek, *O potrzebie i ekonomiczno-prawnych sposobach przelamywania monopolistycznych praktyk w gospodarce uspołecznionej*, [On the need and economic and legal ways of breaking monopolistic practices in the socialized economy], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1973, No. 3.
77. J. Trojanek, *Ustawa antymonopolowa z 1987 roku. (Próba oceny podstawowych rozwiązań)*, [The antimonopoly law of 1987. (An attempt to evaluate its basic solutions)], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1987, No. 4.
78. I. Wiszniewska, *Kartelowe zagrożenia w działalności zrzeszeń przedsiębiorstw państwowych*, [Adverse effects of cartel activities of groupings of state undertakings], Part I and II, *Przegląd Ustawodawstwa Gospodarczego* 1983, No. 11 and 12.
79. I. Wiszniewska, *O projekcie ustawy antymonopolowej*, [On the draft of the antimonopoly law], *Państwo i Prawo* 1982, No. 10.
80. I. Wiszniewska, *Polska ustawa antymonopolowa z 1990 r.*, [Polish antimonopoly act of 1990], *Przegląd Ustawodawstwa Gospodarczego* 1990, No. 7-8.
81. I. Wiszniewska, *Praktyki monopolistyczne w świetle ustawy antymonopolowej*, [Monopolistic practices in the light of the antimonopoly act], *Państwo i Prawo* 1987, No. 7.
82. I. Wiszniewska, A. Kawecki, *Problem legislacji antymonopolowej w systemie zreformowanej gospodarki*, [Problem of antimonopoly legislation in the system of reformed economy], *Przegląd Ustawodawstwa Gospodarczego* 1982, No. 10.
83. T. Woś, *Glosa do wyroku SN z dnia 26 listopada 1993 r.*, [Comment on the judgment of the Supreme Court of 26 November 1993], *III CZP 63/93*, *Państwo i Prawo* 1995, No. 5.

PART II CASE LAW

In order to give a full picture of the Polish competition law, a brief selection of the judicial case law is presented herein. Judgments outlined below were taken by various courts competent in antimonopoly matters i.e. Court of Competition and Consumer Protection (formerly the Antimonopoly Court), Court of Appeal, Supreme Court and Supreme Administrative Court. This presentation is limited to principal theses of judgments and is divided into eight groups:

- Application of the antimonopoly act;
- Anticompetitive agreements;
- Abuse of dominance;
- Merger control;
- Fines;
- Antimonopoly proceedings;
- Proceedings before the antimonopoly court;
- Proceedings before the administrative courts.

For the clarity reasons, references to particular antimonopoly acts and their official names were omitted and replaced with the general term ‘antimonopoly act’. Wherever possible, current numbering of provisions of the antimonopoly act was indicated in parallel to the numbering binding at the time when a particular judgment was delivered. All judgments are preceded by the tags in order to make them more accessible to the readers. Where necessary, judgments are accompanied by short commentaries explaining more complex issues of Polish law. In order to make presented judgments more comprehensible to foreign readers, the translation does not always follow completely the original Polish text. Furthermore, in many instances the necessary shortcuts were made.

1. Application of the antimonopoly act

- *Application of the antimonopoly act - extraterritorial application of the antimonopoly act, foreign undertakings*

Judgment of the Supreme Court of 10 May 2007, III SK 24/06, nyr

The antimonopoly act is applicable to all anticompetitive practices concluded outside the territory of Poland but affecting markets located under the jurisdiction of the Republic of Poland.

- *Application of the antimonopoly act - extraterritorial application of the antimonopoly act, foreign undertakings*

Judgment of the Court of Competition and Consumer Protection of 18 December 2002, XVII Ama 19/01, Journal of Laws of UOKiK of 2003, No. 2, item 260

Foreign undertaking affected by the anticompetitive practices of a domestic undertaking may demand the institution of antimonopoly proceedings [by the UOKiK] on the basis of the antimonopoly act.

- ***Anticompetitive agreements - scope of application, foreign undertakings***

Judgment of the Supreme Court of 18 February 2010, III SK 28/09, nyr

Jurisdiction of the President of UOKiK is based on the premise that behavior of the company has an effect on the Polish market. This premise is self-evident and does not require to be proved when the Polish company is engaged in the anticompetitive behavior on the Polish market directed against other companies present on this market which adversely affect Polish consumers.

- ***Application of the antimonopoly act - division of competences between antimonopoly and regulatory authorities***

Judgment of the Antimonopoly Court of 18 February 2002, XVII Ama 46/01, Journal of Laws of UOKiK of 2002, No. 2, item 104

Regulatory proceedings conducted by the President of the Energy Regulatory Office are a specific form of competition protection procedure undertaken on the regular basis against natural monopolists. Therefore the President of UOKiK is precluded from fining company on the basis of the antimonopoly act if the Energy law finds the behavior of the company admissible.

- ***Application of the antimonopoly act - division of competences between antimonopoly and regulatory authority, parallel application of antimonopoly and regulatory rules***

Judgment of the Court of Appeal of 27 March 2008, VI ACa 957/07, Journal of Laws of UOKiK of 2008, No. 3, item 31

1. The same circumstances may be examined both under the Energy law and the Antimonopoly act. The first is undertaken by the energy regulator, the second by the antimonopoly authority.
2. Consumer of energy may always seek protection based on the antimonopoly law against dominant energy company allegedly abusing its position.

- ***Application of the antimonopoly act - division of competences between antimonopoly and regulatory authorities***

Judgment of the Supreme Court of 17 March 2010, III SK 41/09, OSNP 2011, No. 21-22, item 285

Prior decision of the President of the Office of Electronic Communications precludes the President of UOKiK from any intervention in matters covered by the previous decision.

- ***Application of the antimonopoly act - statutory restrictions of competition***

Judgment of the Antimonopoly Court of 19 November 2001, XVII Ama 6/01, nyr

It is inadmissible to prosecute energy company with accusation of charging excessive prices provided that those prices do not exceed tariffs approved by the energy regulator.

- ***Application of the antimonopoly act - statutory restrictions of competition, limited scope of exemptions***

Judgment of the Antimonopoly Court of 25 October 2000, XVII Ama 10/00, Wokanda 2002, No. 7-8, item 100

Article 4(3) of the Act of 29 July 1992 on games of chance and mutual bets regulates that organizing lotteries is a state monopoly and hence provisions of the antimonopoly act do not apply but it does not exclude application of the antimonopoly act to commercial relations between organizer of the lottery and its distributors (agents).

- ***Application of the antimonopoly act - statutory restrictions of competition***

Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, Wokanda 1994, No. 5, item 56

Restrictions of the free competition resulting from the public authorization of certain commercial activities and related activities of public authorities are left outside of the application of the antimonopoly act.

- ***Application of the antimonopoly act - scope of application, statutory restrictions of competition***

Judgment of the Court of Appeal of 27 May 2009, VI ACa 1404/08, Journal of Laws of UOKiK of 2009, No. 4, item 34

Antimonopoly act does not apply exclusively to those competition-restricting practices which are directly allowed by separate provisions. Those provisions are *lex specialis* in relation to the antimonopoly act. Therefore the President of UOKiK may not persecute anticompetitive activities resulting from public obligations imposed by separate statutes which do not leave any discretion to addressees of these obligations. Neither the antimonopoly authority nor the antimonopoly court is competent to assess whether the municipality fulfils its public obligations and whether this fulfillment is optimal from the point of view of inhabitants of this municipality. The jurisdiction of the President of UOKiK [...] over activities of the municipality is limited to those activities where municipality enjoys discretionary power not constrained by the separate provisions.

- ***Application of the antimonopoly act - scope of application, statutory restrictions of competition, burden of proof***

Judgment of the Supreme Court of 3 March 2010, III SK 37/09, OSNP 2011, No. 19-20, item 264

1. Separate statutory provisions may limit jurisdiction of the President of UOKiK and justify certain anticompetitive behavior of undertakings.
2. The antimonopoly act is applicable as long as the legislator does not limit the free market and enables undertakings to freely engage in economic activity. When the undertaking is organizing the market, the antimonopoly act is applicable in relation to those activities of the undertaking which lie within its discretion [*activities of the company resulting from the statutory regulation of the market fall outside the application of the antimonopoly act*]. The burden of proving the existence of anticompetitive practices during antimonopoly proceedings rests upon the President of UOKiK.

- ***Application of the antimonopoly act - local government***

Judgment of the Antimonopoly Court of 6 December 2000, XVII Ama 95/99, Wokanda 2002, No. 9, item 50

1. Article 40(1) of the Act of 8 March 1990 on the municipal self-government which authorizes the municipality to adopt local laws may not be a legal basis to adopt local laws contrary to the antimonopoly legislation. Therefore the said provision may not be a legal basis to adopt a regulation obliging all real estate owners to contract waste collection services exclusively with the municipal company, excluding all other companies.
2. Municipality that enjoys a monopolistic position [*with regard to certain commercial activities*] may not disregard the antimonopoly act which prohibits anticompetitive behavior of any undertaking, including municipalities.

- ***Application of the antimonopoly act - organization of public services, possibility of reviewing administrative decision and normative acts issued by local government authorities***

Judgment of the Supreme Court of 20 November 2008, III SK 12/08, Glosa 2009, No. 3, p. 102

1. Organization of the public utility services, within the meaning of Article 4(1)(a) of the antimonopoly law, is the activity of the local government consisting in establishment of legal basis for offering such services by the other undertakings. This competence covers the possibility to adopt local laws regulating conditions for obtaining official authorization to perform such services and setting up detailed rules on conducting of such activities.
 2. Municipality, as an undertaking, is obliged to take into consideration all limitations of its discretion and competence to adopt local laws and issue administrative decisions with regard to organizing public utility services resulting from the antimonopoly act.
- ***Application of the antimonopoly act - relation of the antimonopoly act with other economic regulations***

Judgment of the Antimonopoly Court of 21 January 1994, XVII Amr 40/93, nyr

The antimonopoly act [...] is a special statute which has primacy over the other statutes regulating commercial activity of undertakings, both private and public. Therefore, the competent competition authority may lawfully intervene against any anticompetitive commercial activity of undertakings.

- ***Application of the antimonopoly act - scope of application, unfair competition***

Judgment of the Antimonopoly Court of 19 September 1991, XVII Amr 9/91, nyr

The antimonopoly act is not designed to combat unfair competition practices [*those practices are civil law delicts and may be challenged in regular civil proceedings*].

- ***Application of the antimonopoly act - competences of the antimonopoly authority, objective of public enforcement***

Judgment of the Antimonopoly Court of 19 November 2001, XVII Ama 2/01, Journal of Laws of UOKiK of 2002, No. 1, item 47

1. Any entity who suffered loss as a result of the anticompetitive behavior of undertaking may not seek damages during the antimonopoly proceedings. Polish competition authority is not competent to issue an administrative decision in this respect [*the only possibility rests with the private enforcement*].
2. The antimonopoly legislation is aimed at protecting the public interest, not individual interest of any undertaking.

- ***Application of the antimonopoly act - competences of the antimonopoly authority***

Judgment of the Antimonopoly Court of 15 May 2002, XVII Ama 95/01, nyr

The President of UOKiK may not control decisions of the energy regulator on authorization of energy tariffs.

- ***Application of the antimonopoly act - competences of the antimonopoly authority***

Judgment of the Antimonopoly Court of 2 December 2002, XVII Ama 27/02, Journal of Laws of UOKiK of 2003, No. 2, item 259

The antimonopoly authority is not competent to determine the terms and conditions of contracts concluded between the dominant undertaking and the other undertakings.

- ***Application of the antimonopoly act - notion of public interest, prioritization***

Judgment of the Supreme Court of 5 June 2008, III SK 40/07, OSNP 2009, No 19-20, item 272

1. Any activity aimed at disturbing the mechanism of competition violates the public interest.
2. The premise of violation of public interest is the criterion for selecting of cases undertaken by the antimonopoly authority. Decision on institution, conducting and concluding antimonopoly proceedings should indicate and describe the public interest justifying the antimonopoly intervention.
3. Violation of public interest takes place when anticompetitive behavior affects “a wider circle of market participants” or when it resulted in the other adverse market effects.

- ***Application of the antimonopoly act - the concept of competition***

Judgment of the Supreme Court of 7 January 2010, III SK 16/08, OSNP 2010, No. 13-14, item 177

The public interest covers the protection of competition as a mechanism guarantying free entrance of undertakings to the market.

- ***Application of the antimonopoly act - private enforcement***

Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, OSNC 2009, No. 7-8, item 107

Civil court may independently adjudicate on invalidity of any commercial contract due to violation of the antimonopoly act [...] unless there is a prior final decision of the President of UOKiK finding the same violation of the antimonopoly act [...].

- ***Application of the antimonopoly act - EU context, character of EU soft law documents***

Judgment of the Supreme Court of 3 September 2009, III SK 9/09, OSNP 2011, No. 11-12, item 168

Contrary to provisions of the antimonopoly act on the protection of collective consumer interests - stipulations concerning the prohibition of anticompetitive practices do not implement EU directives. Therefore, when interpreting provisions of the antimonopoly law as regards the prohibition of anticompetitive practices, the antimonopoly authority is not limited by the obligation of "pro-European" interpretation of domestic provisions. Consequently soft law documents issued by the European Commission in the field of competition law as well as the case law of the European courts have only subsidiary relevance and may be used to conduct comparative law analysis.

- ***Application of the antimonopoly act - notion of undertaking***

Judgment of Court of Competition and Consumer Protection of 12 January 2006, XVII Ama 105/04, Journal of Laws of UOKiK of 2006, No. 2, item 28

1. Undertakings, within the meaning of Article 4(1)(a) of the antimonopoly law, are entities directly performing services, as well as entities organizing performance of such services.

2. The administrator of the cemetery enjoys the privileged position when confronted with undertakings offering cemetery services. Such administrator hinders the competition among the undertakings offering cemetery services when the one reserves certain cemetery services to oneself excluding other undertakings from performing those services. Such restriction limits the competition and results in securing of stable demand for certain cemetery services for the administrator and in violating of consumer interests by limiting their choice.

- ***Application of the antimonopoly act - liberal profession organization, concerted practice***

Judgment of the Court of Competition and Consumer Protection of 12 October 2005, XVII Ama 53/04, Journal of Laws of UOKiK of 2006, No. 1, item 14

1. Activities of the chamber of commerce consisting of negotiating and then recommending to the members of the chamber basic conditions of the license agreements such as price and duration of licenses constitutes the anticompetitive behavior. Such behavior results in restricting competition in the market for paid television and thus having an adverse effect on undertaking and consumers. By recommending the framework license agreement, the chamber of commerce aims at introducing standardized license agreements concluded by the chamber members with other undertakings. As a result of such standardization the supply of licenses to potential buyers is significantly limited.

2. Activities of the chamber of commerce did not take the shape of any formal act such as resolution or decision. Nonetheless, negotiating and then recommending to members of the chamber basic conditions of the license agreements, clearly aims at achieving anticompetitive results and as such is forbidden by the antimonopoly act.

- ***Application of antimonopoly act - notion of undertaking***

Judgment of the Supreme Court of 6 December 2007, III SK 16/07, Journal of Laws of UOKiK of 2008, No. 2, item 228

The characteristic feature of the antimonopoly legislation is the introduction of the autonomous meaning of legal concepts. The antimonopoly act invokes legal concepts taken from other statutes, but it redefines and adapts them for the purposes of the antimonopoly legislation [...]. Such autonomous meaning of legal concepts is often clearly expressed in the provisions of the antimonopoly act. [...] Article 4(1) of the antimonopoly act proclaims that the undertaking is any entity offering on an organized and long-lasting basis their products on their own behalf and account. [...] Any such entity may influence the competition on the market by stimulating the demand or generating the supply.

- ***Application of the antimonopoly act - notion of undertaking, liberal profession organization***

Judgment of the Antimonopoly Court of 14 May 1997, XVII Ama 11/97, nyr

The bar of advocates as an association of undertakings may be the party to the antimonopoly proceedings and may be charged with the infringement of the antimonopoly act. The bar limited the competition among advocates by adopting internal resolutions setting up the code of conduct of advocates which led to the violation of the public interest.

- ***Application of the antimonopoly act - liberal profession organizations, architects***

Judgment of the Court of Competition and Consumer Protection of 18 September 2007, XVII Ama 125/06, Journal of Laws of UOKiK of 2008, No. 1, item 7

1. Liberal profession organizations should limit themselves to performing their statutory tasks. Any activities of such organizations exceeding their statutory competences resulting in anticompetitive effects are punishable under the antimonopoly act. The resolution of the chamber of architects prohibiting them to engage in public tenders for architectural designs, where the price is the only tender criterion, results in the restriction of competition on the market for architectural services. Such prohibition precludes architects from engaging in lawful contracts and has an adverse effect on competition.
2. The antimonopoly act empowers the President of UOKiK to independently control commercial activities of undertakings in respect of their conformity with the competition law. The control of the antimonopoly authority is autonomous and separate from the control undertaken by other persons or public authorities, regardless of the criteria of their control. Therefore general supervision over the activities of the chamber of architects undertaken by the other authority does not preclude the President of UOKiK from controlling the chamber within the limits of the antimonopoly act. Consequently, any supervisory measures undertaken by the competent minister over the activities of the chamber neither influence nor determine the outcome of the control undertaken by the antimonopoly authority.

3. The chamber of architects is an association of undertakings within the meaning of the antimonopoly laws and resolutions of the chamber may be treated as agreements for the purposes of the antimonopoly act.

- ***Application of the antimonopoly act - relevant market - definition and role***

Judgment of the Court of Appeal of 21 April 2010, VI ACa 1092/09, nyr

The correct definition of the relevant market determines the correctness of instituting and conducting of the antimonopoly proceedings. The relevant market delimits the arena of competition between specific products within specific geographic space.

- ***Application of the antimonopoly act - relevant market, product market, geographic market***

Judgment of the Court of Competition and Consumer Protection of 18 January 2007, XVII Ama 101/05, Journal of Laws of UOKiK of 2007, No. 3, item 33

1. Determining of the product market is of crucial importance for defining the relevant market. Specifying the product market allows for extracting products or services according to their unique features, such as their intended use, functions and price. This enables the authority to distinguish between products and services which are not easily interchangeable. Such products are seen as substitutes by their purchasers.
2. When defining the relevant market, the authority should employ narrow segmentation criteria. Employment of wide segmentation criteria may lead to failure in establishing of any significant market position of a dominant undertaking. As a result, the provisions on the prohibition of abuse of a dominant position would be ineffective with detriment to consumers and other undertakings.
3. A geographic market comprises the area in which the market conditions for all undertakings involved are the same with regard to barriers of entry, price differences, transport costs and other factors.

- ***Application of the antimonopoly act - relevant market***

Judgment of the Court of Appeal of 8 August 2005, VI ACa 6/05, Glosa 2006, No. 2, p. 88

The tendency to employ narrow segmentation criteria, when defining the relevant market, should not lead to narrowing the relevant market comprising to one product and one producer. The art of defining the relevant market does not consist in defining it as narrow as possible. It is about defining the relevant market properly as such definition of relevant market is crucial for the correct analysis of commercial activities of undertakings.

- ***Application of the antimonopoly act - relevant market, geographic market***

Judgment of the Court of Appeal of 24 July 2008, VI ACa 12/08, Journal of Laws of UOKiK of 2008, No. 4, item 41

It is not possible to uphold the concept that intensification of demand for certain products in one area of the country should be crucial for determining the geographical market. Such concept ignores the fact that the said demand may be detected nationwide, but for certain reasons such as migration or financial situation of consumers it is not uniform in all areas of the country.

- *Application of the antimonopoly act - relevant market*

Judgment of the Court of Competition and Consumer Protection of 28 November 2008, XVII Ama 107/07, Journal of Laws of UOKiK of 2009, No. 1, item 6

The relevant market delimits the area of competition between the undertakings concerned. The most important part of the relevant market is the product market. It comprises of products which are not easily interchangeable. Within such a market, all products are substitutes and may be easily replaced by other products by consumers. To define the product market one should find the proper differentiating criteria such as intended use, functions, price or quality. When defining the relevant market, the authority should employ narrow criteria of segmentation. Only such criteria allows for precise determination of geographical market and enable the authority to measure the market position of undertakings.

2. Anticompetitive agreements

- *Anticompetitive agreements - association of undertakings, price recommendations*

Judgment of the Antimonopoly Court of 28 January 2002, XVII Ama 33/01, Journal of Laws of UOKiK of 2002, No. 2, item 103

The resolution of the association of undertakings recommending the minimum prices for certain services [...] should be regarded as anticompetitive agreement.

- *Anticompetitive agreements - concerted practices, parallel behavior*

Judgment of the Supreme Court of 24 April 1996, I CRN 49/96, OSNC 1996, No. 9, item 124

When three independent undertakings producing the same products fix their prices several times on the same days, it is enough to presume that it was the result of their concerted and anticompetitive practice.

- *Anticompetitive agreements - vertical agreements, fines*

Judgment of the Antimonopoly Court of 8 May 1996, XVII Amr 15/96, Wokanda 1997, No. 8, item 46

The anticompetitive vertical agreement may be concluded by undertakings operating on different level of distribution or production in the form of contract or concerted practice. The specific feature of the anticompetitive vertical agreement is that undertakings involved oblige themselves to undertake different activities specific to their level in distribution or production chain. Despite these differences anticompetitive behavior of all undertakings involved should be assessed on the same basis. Therefore there is no legal basis for different treatment of anticompetitive activities of undertakings performed on different level of distribution or production chain.

- *Anticompetitive agreements - exchange of information, parallel behavior*

Judgment of the Antimonopoly Court of 20 September 1995, XVII Amr 15/95, Wokanda 1996, No. 8, item 57

1. Any exchange of information between undertakings regarding costs of production or price increases is anticompetitive and illegal whenever it leads to or allows the coordination of commercial activities of competitors. This rule applies both to undertaking who communicates the piece of information and to undertaking who receives the piece of

information if such communication leads or aids to infringement of the antimonopoly act by unification or coordination of anticompetitive behavior between undertakings involved in exchanging of the information.

2. Following the price leader with regard to set the same prices among competitors is illegal if the price level is a result of compromise between the price leader and other competitors resulting from tacit or explicit collusion.

- ***Antimonopoly agreements - exemptions, public policy defense***

Judgment of the Antimonopoly Court of 21 May 1993, XVII Amr 9/93, nyr

When disorganization and malfunctioning of the market is the result of unsuccessful governmental policy, it should be regarded as a relevant factor in assessing of potentially anticompetitive commercial activities of undertakings [*the authority should investigate to what extent anticompetitive commercial activities of undertakings are a rational economic response to distortive public policy*].

- ***Anticompetitive agreements - notion of agreement, parallel behavior, concerted practice***

Judgment of the Court of Appeal of 5 October 2005, VI ACa 1146/04, Journal of Laws of UOKiK of 2006, No. 1, item 18

Coordination of commercial activities of undertakings may be treated as a concerted practice only if all undertakings are freely involved in this coordination. The antimonopoly act does not require any special form of agreement. Therefore all kinds of agreements are covered, including written and oral ones. The notion of 'agreement' is wider than the notion of 'contract'. Consequently, any form of mutual consent, irrespective of legal or factual form may constitute an agreement. The heart of an agreement is the coordination of commercial activities which is not a result of binding contract but stems from the intentional cooperation restricting the competition by its object or effect. The coordination eliminates commercial uncertainty which is inherent to the free market and competition. To identify the existence of concerted practice, it is not enough to track parallel behavior. The analysis of such behavior should include all market conditions and prove that it is not a normal and adequate behavior in the given market conditions. Therefore concerted practices should be distinguished from pure parallel behavior. The latter consist of similar and simultaneous actions resulting from adaptation to changing market conditions and being a normal and adequate behavior under certain circumstances. Such adjustment to changing market conditions may not be a result of prior mutual consent and it should be treated as an agreement. When assessing parallel behavior, special attention should be given to activities of a market leader. a horizontal agreement is concluded by direct competitors acting on the same side of the market.

- ***Anticompetitive agreements - notion of agreement, exemptions from the prohibition of the anticompetitive agreements***

Judgment of the Court of Competition and Consumer Protection of 29 May 2006, XVII Ama 9/05, Journal of Laws of UOKiK of 2006, No. 4, item 58

1. Non-compete clause contained in agreements have an anticompetitive effect and is illegal due to violation of Article 5 [at present Article 6] of the antimonopoly act. The lack of intention to restrict competition of the parties to the agreement is legally irrelevant, as well as the lack of obligation to notify a merger resulting from such agreement.

2. Non-compete clauses may be justifiable unless the same result may be achieved though detailed regulation of mutual rights and obligations resulting from the transfer of licenses, know-how and other intellectual property rights.

- ***Anticompetitive agreements - price fixing, parallel behavior***

Judgment of the Supreme Court of 9 August 2006, III SK 6/06, Journal of Laws of UOKiK of 2007, No. 3, item 39

1. Price agreements constitute hardcore infringements of competition law. Such agreements extensively influence and deviate commercial behavior of undertakings. Detection of such anticompetitive agreements may be very difficult since they hardly ever take the form of formal agreements and are carefully secured from any disclosure. Therefore, when investigating hardcore restrictions, it is recommended to rely on factual presumptions which alter the burden of proof. To prove price fixing the antimonopoly act does not require revealing formal agreements. Identifying the existence of any informal and tacit coordination leading to the anticompetitive effect is enough. Price fixing agreements may be proven with the use of both direct and indirect evidence.
2. Price fixing agreements should be distinguished from conscious parallelism which is a standard commercial reaction of undertakings adapting to changing market conditions. It is a normal commercial reaction and it is not illegal to adapt to changing market conditions by changing the price offers. The difference between legitimate parallel behavior and the unlawful concerted practice is that the former is a rational imitation of competitors' behavior and the latter is the effect of tacit collusion. However, if price imitation is preceded by any direct or indirect contact between competitors which have as their object or effect alteration of commercial behavior, it should be regarded as price fixing within the meaning of Article 5(1)(1) [at present Article 6(1)(1)] of the antimonopoly act.

- ***Anticompetitive agreements - notion of agreement***

Judgment of the Court of Competition and Consumer Protection of 12 July 2007, XVII Ama 64/06, Journal of Laws of UOKiK of 2007, No. 4, item 46

1. The antimonopoly act presents a very flexible approach towards establishing the existence of an anticompetitive agreement. It only requires proving that any exchange of acts of will of undertakings took place, irrespective of their form. The subject of such act of will is devotion to take action contrary to binding competition rules. The authority is obliged to prove that such act of will was made in order to prove the existence of anticompetitive agreement.
2. Anticompetitive agreements may take the form of a contract or any informal consent leading to elimination, restriction or impediment to competition. Therefore, if informal agreements are covered by the antimonopoly act, it is not necessary that such agreements were concluded by the official representative of an undertaking.

- ***Anticompetitive agreements - per se infringements, direct application of EU Treaty rules on competition, notion of impact on trade between MS***

Judgment of the Court of Appeal of 20 November 2008, VI ACa 384/08, Journal of Laws of UOKiK of 2009, No. 1, item 8

1. It is not necessary to establish adverse market effects to prove the existence of an anticompetitive agreement. The wording of Articles 101(1)(1) and (2) [at present Article 106(1)] of the antimonopoly act unequivocally enables the competition authority to fine the undertaking just for concluding the agreement violating Article 8 [at present Article 9] of the antimonopoly act or Articles 81 or 82 [at present Article 101 or 102 of TFEU].
2. When assessing if the anticompetitive practice affects the trade between member states, it is important to take into consideration that if the undertaking enjoys a dominant position on the national market, it may create a significant barrier of entry. It is enough to establish the possibility of adverse impact on trade between member states. Therefore, it is not necessary to prove that the anticompetitive agreement adversely affects the trade between member states.

- ***Anticompetitive agreements - notion of agreement, indirect evidence, intentionality, bid rigging***

Judgment of the Supreme Court of 14 January 2009, III SK 26/08, OSNP 2010, No. 13-14, item 179

1. Anticompetitive agreement is the agreement in which the parties intend to interfere with the mechanism of competition, as well as the agreement where the restriction of competition is an unavoidable effect of the agreement.
2. Proving the conclusion of anticompetitive agreement, during the court proceedings, may be based on factual presumptions, as described in Article 231 of the civil procedural code.
3. Awareness of infringing the provisions of antimonopoly act is irrelevant for establishing existence of an anticompetitive practice. Infringement of Article 5 par. 1 [at present Article 6(1)] of the antimonopoly act is independent of intentions of undertaking.
4. Bid rigging aims at elimination of price competition, shaping the market structure and creating barriers of entry to potential competitors. Therefore any bid rigging should be considered as per se violation of the antimonopoly act unless there exist some extraordinary circumstances.

- ***Anticompetitive agreements - notion of agreement, indirect evidence***

Judgment of the Court of Competition and Consumer Protection of 7 November 2005, XVII Ama 26/04, Journal of Laws of UOKiK of 2006, No. 1, item 15

Establishing the existence of an anticompetitive agreement is not necessary to prove any written or oral agreement between undertakings. The primary goal of the antimonopoly investigation is to establish the result or the goal of anticompetitive cooperation [...] Therefore, irrespective of the form, any cooperation between undertakings directed against their competitors or consumers may constitute an anticompetitive agreement. To reveal the aim of the cooperation, it is enough to establish that cooperating undertakings intentionally limited their margin of discretion during negotiations with third parties. An anticompetitive agreement consists of mutual consent and parallel behavior irrespective of the fact if it really led to adverse market effects.

- *Anticompetitive agreements - vertical agreements, market definition*

Judgment of the Court of Appeal 12 May 2010, VI ACa 983/09, nyr

It is possible to define the relevant market as a market for one specific book. Any agreement between the publisher and distributors regarding the minimum resale price maintenance may be treated as an anticompetitive vertical agreement.

3. Abuse of dominance

- *Abuse of dominance - duopoly*

Judgment of the Antimonopoly Court of 25 July 2001, XVII Ama 96/00, nyr

Under the mature duopoly, market structure neither of the two active undertakings enjoys unilateral dominant position. Therefore, any 'special price offers' prepared by one of the undertakings may not be treated as unfair prices.

- *Abuse of dominance - onerous contract terms*

Judgment of the Antimonopoly Court of 22 November 2000, XVII Ama 72/00, nyr

Onerous contract terms have objective and subjective dimensions. Terms are subjectively onerous if they are perceived by the party to the agreement as onerous. Terms are objectively onerous if the party would not accept such terms under the competitive market conditions. Terms would be objectively onerous if there is not balance of obligations and the exchange of obligations is not equivalent.

- *Abuse of dominance - notion of abuse*

Judgment of the Antimonopoly Court of 6 November 2000, XVII Ama 8/00, Wokanda 2002, No. 7-8, item 104

Undertaking may lawfully enjoy the dominant position on the market. Such market position is legal. Any abuse of such position is prohibited. The reduction of commercial risk does not constitute by itself the abuse of a dominant position.

- *Abuse of dominance - notion of abuse*

Judgment of the Antimonopoly Court of 26 January 2000, XVII Ama 56/99, nyr

If the heating supplier threatens to terminate the supply of heating in the absence of unilateral acceptance of new prices by the recipient of the heating, such behavior constitutes the abuse of a dominant position.

- *Abuse of dominance - application of dissimilar conditions*

Judgment of the Antimonopoly Court of 22 December 1999, XVII Ama 44/99, nyr

If the demand for certain goods exceeds the supply, the dominant undertaking should supply all contractors on equal terms, unless there exist special reasons for favoring one group of contractors.

- *Abuse of dominance - notion of abuse*

Judgment of the Antimonopoly Court of 14 January 2000, XVII Ama 4/01, nyr

Enforcing the lawful and binding contract may not be treated as an abuse of market dominance.

- *Abuse of dominance - leaving the market, freedom of enterprise*

Judgment of the Antimonopoly Court of 19 May 1999, XVII Ama 13/99, nyr

1. The undertaking may freely decide to leave the certain market and it should not be treated as an abuse of the market dominance. In principle, abandonment of the market may not be regarded as an exploitation of the market power of the dominant undertaking even if it puts their contractors in a difficult position. Such behavior of the dominant undertaking does not limit the freedom of other undertakings and is neutral for the future competition. Therefore, the antimonopoly act does not provide the legal basis to force the dominant undertaking to stay on the market. Otherwise, it would lead to results contrary to the goals of the antimonopoly act limiting the freedom of undertaking to freely decide on allocation of their resources and sustaining profitable commercial activity.
2. The antimonopoly law may not be approached as a legal instrument enabling one undertaking to coerce the other to act on the market which is of no interest for such.

- *Abuse of dominance - cross-subsidization*

Judgment of the Antimonopoly Court of 6 January 1999, XVII Ama 60/98, OSP 2000, No. 11, item 168

If the antimonopoly authority prohibited the dominant undertaking to cross-subsidize their commercial activity on the other competitive market, such undertaking may not justify the non-execution of this decision by indicating that it would not be possible for them to face competitors in the absence of cross-subsidization.

- *Abuse of dominance - notion of abuse*

Judgment of the Antimonopoly Court of 22 October 1993, XVII Amr 25/93, Wokanda 1994, No. 3, item 57

An undertaking is abusing their dominant position if they coerce the contractor to provide the dominant undertaking with the access to contractor's financial books. Such access may allow the dominant undertaking to learn the business secrets of their competitors.

- *Abuse of dominance - refusal to deal*

Judgment of the Antimonopoly Court of 10 December 2001, XVII Ama 3/01, Wokanda 2003, No. 6, item 53

Refusal to supply the good may be regarded as an abuse of the dominant position if it is of discriminatory nature.

- *Abuse of dominance - refusal to deal*

Judgment of the Supreme Court of 9 October 2003, I CK 134/02, nyr

Every undertaking has a right not to sell goods to unreliable contractors or to debtors. However, the criteria for the refusal to sell should be objectively justified and be applicable to all contractors on equal terms. Furthermore, such refusal should not be permanent but it should depend on the meeting of the set criteria by the contractor.

- ***Abuse of dominance - notion of abuse***

Judgment of the Supreme Court of 16 February 2005, IV CK 541/04, OSP 2006, No. 1, item 3

Refusal to renegotiate the contract for healthcare services may constitute an abuse of dominant position by the National Health Fund. The Fund enjoys the monopolist position on the market for publicly contracted healthcare services.

- ***Abuse of dominance - notion of abuse***

Judgment of the Court of Competition and Consumer Protection of 1 September 2004, XVII Ama 90/03, Glosa 2005, No. 1, p. 89

The contracts concluded with farmers for the supply of future products should indicate the price for the crops. In the absence of the price indication, such contract transfers all commercial risk upon the farmer and puts in a privileged position the contracting undertaking. Under such a contract the contracting undertaking has a guarantee that certain amount of products will be delivered and the price will be established on the day of actual purchase. At the same time, the farmer is obliged to produce the goods at the risk that the actual price paid on the day of the purchase could be below their costs. For these reasons such contract terms may be regarded as onerous.

- ***Abuse of dominance - refusal to deal***

Judgment of the Court of Competition and Consumer Protection of 2 June 2004, XVII Ama 94/03, Wokanda 2005, No. 7-8, item 99

The refusal to deal is not listed as prohibited practice constituting the abuse of a dominant position. Nevertheless, the list of practices is open and hence refusal to deal may be treated as a specific form of abuse of a dominant position. Refusal to deal may constitute an abuse of a dominant position if the contractor does not have alternative sources of supply or sale.

- ***Abuse of dominance - excessive pricing***

Judgment of the Court of Appeal of 14 June 2005, VI ACa 93/05, Journal of Laws of UOKiK of 2005, No. 3, item 49

When defining 'excessive pricing' two sets of criteria should be applied in order to avoid defective analysis. First group of criteria refers to the costs of the undertaking. Several costs should be mentioned: own cost barred by the undertaking during the production, the amount of profit gained per item sold, general profitability of undertaking being a relation between the profit and the incurred costs. The second group of criteria regards the comparison of prices listed on the market with the prices of potential competitors on the other markets.

- ***Abuse of dominance - imposition of unfair contract terms***

Judgment of the Supreme Court of 23 February 2006, III SK 6/05, OSNP 2007, No. 5-6, item 86

The abuse of the dominant position may take place when the dominant undertaking forces their agent to accept contract obligations which would not normally be accepted if not threatened with the termination of the agency agreement.

- *Abuse of dominance - onerous contract terms*

Judgment of the Court of Competition and Consumer Protection of 14 September 2006, XVII Ama 71/05, Journal of Laws of UOKiK of 2006, No. 4, item 61

The notion of 'onerous contract terms' refers to the situation when the party to the agreement accepts terms which are more severe than usual contract terms applicable in similar commercial contracts. When evaluating whether the contract terms are onerous, the authority should use the counterfactual. The counterfactual would show whether it might be possible for the undertaking to accept similar contract terms in the absence of the dominant position of the other party to the agreement.

- *Abuse of dominance - notion of imposition*

Judgment of the Supreme Court of 5 January 2007, III SK 17/06, nyr

'Imposition' of the contract terms should not be identified with the psychological coercion. Such coercion may accompany the imposition of the contract provisions but is not the necessary element of this anticompetitive practice. 'Imposition' should be assessed through the objective criteria verifying whether the particular contract provisions result from unlawful pressure or the voluntary negotiations.

- *Abuse of dominance - notion of abuse, preventing formation of conditions for competition*

Judgment of the Court of Competition and Consumer Protection of 29 June 2007, XVII Ama 14/06, Journal of Laws of UOKiK of 2007, No. 4, item 45

Counteracting the formation of conditions necessary for the emergence or development of the competition is a form of abuse of a dominant position. Under the existing economic conditions, this practice should be broadly interpreted so as to cover counteracting formation of competition on any market, not only on the market on which the undertaking enjoys the dominant position.

- *Abuse of dominance - notion of abuse*

Judgment of the Court of Appeal of 20 November 2008, VI ACa 704/08, Journal of Laws of UOKiK of 2009, No. 2, item 16

Two factors are decisive for establishing the dominant position of the undertaking. First, the undertaking should be able to restrict effective competition. The second, the undertaking should be able to act independently of their competitors, contractors or consumers. The presumption of a dominant position inferred from the 40% market share is only a formal one and may be rebutted during the process. Therefore to establish a dominant position it is not enough to show a high market share of the undertaking. Market dominance should be constant and stable through a long period of time preventing any new successful entrants.

- *Abuse of dominance - notion of abuse, objective liability*

Judgment of the Court of Competition and Consumer Protection of 28 November 2008, XVII Ama 107/07, Journal of Laws of UOKiK of 2009, No. 1, item 6

1. The behavior of the undertaking may constitute an abuse of dominant position even if no adverse effects occurred in the market. The mere possibility of inducing such effects on competition is enough to establish that the behavior in question restricts the competition.

2. The liability of the undertaking under the antimonopoly act is of objective character. It means that the lack of intention ('guilt') of the dominant undertaking to abuse their market position does not serve as the exculpatory factor.

- ***Abuse of dominance - unfair prices***

Judgment of the Supreme Court of 12 February 2009, III SK 29/08, OSNP 2010, No. 15-16, item 204

The notion of 'unfair price', as indicated in Article 8(2)(1) [at present Article 9(2)(1)] of the antimonopoly act, covers situations where the undertaking calculating the price includes costs which were not barred in relation to the production or distribution of the product. It is irrelevant whether the calculated price is at the same time an excessive price. The misleading method of calculation of the price is enough to establish that the price is 'unfair'.

- ***Abuse of dominance - abrogation of anticompetitive behavior, limits for application of rules on abuse of dominance, burden of proof***

Judgment of the Supreme Court of 2 July 2009, III SK 10/09, OSNP 2011, No. 7-8, item 116

1. Strict determination of the prohibited anticompetitive behavior determines the proper execution of the decision of the antimonopoly authority. The proper execution of the decision takes place when the undertaking really ceases to engage in prohibited practices.
2. If the undertaking loses a dominant position after imposing a fine for the abuse of a dominant position, such undertaking may still be fined for non-executing of the prohibition decision. However, the decision for non-execution of the decision should only cover the period between the date when the decision became final and the date of losing the dominant position by the undertaking concerned. Consequently, if the undertaking loses their dominant position after the day of issuance of the prohibition decision, but before the date of losing the dominant position by the undertaking concerned, the antimonopoly authority may not fine the undertaking for non-executing of the prohibition decision. Decisions prohibiting the abuse of a dominant position are valid as long as the undertaking enjoys the dominant position. The burden of proof in the presented scenarios rests upon the undertaking.

- ***Abuse of dominance - notion of abuse, interpretation of the catalogue of practices, differentiation of prices***

Judgment of the Supreme Court of 19 August 2009, III SK 5/09, OSNP 2011, No. 9-10, item 144

1. The abuse of dominance takes place when the behavior of the dominant undertaking is objectively contrary to normal commercial behavior on the competitive market. Such behavior adversely affects the market structure or takes a form of competition based not on merits but on the strength of the undertaking.
2. The antimonopoly act provides for an open catalogue of prohibited unilateral behaviors. Consequently, it is not justified to broadly interpret Article 8(2) [at present Article 9(2)] of the antimonopoly act.

3. Application of different prices is not a *per se* infringement of the antimonopoly act, even if it is undertaken by the dominant undertaking. Price differentiation may have objective justification. Prices may differ across the given geographical area, being dependent on distinct variables like costs of transport or operative costs. Nonetheless, if the price differentiation is applied because of different level of wealth of consumers, it constitutes a price discrimination (purchasers of the same products have to pay different prices depending on the different place of purchase).

- ***Abuse of dominance - excessive pricing, concept of abuse***

Judgment of the Supreme Court of 18 February 2010, III SK 24/09, OSNP 2011, No. 15-16, item 222

1. The price is excessive if it is objectively too high in the given market conditions.
2. The notion of 'excessive price' should not be identified with the amount of margin or the profitability of the undertaking. The excessive price could be the price bringing only a small profit but with overestimated costs of production.
3. The notion of the 'abuse of a dominant position', as well as the notion of the 'anticompetitive agreement' are based on the objective criteria. The subjective criteria may play a role in the substantive analysis of the market behavior, but they are irrelevant for the definition of the exploitative practices.

- ***Abuse of dominance - tying***

Judgment of the Supreme Court of 17 March 2010, III SK 41/09, OSNP 2011, No. 21-22, item 285

Tying is a form of the abuse of a dominant position. Tying takes place when the undertaking makes conclusion of the sale of one product subject to purchase of the other product serving other purposes [*not related to the first one*].

- ***Abuse of dominance - unfair prices***

Judgment of the Court of Appeal of 17 December 2010, VI ACa 427/10, Apel.-W-wa 2011, No. 2, item 19

The public interest is violated not only when the adverse effects of the anticompetitive behavior affect a wide group of market participants, but also when the behavior induces other distortive effects. Application of heterogeneous price conditions (regarding airport and navigation fees) favoring a specific group of flight carriers (carriers offering domestic flights) should be regarded as an abuse of a dominant position. The relevant market consists of services connected with departures and arrivals of airplanes within the area of particular airport.

4. Merger control

- *Merger control - merger test*

Judgment of Antimonopoly Court of 28 March 2001, XVII Ama 88/99, nyr

The creation or strengthening of the dominance of the undertaking precludes the antimonopoly authority from authorization of the notified merger.

- *Merger control - fines*

Order of the Supreme Court of 7 July 1999, I CKN 184/99, OSNC 2000, No. 2, item 33

Imposition of the fine for failure to notify the merger [...] lies within the administrative discretion of the antimonopoly authority and is independent of the substantive analysis of the potential pro- or anticompetitive effects of the merger.

- *Merger control - developing markets, prohibition of mergers*

Judgment of the Antimonopoly Court of 8 October 1997, XVII Ama 33/97, Wokanda 1998, No. 2, item 46

The risk of potential anticompetitive effect of the merger is smaller if the merging undertakings operate on emerging markets. Therefore, it is usually not necessary to perform extensive substantive analysis of this type of mergers.

- *Merger control - time limit for conducting the proceedings, consequences of not observing the time limit*

Judgment of the Antimonopoly Court of 9 March 1994, XVII Amr 45/92, nyr

The 2-month time limit to conduct the merger proceedings is of substantive and statutory character. The antimonopoly authority is precluded from issuing a merger decision if the time limit elapsed [*such decision is invalid and the legal presumption applies that the antimonopoly authority authorized the merger*].

- *Merger control - party to the proceedings*

Order of the Antimonopoly Court of 11 March 1991, XVII Amr 5/91, Wokanda 1992, No. 4, item 37

Competitors of the merging undertakings cannot be parties to the merger proceedings [*and are deprived of the right to challenge the merger decision*].

- *Merger control - notion of notification obligation, ex ante control of transactions*

Judgment of the Court of Competition and Consumer Protection of 12 November 2003, XVII Ama 129/02, Journal of Laws of UOKiK of 2004, No. 2, item 295

Undertakings are obliged to notify the antimonopoly authority of the intended not consummated merger [*notification of the consummated merger is not legally effective and results in instituting sanctioning proceedings*].

5. Fines

- *Fines - legal character of liability under the antimonopoly act*

Judgment of the Court of Appeal of 17 May 2012, VI ACa 1428/11, nyr

The liability of undertakings regulated in the antimonopoly act is of objective nature, which means that the guilt [*intention*] of the undertaking is not the necessary element for establishing the infringement of the antimonopoly act. Therefore, any subjective elements of the antimonopoly delict such as guilt [*intention*] are irrelevant for the substantive analysis. Subjective elements of the antimonopoly delict may be taken into consideration at the stage of determining the amount of the fine to be imposed.

- *Fines - application of ECHR, legal character of liability under competition law*

Judgment of the Supreme Court of 21 April 2011, III SK 45/10, nyr

When the court reviews a decision of the antimonopoly authority imposing a fine for the infringement of the antimonopoly act, the court [...] should follow the standard applicable to the criminal cases, as defined by the European Court of Human Rights.

- *Fines - function of fines, exemptions from fines*

Judgment of the Supreme Court of 28 October 2003, I CK 179/02, nyr

The competence of the antimonopoly authority to impose fines for infringements of competition rules is of crucial importance in achieving the fundamental goal of the antimonopoly act i.e. public protection of competition and consumers [...]. This competence may not be limited by other actions or regulatory authorities conducting proceedings designed to protect competition in specific sectors of the economy [*such as energy or telecommunications and post*]. Limitation or derogation of the competence of the antimonopoly authority to impose fines in relation to undertakings active in a particular sector of the economy would need a legal basis in an unequivocal statutory provision. Polish law does not provide for any such provisions. Therefore, if the energy regulator is investigating the infringement of the energy law in parallel to the investigation of the antimonopoly authority, it does not limit the competence of the antimonopoly authority to fine the undertaking for violating the competition rules.

- *Fines - function of fines*

Judgment of the Supreme Court of 27 June 2000, I CKN 793/98, nyr

Financial sanction imposed for the infringement of competition rules should have a repressive and educational character. Therefore, such fine should be adjusted to the economic potential of the undertaking fined.

- *Fines - functions of fines, limits for fines*

Judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 3/97, nyr

1. When imposing a fine the antimonopoly authority should act in conformity with the functions of the fine and take into consideration the economy or proceedings. Consequently, the antimonopoly authority violates the general principles of administrative procedure [...] when imposing a fine which is excessive as regards the function of the fine.

2. The decision imposing a fine is defective if the amount of the fine is disproportionate from the point of view of the level of intent of the undertaking.
 - ***Fines - function of fines, financing of fines, local government***
Judgment of the Court of Competition and Consumer Protection of 7 April 2004, XVII Ama 48/03, Journal of Laws of UOKiK of 2004, No. 3, item 311
 1. The fine under Article 101(1)(1) [at present Article 106(1)(1)] of the antimonopoly act is the basic sanction for anticompetitive behavior imposed by the antimonopoly authority for the anticompetitive behavior [...].
 2. It is legally irrelevant that the fined undertaking is the municipal company [...] investing all the profits in municipal projects. Furthermore, it is irrelevant that the undertaking organizes the public utility services. These factors may not affect fixing the amount of fine since the antimonopoly act does not qualify them as mitigating circumstances.
 - ***Fines - function of fines, leniency***
Judgment of the Court of Appeal of 5 August 2010, VI ACa 116/10, nyr
 Preventive function of the fine is not distorted by the *leniency* programme. The programme is open for any undertaking involved in anticompetitive agreement that follows the statutory conditions for fine reduction in exchange for cooperation with the antimonopoly authority. The *leniency* programme serves the public interest since it results in more efficient detection and elimination of anticompetitive agreements.
 - ***Fines - legal character and function of procedural fines, duty to cooperate***
Judgment of the Supreme Court of 7 April 2004, III SK 31/04, nyr
 Financial sanction for refusal to provide the information or supply of false or misleading information is not a criminal sanction. The character of this sanction is administrative and hence the interpretation rules of criminal law are not applicable in this situation. Not every antimonopoly sanction or fine is the criminal sanction. Procedural sanctions imposed by the antimonopoly authority are sanctions resulting from neglecting procedural duties of undertaking during the antimonopoly proceedings and they are of administrative character. Those sanctions may serve several goals. They are repressive - they are imposed for violation of statutory duty of every undertaking to cooperate with the antimonopoly authority. They are preventive - they prevent similar infringements from occurring in the future and encourage abiding by the law. They are disciplinary - awareness of the sanction discourages undertaking from non-obeying the law. Those goals are similar to goals of the criminal sanctions, however, they are not the same [...].
 - ***Fines - failure to notify a merger***
Judgment of the Antimonopoly Court of 3 December 1999, XVII Ama 67/99, nyr
 Imposition of the fine [...] for the failure to notify the merger lies within the administrative discretion of the antimonopoly authority. The lack of adverse effects on competition of not-notified merger may be a mitigating factor for determination of the amount of fine.
 - ***Fines - failure to execute decision***
Judgment of the Antimonopoly Court of 12 February 2001, XVII Ama 42/00, nyr
 Delay in execution of the final judgment of the antimonopoly court gives a ground for imposing the financial sanction.

- *Fines - failure to execute decision, fining directives*

Judgment of the Antimonopoly Court of 2 December 1998, XVII Ama 55/98, Wokanda 2000, No. 2, item 56

When determining the amount of the fine for non-executing of the decision or the judgment, the antimonopoly authority should take into the consideration the degree of intent of the undertaking, social detriment caused by the anticompetitive behavior and financial condition of the undertaking.

- *Fines - failure to execute decision, local government*

Judgment of the Court of Competition and Consumer Protection of 4 December 2003, XVII Ama 4/03, Wokanda 2004, No. 11, item 51

If the municipality refuses to desist from the anticompetitive practice, as ordered in the decision of the antimonopoly authority [...], it creates a legal ground for fining the municipality for non-execution of the final decision in accordance with Article 102(1) [at present Article 107] of the antimonopoly act.

- *Fines - reduction of fines, aggravating circumstances*

Judgment of the Antimonopoly Court of 16 November 1994, XVII Amr 31/94, Wokanda 1995, No. 9, item 52

[Decisions of the antimonopoly authority are not enforceable if challenged before the court] Except for extraordinary circumstances, the antimonopoly court does not reduce the amount of the fine imposed by the antimonopoly authority if the undertaking concerned does desist from the anticompetitive behavior during the court proceedings.

- *Fines - procedural fines, duty to cooperate*

Judgment of the Court of Competition and Consumer Protection of 9 July 2003, XVII Ama 98/02, Journal of Laws of UOKiK of 2004, No. 1, item 280

When the undertaking refuses to provide the antimonopoly authority with the information requested it may be subject to a financial sanction.

- *Fines - desistance from the anticompetitive behavior*

Judgment of the Court of Competition and Consumer Protection of 2 June 2005, XVII Ama 65/04, nyr

Discontinuance of the anticompetitive behavior may not be a ground for desistance from imposing a fine on the undertaking. Such desistance would be contrary to the repressive function of the antimonopoly fines.

- *Fines - due process, anticompetitive practices*

Judgment of the Court of Appeal of 20 May 2005, VI ACa 87/05, Apel.-W-wa 2006, No. 2, item 14

If the decision imprecisely defines what constituted the anticompetitive behavior of the undertaking, the undertaking concerned may not be fined for non-executing of such decision.

- *Fines - financing of fines, local government*

Judgment of the Supreme Court of 5 January 2007, III SK 16/06, Glosa 2008, No. 1, p. 95

The source, the form and the method of financing the due fine by the undertaking is irrelevant [...] from the point of view of the goals and functions of the fine. Therefore the local government should not be put in a privileged position only because it serves local community and organizes the public utility services [*The antimonopoly authority should disregard the legal form of the undertaking when imposing a fine*].

- *Fines - application of fines, lack of consistent case law*

Judgment of the Supreme Court of 15 July 2009, III SK 34/08, OSNP 2011, No. 7-8, item 117

The lack of prior decisions or a case law finding a certain behavior of the undertakings as anticompetitive does not create a legal obstacle to sanction such behavior and fine the undertaking.

- *Fines - strict interpretation of rules on fines, quasi-criminal character of rules on fines*

Judgment of the Court of Appeal of 2 February 2011, VI ACa 907/10, nyr

Interpretation of the provisions of the antimonopoly act on fines should be rigorous so as to avoid the risk of any mistake when imposing fines. Furthermore, when the court reviews the case where the fine was imposed, it should follow the judicial standard of review applicable in criminal cases.

6. Antimonopoly proceedings

- *Antimonopoly proceedings - legal character of notification of possible anticompetitive behavior*

Order of the Supreme Administrative Court of 12 July 2011, II GSK 1035/11, nyr

[*Everybody has the right to submit to the antimonopoly authority a formal written notification of possible anticompetitive practices being applied*] The antimonopoly authority verifies the submitted notification in order to establish whether there is a need to institute the antimonopoly proceedings. [...] If the information submitted is not sufficient, the antimonopoly authority may institute the explanatory proceedings that may precede the antimonopoly proceedings. The notifying individual [*enjoys the right to official response to their notification but*] is not entitled to challenge the position of the antimonopoly authority. The information refusing the institution of the antimonopoly proceedings should not be treated as an administrative decision. The response is of purely informative character and it is not a binding administrative act. The antimonopoly authority enjoys discretion as to how to respond to notification and whether to institute the antimonopoly proceedings. The only obligation of the antimonopoly authority is to transmit to the notifying individual the information concerning the reasoned and official assessment of the notification. The antimonopoly authority is not bound by the notification and enjoys full discretion whether to institute antimonopoly proceedings.

- **Antimonopoly proceedings - party to the proceedings, limited rights of competitors**
Judgment of the Antimonopoly Court of 22 April 1998, XVII Ama 81/97, Wokanda 1999, No. 4, item 61

1. During the merger proceedings the competitor is not the party to the merger proceedings [*The party to the proceedings is the active party to the concentration*].

2. The competitor to the party to the merger proceedings is precluded from demanding abrogation of the merger decision [*Such demand is inadmissible as he has no right to appeal against the decision of the antimonopoly authority*].

- **Antimonopoly proceedings - procedural guarantees for parties, evidence proceedings**

Judgment of the Antimonopoly Court of 21 September 1995, XVII Amr 40/95, Wokanda 1996, No. 10, item 56

According to Article 7 of the administrative procedural code, the antimonopoly authority is obliged to follow the principle of legalism and to comprehensively investigate the case and reveal relevant facts. [*The antimonopoly proceedings are the inquisitorial process*] The character of antimonopoly proceedings determines that the antimonopoly authority is obliged to secure the public interest. Furthermore, it is the antimonopoly authority on whom rests the responsibility to lead the proceedings and actively collect evidence [...].

- **Antimonopoly proceedings - procedural guarantees**

Judgment of the Antimonopoly Court of 20 August 2001, XVII Ama 115/00, Journal of Laws of UOKiK of 2001, No. 3, item 124

The antimonopoly proceedings, as a special administrative proceedings, should follow the procedural standards as set out by the procedural administrative code.

- **Antimonopoly proceedings - procedural guarantees, access to files, right to reply**

Judgment of the Antimonopoly Court of 13 September 2000, XVII Ama 71/99, nyr

[*The antimonopoly authority is obliged to inform the party about the conclusion of evidence proceedings and allow the party to gain access to the collected evidence and to take the stance in relation to the collected evidence. When informing about the conclusion of the evidence proceedings, the antimonopoly authority sets a time limit for the party to gain this access*] If the antimonopoly authority issues the decision before the expiration of time limit set to scrutinize the case files by the party and to state its position, such decision is defective and should be set aside [*The rule does not apply to merger proceedings*].

- **Antimonopoly proceedings - access to public information, access to files**

Judgment of the Voivodeship Administrative Court of 29 March 2012, II SAB/Wa 485/11, nyr

[*The notion of 'public information' is very broad in Polish law*] The notion of public information covers all documents, files and other materials produced by public authorities, as well as any other materials collected during and in connection with the proceedings. Therefore, even if the document was produced by the undertaking and submitted upon request of the antimonopoly authority, it is a piece of public information. Consequently, the notification form provided by the party to the antimonopoly proceedings is a piece of public information. This form is a part of case files which as a whole are covered by the notion of public information.

- ***Antimonopoly proceedings - procedural guarantees for the parties***

Judgment of the Antimonopoly Court of 21 July 1999, XVII Ama 34/99, Wokanda 2000, No. 12, item 44

Decision of the antimonopoly authority is defective if it was issued in the proceedings conducted without the party [*It may occur if the authority incorrectly identifies the parties or neglects to inform all parties about the proceedings*].

- ***Antimonopoly proceedings - protection of business secrets***

Judgment of the Antimonopoly Court of 10 July 2002, XVII Ama 78/01, Journal of Laws of UOKiK of 2002, No. 5, item 224

Business secret remains a secret even if an undertaking does not actively secure it from disclosing. Therefore, even if the undertaking expresses the willingness to disclose the secret, it remains protected until the undertaking actually does so.

- ***Antimonopoly proceedings - protection of business secrets***

Order of the Antimonopoly Court of 18 November 1998, XVII Amz 4/98, nyr

The antimonopoly authority may *ex officio* or upon the motion of the undertaking restrict access to case files to the other parties to the proceedings. The entity may do so, if the disclosure of the files would result in revealing business secrets to other undertakings, in particular its competitors.

- ***Antimonopoly proceedings - protection of business secrets***

Order of the Antimonopoly Court of 15 May 1996, XVII Amz 2/96, nyr

According to the definition of the business secret, as defined in Article 11(4) of the Act of 16 April 1993 on combating unfair competition, any data of the volume and value of sales or sources of sale and supply may be treated as business secret. If the undertaking is obliged to provide the antimonopoly authority with this sort of data, it may demand from the authority to restrict the access to this data to any third parties, especially competitors.

- ***Antimonopoly proceedings - protection of business secrets***

Order of the Antimonopoly Court of 27 November 1996, XVII Amz 4/96, nyr

Tax declarations of the undertaking contain highly confidential information and may not be disclosed to other undertakings during the antimonopoly proceedings.

- ***Antimonopoly proceedings - protection of business secrets***

Judgment of the Supreme Court of 5 September 2001, I CKN 1159/2000, OSNC 2002, No. 5 item 67

Articles 11(1) and 11(4) of the Act of 16 April 1993 on combating unfair competition define the notion of 'business secret'. In accordance with this definition, a piece of information that may be collected with the use of ordinary and lawful measures by anybody, may not be treated a business secret.

- ***Antimonopoly proceedings - legal character of explanatory proceedings, protection of business secrets***

Resolution of the Supreme Court of 8 April 2010, III SZP 1/10, OSNP 2011, No. 5-6, item 89

1. [*The explanatory proceedings are supplementary proceedings that may precede the antimonopoly proceedings*] The explanatory proceedings are of internal administrative nature. Those proceedings do not affect any rights or obligations of any individual and there are no parties to such proceedings. The explanatory proceedings are concluded with administrative act. However, this act is very peculiar because it is not directed to any individual. This act is a measure allowing the antimonopoly authority to institute the antimonopoly proceedings.
2. [*There are no parties to the explanatory proceedings*] Therefore, the antimonopoly authority is not competent to restrict access to files of these proceedings in relation to any individual. [*In Polish law only the parties to the proceedings enjoy the right of access to the case files*] The antimonopoly authority may restrict the access to the files only during the antimonopoly proceedings.
3. The antimonopoly authority may restrict access to the files to any party to the proceedings in relation to particular protected information. The extent of such restriction depends on the character of protected information and on the party to which this restriction will be addressed.
4. During the explanatory proceedings the antimonopoly authority collects information from the undertakings. Those undertakings may demand from the authority to restrict the provided information because it contains business secrets. Such motions are not relevant during the explanatory proceedings since there are no parties and no undertaking has access to files. However, if the information collected during the explanatory proceedings is used during the antimonopoly proceedings, the antimonopoly authority should follow demands of the undertakings and restrict access to files to the parties to the antimonopoly proceedings.

- ***Antimonopoly proceedings - evidence proceedings, duty to cooperate***

Judgment of the Antimonopoly Court of 28 June 1995, XVII Amr 14/95, Wokanda 1996, No. 7, item 62

1. The antimonopoly authority may demand from undertaking to provide it with all necessary information concerning this undertaking. Such demand may be issued within the limits set by the competences of the antimonopoly authority and the subject of the antimonopoly proceedings.
2. Unjustified refusal to provide requested information may result in imposition of fines upon the undertaking or its CEO.

- ***Antimonopoly proceedings - obligations of party, duty to cooperate***

Judgment of the Antimonopoly Court of 6 September 1993, XVII Amr 22/93, Wokanda 1994, No. 2, item 54

The party to the antimonopoly proceedings is obliged to cooperate with the antimonopoly authority. Commercial secrets of the party may not be a legal ground for refusal to provide information requested by the antimonopoly authority.

- ***Antimonopoly proceedings - services during the proceedings***

Judgment of the Antimonopoly Court of 1 March 1993, XVII Amr 37/92, Wokanda 1993, No. 8, item 33

Delivery of the decision by fax is not legally effective in view of Articles 9 and 49 of the administrative procedural code.

- ***Antimonopoly proceedings - standard of proof, indirect evidence***

Judgment of the Antimonopoly Court of 1 March 1993, XVII Amr 37/92, Wokanda 1993, No. 8, item 33

The facts of the case may be established with the use of direct and indirect evidence. Existence of the anticompetitive agreement may be proven indirectly by showing parallel behavior of undertakings and proving that such behavior may be only the result of collusion in absence of any circumstantial or objective evidence justifying such behavior.

- ***Antimonopoly proceedings - expert opinions, rights of defense***

Judgment of the Antimonopoly Court of 22 April 2002, XVII Ama 41/01, nyr

If the party to the proceedings challenges the testimony of the expert, the antimonopoly authority is obliged to organize a hearing and allow the expert to supplement such testimonies.

- ***Antimonopoly proceedings - two types of control of undertaking, duty to cooperate***

Judgment of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02, Journal of Laws of UOKiK of 2004, No. 1, item 281

[*There are two kinds of inspections in the antimonopoly act: the simple inspection and the inspection connected with the search of premises or persons*] The simple inspection, as laid down in Article 57 [at present Article 105a] of the antimonopoly act, differs from the inspection connected with search, as regulated in Article 58 [at present Article 105c] of the antimonopoly act, because it is based on the voluntary and conscious cooperation of the inspected undertaking. During the simple inspection the undertaking is obliged to provide any necessary information or access to books, documents, data storage, premises and means of transport. Lack of cooperation during the simple inspection may result in imposition of financial sanctions upon the undertaking. However, the antimonopoly authority may not force the undertaking to grant immediate access on the spot to demanded items. The inspection with search is authorized by the court and hence it may be conducted without the prior consent or knowledge of the inspected undertaking. The employees of the antimonopoly authority are entitled to enter any room belonging to the undertaking and have access to books, documents, data storage, premises and means of transport related to the subject of inspection.

- ***Antimonopoly proceedings - inspection of premises, duty to cooperate***

Judgment of the Supreme Court of 7 May 2004, III SK 35/04, OSNP 2005, No. 7, item 103

During the inspection of the premises of the undertaking the obligation of the undertaking to cooperate with the antimonopoly authority includes providing access to the employees of the authority to all documents related to the subject of the inspection or providing a copy of all such documents.

- ***Antimonopoly proceedings - procedural fines, duty to cooperate***

Judgment of the Supreme Court of 7 April 2004, III SK 31/04, OSNP 2005, No. 4, item 60

The fine under Article 101(2)(2)(b) [at present Article 106(2)(2)] of the antimonopoly act is imposed upon the undertaking for the lack of response to the formal request of the antimonopoly authority to present the necessary information. Such information is necessary for the proper and prompt conduct of the antimonopoly proceedings. Late response, after the institution of the fining procedure, does not preclude the antimonopoly authority from imposing the financial sanction. [*The sanction is of punitive character and is designed to persuade undertaking to cooperate efficiently and it prevents obstruction of the antimonopoly proceedings because of the lack of cooperation of undertakings*]

- ***Antimonopoly proceedings - inspection of companies' premises, prior information on instituting proceedings***

Judgment of the Antimonopoly Court of 16 December 1998, XVII Ama 62/98, Wokanda 2000, No. 4, item 52

It is not compulsory to institute the antimonopoly proceedings against the undertaking and notify them of this fact in advance, in order to conduct the inspection of premises of the undertaking concerned.

- ***Antimonopoly proceedings - suspension of proceedings, role of a judgment of civil court***

Order of the Antimonopoly Court of 3 December 1997, XVII Amz 5/97, nyr

The judgment of the civil court adjudicating on the private lawsuit based on the possible infringement of the antimonopoly act is not binding for the antimonopoly authority. Any parallel civil law proceedings regarding the possible infringement of the antimonopoly act do not give any ground to suspend the antimonopoly proceedings.

- ***Antimonopoly proceedings - discontinuance of proceedings***

Judgment of the Antimonopoly Court of 28 June 1995, XVII Amr 24/95, Wokanda 1996, No. 8, item 53

When the antimonopoly authority discontinues the proceedings, it may neither present any substantive analysis of the case nor express any official standing of the authority as regards the possible infringement of the antimonopoly law [*Discontinuance of the proceedings is a purely formal conclusion of the antimonopoly proceedings without any references to the merits of the case*].

- ***Antimonopoly proceedings - standard of decision making, limits for administrative adjudication***

Judgment of the Antimonopoly Court of 31 May 1995, XVII Amr 1/95, nyr

If the antimonopoly authority finds the behavior of the undertaking anticompetitive, it is obliged to expressly forbid such behavior in the decision. However, the antimonopoly authority is limited in its adjudication and may not oblige the undertaking to undertake certain actions in order not to infringe the antimonopoly act.

- ***Antimonopoly proceedings - standard of decision making, rights of defense***

Judgment of the Antimonopoly Court of 11 January 1995, XVII Amr 45/94, Wokanda 1995, No. 12, item 54

If the decision of the antimonopoly authority is vague and imprecise and gives grounds for contrary interpretations of its contents - such decision is defective and unenforceable.

- ***Antimonopoly proceedings - standard of decision making, rights of defense***

Judgment of the Antimonopoly Court of 1 March 1995, XVII Amr 63/94, Wokanda 1996, No. 2, item 59

Decision of the antimonopoly authority imposing a fine upon the undertaking needs to present legal and factual reasoning. Lack of such presentation makes a decision defective and results in setting aside the challenged decision.

- ***Antimonopoly proceedings - appeal against decision***

Resolution of the Supreme Court of 7 April 1994, III CZP 35/94, PS 1998, No. 2, p. 111

The party may challenge the decision of the antimonopoly authority in whole or in part, including challenging exclusively the factual and legal reasoning.

- ***Antimonopoly proceedings - appeal against decision***

Judgment of the Antimonopoly Court of 22 June 1994, XVII Amr 45/93, Wokanda 1995, No. 3, item 52

The party may challenge the decision with relation to the legal and factual reasoning presented in the decision without questioning the substance of the decision. Such situation may occur when the given reasoning is contrary to the basic principles of the administrative procedure such as legalism, discovery of objective truth or securing the justified interest of the party. This may also take place when the reasoning in question infringes the rights of the party, adversely affects the good name of the party or impedes the commercial activity of the party.

- ***Antimonopoly proceedings - appeal against decision, time limit to challenge the decision of the antimonopoly authority***

Order of the Antimonopoly Court of 14 May 1997, XVII Ama 25/97, nyr

The appeal lodged after the lapse of prescribed 14-day time limit to lodge the appeal results in disregarding the appeal by the antimonopoly court.

- ***Antimonopoly proceedings - appeal against decision, time limit to challenge the decision of the antimonopoly authority***

Order of the Antimonopoly Court of 4 January 2000, XVII Amo 5/99, nyr

The time limit to lodge the appeal is a statutory time limit. Therefore this time limit may not be prolonged neither by the party nor by the court.

- *Antimonopoly proceedings - appeal against decision, time limit to challenge the decision of the antimonopoly authority, restitution of time limit*

Order of the Antimonopoly Court of 4 February 1998, XVII Ama 65/97, nyr

1. The court is competent to restore the time limit for lodging the appeal if the party presents probable exculpatory grounds and lodge the appeal at the same time.
2. Negative consequences for the party of entering into force the decision of the antimonopoly authority may not be regarded as an exculpatory ground for restoring the time limit for lodging the appeal.

- *Antimonopoly proceedings - appeal against decision, time limit to challenge the decision of the antimonopoly authority, restitution of time limit*

Order of the Antimonopoly Court of 7 October 1998, XVII Ama 68/98 , nyr

If the time limit for lodging the appeal has lapsed, the party may request the court to restore the time limit. Along with lodging such demand, the party must lodge the appeal at the same time (Article 169(1) of the civil procedural code) [*Such demand is admissible only if the non-observance of time limit was a result of external circumstances*].

- *Antimonopoly proceedings - appeal against decision, association of undertakings*

Order of the Antimonopoly Court of 21 December 2000, XVII Ama 85/99, Wokanda 2001, No. 11, item 52

If the association of undertakings did not take part in the proceedings before the antimonopoly authority, it is not competent to lodge the appeal on behalf of the member of this association who was the party to the proceedings.

- *Antimonopoly proceedings - appeal against decision*

Order of the Antimonopoly Court of 8 October 1997, XVII Ama 49/97, Wokanda 1998, No. 11, item 62

The appeal must be lodged through the intermediary of the antimonopoly authority [...]. The lodging of the appeal with the court directly is ineffective and may lead to the lapse of the time limit to lodge the appeal.

- *Antimonopoly proceedings - appeal against decision, scope of appeal*

Judgment of the Antimonopoly Court of 13 November 2000, XVII Ama 11/00, nyr

The appeal is limited by the subject of the decision. Therefore, the appeal may not challenge issues that were not the subject of the decision. Such appeal is inadmissible and should be disregarded by the court.

- *Antimonopoly proceedings - appeal against decision, scope of appeal*

Order of the Antimonopoly Court of 23 April 1997, XVII Ama 7/97, nyr

The appeal against non-existing decision is inadmissible.

- ***Antimonopoly proceedings - appeal against decision, self-control procedure, passage of appeal, limited jurisdiction of the court over the antimonopoly proceedings***

Judgment of the Court of Competition and Consumer Protection of 10 April 2006, XVII Ama 89/05, nyr

1. Article 78(4) [at present Article 91(3)] of the antimonopoly act empowers the President of UOKiK to set aside their decision whenever they find the appeal justified. However, the President enjoys a full discretion as to the essence of the new decision and therefore the substance of a new decision does not need to differ from the old one since the new decision may only provide for new factual and legal justification of the decision.
2. The Court of Competition and Consumer Protection is not competent to control the course of proceedings before the antimonopoly authority. Therefore the court is precluded from controlling the duration of antimonopoly proceedings or timing of the transferring appeal and case files to the court.

- ***Antimonopoly proceedings - execution of court judgment abrogating decision of the antimonopoly authority***

Judgment of the Antimonopoly Court of 18 October 2000, XVII Ama 6/00, Wokanda 2001, No. 12, item 51

After setting aside the challenged decision of the antimonopoly authority by the antimonopoly court - the antimonopoly authority enjoys full discretion on how to further proceed with the case. The authority may discontinue the antimonopoly proceedings. It may also proceed with the case and continue the antimonopoly proceedings. After conducting the proceedings and finding the infringement of the antimonopoly act, the authority may issue a new decision.

- ***Antimonopoly proceedings - resumption of proceedings***

Judgment of the Antimonopoly Court of 25 June 2001, XVII Ama 31/01, nyr

The motion of the party for resumption of the antimonopoly proceedings concluded with the final decision is inadmissible.

7. Proceedings before the antimonopoly court

- *Proceedings before the antimonopoly court - scope of judicial review*

Order of the Antimonopoly Court of 5 January 2000, XVII Amo 1/00, nyr

The antimonopoly court is competent to hear appeals against decisions of the antimonopoly authority and appeals against decisions of the energy regulator. Therefore the antimonopoly court is not competent to adjudicate on the civil lawsuit of the energy consumer in which it demands to control whether the energy seller complies with provisions of the energy law, the antimonopoly law or the law on unfair competition.

- *Proceedings before the antimonopoly court - scope of judicial review*

Judgment of Court of Competition and Consumer Protection of 27 October 2009, XVII Ama 126/08, Journal of Laws of UOKiK of 2010, No. 1, item 5

The appeal against the decision of the antimonopoly authority may not be based on indicated procedural shortcomings that occurred during the antimonopoly proceedings. The court independently hears the case from the beginning and any procedural irregularities taking place during proceedings before the antimonopoly authority are irrelevant for the outcome of the court proceedings.

- *Proceedings before the antimonopoly court - scope of judicial review*

Judgment of the Antimonopoly Court of 25 July 2001, XVII Ama 96/00, nyr

The Antimonopoly Court adjudicates within the limits of the case as set by the challenged decision.

- *Proceedings before the antimonopoly court - scope of judicial review*

Judgment of the Supreme Court of 13 May 2004, III SK 44/04, OSNP 2005, No. 9, item 136

The Court of Competition and Consumer Protection may not limit its jurisdiction to control the challenged decision towards its legality. The court is obliged to adjudicate on the substance of the case and apply other criteria when reviewing the questioned decision.

- *Proceedings before the antimonopoly court - scope of judicial review*

Judgment of the Court of Appeal of 19 January 2011, VI ACa 1031/10, nyr VI ACa 1031/10

The control of administrative decisions is a competence of public authorities and administrative courts. Civil courts, such as the antimonopoly court, are obliged to investigate the case from the beginning and adjudicate on the substance of the case [*and not limit itself to control the challenged decision*].

- *Proceedings before the antimonopoly court - scope of judicial review*

Judgment of the Antimonopoly Court of 20 September 1995, XVII Amr 15/95, Wokanda 1996, No. 8, item 57

When there are more than one addressee of the decision of the antimonopoly authority and only some of them appeal against the decision, the antimonopoly court is obliged to take ex

officio into consideration the interests of other addressees if the challenged decision affects their rights or obligations, as well [...].

- ***Proceedings before the antimonopoly court - character of proceedings, rights of the parties***

Judgment of the Court of Competition and Consumer Protection of 14 September 2006, XVII Ama 71/05, Journal of Laws of UOKiK of 2006, No. 4, item 61

The proceedings before the antimonopoly court are the first instance proceedings. Lodging the appeal initiates regular civil proceedings. The court independently assesses the evidence and establishes the facts. During the court proceedings the parties are entitled to demand production of new pieces of evidence. The appeal sets the limits of courts adjudication in the given case.

- ***Proceedings before the antimonopoly court - rules of evidence proceedings***

Judgment of the Court of Appeals of 31 May 2012, VI ACa 1299/10 , nyr

The proceedings before the antimonopoly court are the first instance proceedings. Lodging the appeal initiates regular civil proceedings. The prior administrative proceedings before the antimonopoly authority is the necessary prerequisite before the initiation of the court proceedings. The antimonopoly court is obliged to investigate the case from the beginning. The court may not rely on facts established by the antimonopoly authority [*and is obliged to make its independent conclusions*].

- ***Proceedings before the antimonopoly court - rules of evidence proceedings***

Judgment of the Court of Competition and Consumer Protection of 19 December 2006, XVII Ama 15/06, Journal of Laws of UOKiK of 2007, No. 2, item 21

When hearing the appeal against the decision of the antimonopoly authority the court applies rules on evidence applicable in civil not administrative proceedings. [...] As a consequence the court is not bound by the principle of discovering objective truth and the burden of proof rests upon the party claiming the fact [*In administrative proceedings public authorities are obliged to produce all necessary and available evidence in order to discover the 'objective truth'. In civil proceedings the court relies on the facts established upon the evidence produced during the process and may rely on the 'formal truth'*].

- ***Proceedings before the antimonopoly court - rules of evidence proceedings***

Judgment of the Court of Appeal of 21 September 2006, VI ACa 142/06 , Journal of Laws of UOKiK of 2007, No. 1, item 13

The proceedings before the antimonopoly court were and are the first instance proceedings. [...] Therefore, the antimonopoly court is competent and obliged to independently assess all the evidence and draw its own conclusions. Furthermore, the court is obliged to indicate the evidence on which it relied and explain why it disregarded opposing evidence [*The court cannot limit its jurisdiction and rely on the facts established by the antimonopoly authority*].

- *Proceedings before the antimonopoly court - evidence proceedings, expert opinions*

Judgment of the Supreme Court of 12 April 2002, I CKN 92/00, nyr

Private expert opinions produced for the party may not be regarded as an evidence from the expert opinion, even if the expert is a registered court expert. [*In Poland courts keep official registries of experts*] Private expert opinions ordered by the party during or even before court proceedings may be regarded by the court as additional supporting statements of the party. However, if the court believes that there is a need to hear the expert - such expert should be summoned by the court in accordance with applicable rule on evidence in civil proceedings.

- *Proceedings before the antimonopoly court - duties of the court, issuance of a judgment, commitment decisions*

Judgment of the Supreme Court of 19 August 2009, III SK 5/09, OSNP 2011, No. 9-10, item 144

1. When issuing a judgment, the antimonopoly court verifies the challenged decision of the antimonopoly authority. [...] The antimonopoly court may change the challenged decision in part and abrogate the decision in the remaining scope. The court changes the challenged decision to remedy discovered defects of the decision. However, there are some shortcomings that may not be remedied during the court proceedings. Such defects give grounds for abrogation of the decision. [*The challenged decision may also have defects which do not adversely affect the substance of the decision*] Therefore, the court is not obliged to address all issues raised in the appeal. It is especially true when the appellant does not show that indicated defects of the challenged decision adversely affect the substance of the decision.

2. [...] Commitment decisions are one of the possible types of decisions concluding the antimonopoly proceedings. They may be issued instead of decisions finding the infringement of competition rules. Therefore, the motion of the party to issue a commitment decision does not initiate new antimonopoly proceedings, but it is considered during the proceedings already initiated.

- *Proceedings before the antimonopoly court-duties of the court, issuance of a judgment*

Judgment of the Supreme Court of 05 April 2011, III SK 39/10, nyr

The Court of Competition and Consumer Protection and the Court of Appeal adjudicate on appeals from the regulatory authorities. Both courts review the substance of the case and they are obliged to take into consideration the state of law and fact as of the date of issuance of the court judgment.

- *Proceedings before the antimonopoly court-duties of the court, issuance of a judgment*

Judgment of the Antimonopoly Court of 21 May 2001, XVII Ame 36/00, nyr

Substantial change of the applicable law during the court proceedings may justify abrogation of the challenged decision.

- ***Proceedings before the antimonopoly court - duties of the court, issuance of a judgment, fines***

Judgment of the Court of Appeal of 13 February 2008, VI ACa 463/07, nyr

Financial sanction issued upon Article 101(2)(1) [at present Article 106(1)(1)] of the antimonopoly act is of subsidiary character. The primary (behavioral) sanction is the obligation to desist from the anticompetitive practice. When challenging the financial penalty, the party is obliged to prove that there were no grounds for issuing the fine. This may be proven by showing that there was no violation of Article 6 or 9 of the antimonopoly act [i.e. prohibition of anticompetitive practices]. Furthermore, the party may claim that issuing a financial sanction was not necessary for achieving the goal of the antimonopoly act and that the primary (behavioral) sanction fulfils that objective.

- ***Proceedings before the antimonopoly court - cassatory appeal***

Order of the Supreme Court of 12 September 2009, III SK 32/08 , nyr

[Cassatory appeals are extraordinary legal measures against final judgments of lower civil courts handled by the Supreme Court] During proceedings before the antimonopoly court and the court of appeal, a cassatory appeal is available to the party if the final judgment of the court of appeal was issued concluding proceedings in the competition case [starting with the antimonopoly authority and completed with the ruling of the court of appeal]. It means that the cassatory appeal is available if the competition case has been concluded with the final judgment of the court of appeal dismissing the appeal from the judgment of the antimonopoly court changing the challenged decision of the antimonopoly authority. [...] The cassatory appeal is available, as well, from the judgment of the court of appeal upholding the appeal from the judgment of the antimonopoly court changing the challenged judgment.

- ***Proceedings before the antimonopoly court - cassatory appeal***

Judgment of the Supreme Court of 19 January 2001, I CKN 1036/98, nyr

[Cassatory appeals are extraordinary legal measures against final judgments of lower civil courts handled by the Supreme Court] Cassatory appeal is inadmissible if it indicates the alleged infringement of the specific substantive provision of the antimonopoly act concerning the anticompetitive practice different from the practice established in the challenged judgment.

- ***Proceedings before the antimonopoly court - execution of the court judgment***

Judgment of the Antimonopoly Court of 19 November 1991, XVII Amr 13/91, nyr

If the judgment of the court does not state otherwise it should be executed without undue delay. Execution without undue delay does not mean that the judgment must be executed immediately after it was issued. The time limit for execution of the judgment should be adjusted as to provide the addressee of the judgment with adequate time for preparing to execute such judgment.

- *Proceedings before the antimonopoly court - setting aside of administrative decision, duties of the antimonopoly authority*

Order of the Antimonopoly Court of 18 October 2000, XVII Ama 6/00, Wokanda 2001, No. 12, item 51

After setting aside of the challenged decision of the antimonopoly authority by the antimonopoly court, the authority enjoys a full discretion as to its next steps (Article 479(34)(2) of the Civil procedural code). The antimonopoly authority may discontinue the antimonopoly proceedings. The authority may also reopen antimonopoly proceedings and [...] issue a decision.

- *Proceedings before the antimonopoly court - costs of proceedings*

Order of the Antimonopoly Court of 8 November 1995, XVII Amr 64/95, Wokanda 1997, No. 2, item 52

The antimonopoly authority may demand from the party which had withdrawn its appeal to cover the cost of appeal proceedings, even though the withdrawal took place before the transmission of appeal and case files to the antimonopoly court.

8. Proceedings before the administrative courts

- *Administrative court proceedings - complaint against the failure to act of the antimonopoly authority*

Order of the Supreme Administrative Court of 22 May 2012, II GSK 620/12, nyr

According to Article 3(2)(8) of the Act on proceedings before administrative courts, the administrative court is competent to hear complaints against the failure to act as well as extensive and long-lasting conducting of antimonopoly proceedings by the antimonopoly authority.

- *Administrative court proceedings - territorial jurisdiction of the administrative court*

Order of the Supreme Administrative Court of 24 September 2009, II GZ 211/09, nyr

Voivodeship Administrative Court in Warsaw is competent to review complaints against an act issued by the branch office of UOKiK in Gdansk. The jurisdiction of the voivodeship administrative court depends on the seat of the authority. The branch office of the antimonopoly authority issues decisions on behalf of the President of UOKiK and the seat of the President is in Warsaw. [*Jurisdiction of administrative courts concerns the control of special acts and activities of the antimonopoly authority other than administrative decisions and orders*]

PART III BASIC LEGAL TEXTS

1. Introduction

Polish competition law consists of many acts of different legal nature. The pivotal role rests upon the Act on competition and consumer protection and implementing regulations. However, since the Act on competition and consumer protection contains many references to other statutes, those acts are also enlisted. Finally, to give the full picture of relevant legislation, soft law documents are presented as well. Soft law documents are not binding, but they provide official interpretations of the statutes in force and therefore cannot be ignored during application of the Polish competition law provisions. This book is devoted to the Polish competition law and hence binding European competition rules are not presented. Furthermore, the selection does not cover any binding international agreements since Poland is not a party to any bilateral or multilateral international agreements on competition law. The Polish competition authority has the right to cooperate with other antitrust authorities and conclude informal agreements, however, they are non-binding international agreements. Usually, they concern the development of international cooperation forums in the field of competition, such as the International Competition Network, the European Competition Authorities or other numerous arrangements regarding the cooperation within the European Competition Network. Those documents are well-known and easily accessible and hence they are omitted here.

Due to editorial restrictions, only selected acts are presented in this volume. The selection was made in accordance with the practical relevance of particular acts and frequency of their application. The majority of omitted acts are accessible on the website of UOKiK - www.uokik.gov.pl. Finally, there is a number of short clarifications and comments on particular problems issued by the antimonopoly authority. All of them are in Polish exclusively. Due to their temporal nature and limited application, they are not listed and have been omitted, as well.

General

Statutes and Regulations

1. Act of 27 February 2007 on competition and consumer protection, Journal of Laws No. 50, item 331, with further amendments.
2. Act 16 April 1993 on combating unfair competition (consolidated act), Journal of Laws of 2003 No. 153, item 1503, with further amendments. (*not published in this volume*)
3. Act of 14 June 1960 - Administrative Procedural Code, Journal of Laws of 2000 No. 98, item 1071, with further amendments. (*not published in this volume*)
4. Act of 17 June 1966 on administrative execution proceedings, Journal of Laws of 2005 No. 229, item 1954, with further amendments. (*not published in this volume*)
5. Act of 6 June 1997 - Penal Procedural Code, Journal of Laws No. 89, item 555, with further amendments. (*not published in this volume*)

6. Regulation of the Prime Minister of 1 July 2009 on determination of territorial and material jurisdiction of regional bureaus of the Office of Competition and Consumer Protection, Journal of Laws No. 107, item 887. (not published in this volume)

Policy acts

1. Competition Policy for 2011-2013. (not published in this volume)

Anticompetitive practices

Regulations

1. Regulation of the Council of Ministers of 13 December 2011 on exemption from the prohibition of competition restricting agreements of certain specialization agreements and research - development agreements, Journal of Laws No. 288, item 1691. (not published in this volume)
2. Regulation of the Council of Ministers of 30 March 2011 on exemption from the prohibition of competition restricting agreements of certain vertical agreements, Journal of Laws No. 81, item 441.
3. Regulation of the Council of Ministers of 8 October 2010 on the exemption of certain vertical agreements in the motor vehicle sector from the prohibition of competition-restricting agreements, Journal of Laws of 2010, No. 198, item 1315. (not published in this volume)
4. Regulation of the Council of Ministers of 30 July 2007 on exemption from the prohibition of competition restricting agreements of certain categories of agreements concerning transfer of technologies, Journal of Laws No. 137, item 963. (not published in this volume)
5. Regulation of the Council of Ministers of 22 March 2011 on exemption from the prohibition of competition restricting agreements of certain categories of agreements concluded between the undertakings conducting insurance business activity, Journal of Laws No. 67, item 355. (not published in this volume)

Soft Law

1. Clarifications on issuance of commitment decisions concerning anticompetitive practices and collective consumer interests cases, Journal of Laws of UOKiK of 2012, No. 1, item 2. (not published in this volume)

Merger control

Regulations

1. Regulation of the Council of Ministers of 17 July 2007 concerning the notification of the intention of concentration of undertakings, Journal of Laws of 2007, No. 134, item 936 and 937.
2. Regulation of the Council of Ministers of 17 July 2007 concerning the method of calculation of the turnover of undertakings participating in the concentration, Journal of Laws of 2007, No. 134, item 934 and 935. (not published in this volume)

Soft Law

1. Clarifications on the criteria and procedure of notifying the intention of concentration to the President of UOKiK, Journal of Laws of UOKiK of 2011, No. 1, item 1. (not published in this volume)
2. Clarifications on substantive analysis of merger notifications, Journal of Laws of UOKiK of 2012, No. 1, item 1. (not published in this volume)
3. Clarifications on the mode of calculating time limits in antimonopoly merger proceedings. (not published in this volume)

Fines

Regulations

1. Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines, Journal of Laws of 2009, No. 20, item 109.

Soft Law

1. Guidelines of the President of the Office of Competition and Consumer Protection on the Leniency Programme (the procedure of submitting and handling applications for immunity from or reduction of a fine - “leniency applications”). (not published in this volume)
2. Guidelines on setting fines for competition-restricting practices, Journal of Laws of UOKiK of 2008, No. 4, item 4. (not published in this volume)

Appeal proceedings before the courts

Proceedings before antimonopoly court and civil courts

1. Act of 17 November 1964 - the Civil Procedural Code, Journal of Laws No. 43, item 296, with further amendments. (not published in this volume)
2. Regulation of the Minister of Justice of 30 December 1998 on the establishment of antimonopoly court, Journal of Laws No. 166, item 1254. (not published in this volume)

Proceedings before administrative courts

1. Act of 25 July 2002 - Law on the regime of administrative courts, Journal of Laws of 2002, No. 153, item 1269, with further amendments. (not published in this volume)
2. Act of 30 August 2002 - Law on proceedings before administrative courts, Journal of Laws of 2002, No. 153, item 1270, with further amendments. (not published in this volume)

2. Act of 16 February 2007 on competition and consumer protection

Title I General provisions

Article 1

1. The Act determines the conditions for the development and protection of competition as well as the principles of protecting the interests of undertakings and consumers in the public interest.
2. The Act regulates the principles and measures of counteracting competition-restricting practices and practices infringing collective consumer interests, as well as anti-competitive concentrations of undertakings and their associations, where such practices or concentrations have or may have impact in the territory of the Republic of Poland.
3. The Act also indicates the authorities competent in matters related to competition and consumer protection.

Article 2

1. The Act is without prejudice to any rights following from provisions concerning the protection of intellectual and industrial property, in particular the provisions on the protection of inventions, utility and industrial models, topography of integrated circuits, trademarks, geographical indications, copyright and neighbouring rights.
2. The Act shall apply to:
 - 1) contracts between undertakings, in particular licences, as well as to practices other than contracts concerning exercising rights referred to in paragraph 1 herein;
 - 2) contracts between undertakings related to:
 - a) technical or technological information,
 - b) principles of organisation and management
 - which have not been disclosed to the general public and in relation to which measures have been taken to prevent their disclosure, where such contracts result in an unjustified limitation of the freedom of business activity of their parties or in a significant restriction of competition in the market.

Article 3

The provisions of the Act shall not apply to restrictions of competition allowed by virtue of separate provisions.

Article 4

For the purposes of this Act:

- 1) “undertaking” shall mean an undertaking in the meaning of the provisions on freedom of business activity, as well as:
 - a) natural and legal person as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or rendering public utility services, which do not constitute business activity in the meaning of the provisions on freedom of business activity,
 - b) natural person exercising a profession on its own behalf and account or carrying out an activity as part of exercising such a profession,

- c) natural person having control, in the meaning of subparagraph 4 herein, over at least one undertaking, even if the person does not carry out business activity in the meaning of the provisions on freedom of business activity, if this person undertakes further actions subject to the control of concentrations, referred to in Article 13;
 - d) associations of undertakings in the meaning of subparagraph 2 - for the purposes of the provisions on competition-restricting practices and practices infringing collective consumer interests;
- 2) "associations of undertakings" shall mean chambers, associations and other organizations associating undertakings referred to in subparagraph 1, as well as associations of such organisations;
 - 3) "dominant undertaking" shall mean an undertaking having control, in the meaning of subparagraph 4, over another undertaking;
 - 4) "taking over control" shall mean any form of direct or indirect acquisition of powers by an undertaking, allowing the undertaking, to exert, individually or jointly, taking into account all legal or factual circumstances, a decisive influence upon another undertaking or other undertakings. Such powers follow in particular from:
 - a) holding directly or indirectly a majority of votes in the meeting of company members or general shareholders' meeting, also in the capacity of a pledgee or user, or in the management board of another undertaking (dependent undertaking), including based on agreements with other persons,
 - b) the right to appoint or recall a majority of members of the management board or supervisory board of another undertaking (dependent undertaking), including based on agreements with other persons,
 - c) members of the undertaking's management board or supervisory board constituting more than half of the members of another undertaking's (dependent undertaking's) management board,
 - d) holding directly or indirectly a majority of votes in a dependent partnership or in the general meeting of a dependent cooperative, including based on agreements with other persons,
 - e) holding a title to the entire or a part of the property of another undertaking (dependent undertaking),
 - f) contract which envisages managing another undertaking (dependent undertaking) or such undertaking transferring its profits;
 - 5) "agreements" shall mean:
 - a) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements,
 - b) concerted practices undertaken in any form by two or more undertakings or associations thereof,
 - c) resolutions or other acts of associations of undertakings or their statutory organs;
 - 6) "distribution agreements" shall mean agreements concluded between undertakings acting at different levels of the economic process aimed at purchase of products for further resale;
 - 7) "goods" shall mean items as well as all forms of energy, securities and other property rights, services as well as construction works;
 - 8) "prices" shall mean prices, also charges in the nature of prices, trade margins, commissions and markups;

- 9) “relevant market” shall mean a market of goods, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in the area in which, by reason of their nature and characteristics, the existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous;
- 10) “dominant position” shall mean an undertaking’s market position which allows it to prevent effective competition in a relevant market thus enabling it to act to a significant degree independently of its competitors, contracting parties and consumers; it is assumed that an undertaking holds a dominant position if its market share in the relevant market exceeds 40%;
- 11) “competitors” shall mean undertakings which introduce or may introduce, purchase or may purchase goods in the relevant market at the same time;
- 12) “consumer” shall mean a consumer as defined by the Act of 23 April 1964 - the Civil Code (Journal of Laws No. 16, item 93, as amended));
- 13) “consumer organisations” shall mean social organisations independent of undertakings and of associations thereof, whose statutory tasks include the protection of consumer interests; consumer organisations may run business activity on general terms, provided that the income from the activity serves solely to finance the execution of the organisations’ statutory tasks;
- 14) “capital group” shall mean all undertakings controlled directly or indirectly by a single undertaking, including that undertaking;
- 15) “revenue” shall mean the revenue gained in the fiscal year preceding the day of instituting the proceedings by virtue of the present Act, within the meaning of income tax provisions binding the undertaking;
- 16) “average remuneration” shall mean an average monthly remuneration in the business sector in the last month of the quarter preceding the day of issuance of a decision by the President of the Office of Competition and Consumer Protection, published by the President of the Central Statistical Office pursuant to separate provisions;
- 17) “business secret” shall mean business secret as defined in Article 11 paragraph 4 of the Act of 16 April 1993 on combating unfair competition (Journal of Laws of 2003 No. 153, item 1503, of 2004, as amended));
- 18) “President of the Office” shall mean the President of the Office of Competition and Consumer Protection;
- 19) “EC Treaty” shall mean the Treaty establishing the European Community (Official Journal EC C 325 of 24.12.2002);
- 20) “Regulation No. 1/2003/EC” shall mean Council Regulation No. 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Official Journal EU L 1 of 4.01.2003, p. 1; Official Journal EU Polish special edition, chapter 08, volume 02, p. 205);
- 21) “Regulation No. 139/2004/EC” shall mean Council Regulation No. 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings (Official Journal EU L 024 of 29.01.2004, p.1; Official Journal EU Polish special edition, chapter 08, volume 03, p. 40);
- 22) “Regulation No. 2006/2004/EC” shall mean European Parliament and Council Regulation No. 2006/2004/EC of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (“Regulation on consumer protection cooperation”) (Official Journal EU L 364 of 9.12.2004).

Article 5

The value of euro referred to in the Act shall be converted into Polish zloty, according to the average rate of foreign currencies published by the National Bank of Poland on the last day of the calendar year preceding the year in which the intention of concentration is notified or a fine imposed.

Title II

Prohibition of competition-restricting practices

Chapter 1

Prohibition of competition-restricting agreements

Article 6

1. Agreements which have as their object or effect elimination, restriction or any other infringement of competition on the relevant market shall be prohibited, in particular those consisting in:
 - 1) fixing, directly or indirectly, prices and other trading conditions;
 - 2) limiting or controlling production or sale as well as technical development or investments;
 - 3) dividing markets of sale or purchase;
 - 4) applying to equivalent agreements with third parties onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition;
 - 5) making conclusion of an agreement subject to acceptance or fulfilment by the other party of another performance, having neither substantial nor customary relation with the subject of such agreement;
 - 6) limiting access to the market or eliminating from the market undertakings which are not parties to the agreement;
 - 7) collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.
2. The agreements referred to in paragraph 1 shall be in their entirety or in the respective part void, subject to Articles 7 and 8.

Article 7

1. The prohibition referred to in Article 6 paragraph 1 shall not apply to agreements concluded between:
 - 1) competitors whose combined market share in the calendar year preceding the conclusion of the agreement does not exceed 5%;
 - 2) undertakings which are not competitors, if the market share of any of them in the calendar year preceding the conclusion of the agreement does not exceed 10%.
2. The provisions of paragraph 1 shall not apply to cases specified in Article 6, paragraph 1, subparagraph 1 to 3 and subparagraph 7.

Article 8

1. The prohibition referred to in Article 6, paragraph 1 shall not apply to agreements which at the same time:
 - 1) contribute to improvement of the production, distribution of goods or to technical or economic progress;

- 2) allow the buyer or user a fair share of benefits resulting thereof;
 - 3) do not impose upon the undertakings concerned such impediments which are not indispensable to the attainment of these objectives;
 - 4) do not afford these undertakings the possibility to eliminate competition in the relevant market in respect of a substantial part of the goods in question.
2. The burden of providing evidence to circumstances referred to in paragraph 1 shall rest upon the undertaking concerned.
 3. The Council of Ministers may, by way of a regulation, exempt from the prohibition referred to in Article 6, paragraph 1, certain types of agreements which meet the conditions referred to in paragraph 1 above, taking into consideration the benefits resulting from such types of agreements. In the regulation, the Council of Ministers shall specify:
 - 1) conditions which are to be satisfied for the agreement to be considered exempted from the prohibition;
 - 2) clauses, the existence of which in the agreement constitutes the infringement of Article 6;
 - 3) a period during which the exemption shall apply and may specify clauses, the existence of which in the agreement is not considered the infringement of Article 6.

Chapter 2

Prohibition of abuse of a dominant position

Article 9

1. The abuse of a dominant position in the relevant market by one or more undertakings shall be prohibited.
2. The abuse of a dominant position may, in particular consist in:
 - 1) direct or indirect imposition of unfair prices, including excessive or predatory pricing, delayed payment terms or other trading conditions;
 - 2) limiting production, sale or technological progress to the prejudice of contracting parties or consumers;
 - 3) application to equivalent agreements with third parties onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition;
 - 4) making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of the agreement;
 - 5) counteracting formation of conditions necessary for the emergence or development of competition;
 - 6) imposition onerous agreement terms and conditions, yielding to this undertaking unjustified profits;
 - 7) dividing the market according to territorial, product, or entity-related criteria.
3. Legal actions which constitute abuse of a dominant position shall be in their entirety or in the respective part void.

Chapter 3

Decisions concerning competition-restricting practices

Article 10

The President of the Office shall issue a decision recognizing the practice as restricting competition and ordering to refrain from it, if he finds an infringement of the prohibition specified in Article 6 or 9 of the Act, or in Article 81 or 82 of the EC Treaty.

Article 11

1. The decision referred to in Article 10 shall not be issued if the market behaviour of the undertaking no longer infringes the prohibitions specified in Article 6 or 9 of the Act, or in Article 81 or 82 of the EC Treaty.
2. In the case referred to in paragraph 1, the President of the Office shall issue a decision regarding the practice as restricting competition and shall declare it be discontinued.
3. The burden of providing evidence to circumstances referred to in paragraph 1 shall rest upon the undertaking.

Article 12

1. In the event that, in the course of antimonopoly proceedings, it has been rendered plausible - on the basis of the circumstances of a given case, information comprised in the notification or information forming the basis for instituting ex officio proceedings - that the prohibition referred to in Article 6 or Article 9 of the Act, or in Article 81 or 82 of the EC Treaty has been infringed, whereas the undertaking being charged with having infringed such prohibition has agreed to take or discontinue certain actions aiming at preventing those infringements, then the President of the Office may, by way of a decision, impose upon the undertaking an obligation to exercise the undertaken commitments.
2. In the decision referred to in paragraph 1, the President of the Office may determine the final date for realisation of the commitments.
3. In the decision referred to in paragraph 1, the President of the Office shall impose upon the undertaking an obligation to provide, within fixed date(s), information regarding the stage of implementation of the assumed commitments.
4. In the event that a decision, referred to in paragraph 1 is issued, Articles 10 and 11 as well as Article 106, paragraph 1, subparagraphs 1 and 2 shall not apply, subject to paragraph 7.
5. The President of the Office may, on an ex officio basis, revoke the decision referred to in paragraph 1, in the event that:
 - 1) it has been issued on the basis of false, incomplete or misleading information or documents;
 - 2) the undertaking has not carried out commitments or obligations imposed thereupon in the decision referred to in paragraphs 1 to 3.
6. The President of the Office may, upon consent of the undertaking, on an ex officio basis revoke the decision referred to in paragraph 1, in case that the circumstances having a significant impact on the issuance of the decision, have changed.
7. In the event that the decision is revoked, the President of the Office shall adjudicate on the merits of the case.

Title III

Concentrations of undertakings

Chapter 1

Control of concentrations

Article 13

1. The intention of concentration is subject to a notification submitted to the President of the Office in the case where:
 - 1) the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1 000 000 000, or

- 2) the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50 000 000.
2. The obligation referred to in paragraph 1 concerns the intention of:
- 1) merging two or more independent undertakings;
 - 2) taking over by acquiring or taking up stocks, other securities or shares, or in any other way, direct or indirect control over one or more undertakings by one or more undertakings;
 - 3) creation by undertakings of one joint undertaking;
 - 4) acquisition by the undertaking of a part of another undertaking's property (the entirety or part of the undertaking) if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland the equivalent of EUR 10 000 000.

Article 14

The obligation to notify the intention of concentration shall not apply where:

- 1) the turnover of the undertaking over which the control is to be taken in accordance with Article 13, paragraph 2, subparagraph 2, did not exceed in the territory of the Republic of Poland in any of the two financial years preceding the notification, the equivalent of EUR 10 000 000;
- 2) the financial institution, the normal activities of which include investing in stocks and shares of other undertakings, for its own account or for the account of others, acquires or takes over, on a temporary basis, stocks and shares with a view to reselling them provided that such resale takes place within one year from the date of the acquisition or taking over, and that:
 - a) this institution does not exercise the rights arising from these stocks or shares, except for the right to dividend, or
 - b) exercises these rights solely in order to prepare the resale of the entirety or part of the undertaking, its assets, or these stocks and shares;
- 3) the undertaking acquires or takes over, on a temporary basis, stocks and shares with a view to securing debts, provided that such undertaking does not exercise the rights arising from these stocks or shares, except for the right to sell;
- 4) the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over by a competitor or a participant of the capital group to which the competitors of the to-be-taken undertaking belong;
- 5) the concentration applies to undertakings participating in the same capital group.

Article 15

The concentration implemented by a dependent undertaking shall be considered as implemented by a dominant undertaking.

Article 16

1. The turnover referred to in Article 13, paragraph 1 shall include the turnover of undertakings directly participating in the concentration as well as of the remaining undertakings participating in the capital groups to which undertakings directly taking part in the concentration belong.
2. The turnover referred to in Article 14, paragraph 1 shall include the turnover of the to-be-taken undertaking as well as of its dependent undertakings.

Article 17

The Council of Ministers shall specify, by way of a regulation, the method of calculating the turnover referred to in Article 13, and Article 14, subparagraph 1, taking into account the specificity of the activity conducted by undertakings, and in particular accountancy rules applicable to particular categories of undertakings, including banks, insurance companies and investment funds.

Chapter 2

Decisions concerning concentration

Article 18

The President of the Office shall, by way of decision, issue a consent to implement a concentration, which shall not result in significant impediments to competition in the market, in particular, by the creation or strengthening of a dominant position in the market.

Article 19

1. The President of the Office shall, by way of a decision, issue a consent to implement a concentration when, upon fulfilment of the conditions specified in paragraph 2 by undertakings intending to implement the concentration, competition in the market will not be significantly impeded, in particular by the creation or strengthening of a dominant position.
2. The President of the Office may impose upon the undertaking or undertakings intending to implement a concentration an obligation, or accept their obligation, in particular:
 - 1) to dispose of the entirety or part of the assets of one or several undertakings,
 - 2) to divest control over an undertaking or undertakings, in particular by disposing of a block of stocks or shares, or to dismiss one or several undertakings from the position in the management or supervisory board,
 - 3) to grant a competitor exclusive rights - determining in the decision referred to in paragraph 1 the time limit for meeting the requirements.
3. In the decision referred to in paragraph 1, the President of the Office shall impose upon the undertaking or undertakings an obligation to provide information about fulfilment of such requirements, in a time limit specified in the decision.

Article 20

1. The President of the Office shall, by way of a decision, prohibit the implementation of the concentration, if it results in a significant impediment to competition in the market, in particular by the creation or strengthening of a dominant position.
2. The President of the Office shall issue, by way of a decision, a consent for the implementation of the concentration as a result of which competition in the market will be significantly impeded, in particular by the creation or strengthening of a dominant position, in any case that the desistance from banning concentration is justifiable, and in particular:
 - 1) the concentration is expected to contribute to economic development or technical progress;
 - 2) it may exert a positive impact on the national economy.

Article 21

1. The President of the Office may revoke the decisions referred to in Article 18, Article 19, paragraph 1, and Article 20, paragraph 2, if they were based on unreliable information for

which undertakings participating in the concentration were responsible or where undertakings did not comply with the conditions referred to in Article 19, paragraphs 2 and 3. In the case of revoking the decision, the President of the Office shall adjudicate on the merits of the case.

2. Where, in the cases referred to in paragraph 1, the concentration is already implemented and restoration of the competition in the market is otherwise impossible, the President of the Office may, by way of a decision, defining the time limit for its implementation under conditions specified in the decision, order in particular:
 - 1) separation of the merged undertaking under conditions defined in the decision;
 - 2) disposal of the entirety or part of the undertaking's assets;
 - 3) disposal of stocks or shares ensuring the control over the undertaking or undertakings, or dissolution of the company over which the undertakings have joint control;
3. The decision referred to in paragraph 2 cannot be issued after the lapse of 5 years from the day the concentration was implemented.
4. The provisions of paragraphs 2 and 3 shall apply accordingly in cases whereby the intention of concentration has not been notified to the President of the Office, as stipulated in Article 13, paragraph 1, and when the decision banning the concentration has not been executed.

Article 22

1. Decisions referred to in Article 18 and Article 19, paragraph 1, or in Article 20, paragraph 2 shall expire, if within 2 years from their issuance date, the concentration has not been implemented.
2. The President of the Office may, upon request of an undertaking participating in a concentration, extend, by way of a resolution, the date, referred to in paragraph 1, by one year, if the undertaking has proved that no change has occurred as to the circumstance as a result of which the concentration may cause a significant impediment to competition in the market.
3. Before taking a resolution on the extension of the date referred to in paragraph 1, the President of the Office may carry out explanatory proceedings.
4. In the event that a resolution has been issued refusing an extension of the date referred to in paragraph 1, implementing a concentration upon the lapse of the time limit concerned shall require that the intent to implement the concentration be notified to the President of the Office, and that a consent be obtained for implementing thereof, under the rules and by the procedure as determined in the Act.

Article 23

The President of the Office, upon request of a financial institution, may extend, by way of a decision, the time limit referred to in Article 14, subparagraph 2, if the institution proves that resale of stocks or shares was not possible or economically justified before the lapse of one year from the date of their acquisition.

Title IV

Prohibition of practices infringing collective consumer interests

Chapter 1

Practices infringing collective consumer interests

Article 24

1. Practices infringing collective consumer interests shall be prohibited.

2. A practice infringing collective consumer interests shall mean any unlawful activity of an undertaking detrimental to these interests, in particular:
 - 1) application of clauses of standard forms of agreements entered in the register of prohibited clauses of standard forms of agreements, as referred to in Article 47945 of the Act of 17 November 1964 - the Code of Civil Procedure (Journal of Laws of 1964 No. 43, item 296, as amended));
 - 2) a breach of the duty to provide consumers with reliable, truthful and complete information;
 - 3) unfair market practice or other acts of unfair competition.
3. The sum total of individual consumer interests shall not be a collective consumer interest.

Article 25

The protection of collective consumer interests provided for in this Act shall be without prejudice to protection under other acts, in particular, including the provisions on counteracting unfair market practices and unfair competition. The provisions of this Act shall not apply to cases concerning recognizing the clauses of a standard form of an agreement as inadmissible.

Chapter 2

Decisions on practices violating collective consumer interests

Article 26

1. The President of the Office shall issue a decision on pronouncing a practice as violating collective consumer interests and ordering that the same be discontinued, if he identifies a breach of the prohibition specified in Article 24.
2. The President of the Office may identify, in the decision referred to in paragraph 1, measures for removing lasting effects of the violation of collective consumer interests with a view to ensuring compliance with the order, in particular commit the undertaking to issue a single or recurring declaration with such contents and in such form as may be prescribed in the decision. The President of the Office may also order the decision to be published in whole or in part at the expense of the undertaking.

Article 27

1. A decision referred to in Article 26 shall not be issued if the undertaking concerned has ceased to use the practice referred to in Article 24.
2. In a case as determined in paragraph 1, the President of the Office shall issue a decision assessing the practice as violating collective interests of consumers, and shall declare it be discontinued.
3. The burden of providing evidence to circumstances referred to in paragraph 1 shall rest upon the undertaking concerned.
4. The provision of Article 26, paragraph 2 shall be applied accordingly.

Article 28

1. If, in the course of proceedings regarding practices violating collective interests of consumers, it has been rendered plausible - on the basis of the circumstances of a given case, information comprised in the notification referred to in Article 100, paragraph 1, or information forming the basis for instituting proceedings - that the undertaking concerned uses the practice referred to in Article 24, whereas the undertaking charged with infringing such provision, has undertaken to take or discontinue certain actions aiming at preventing

those infringements, then the President of the Office may, by way of a decision, impose an obligation to exercise the undertaken commitments.

2. In the decision referred to in paragraph 1, the President of the Office may determine the final date(s) for implementing the undertaken commitments.
3. In the decision referred to in paragraph 1, the President of the Office shall impose upon the undertaking an obligation to provide, within the fixed date(s), information regarding the stage of implementation of the assumed commitments.
4. In the event that a decision referred to in paragraph 1 is issued, Articles 26 and 27 and Article 106, paragraph 1, subparagraph 4 shall not apply, subject to paragraph 7.
5. The President of the Office may, on an ex officio basis, revoke the decision referred to in paragraph 1, in the event that:
 - 1) it has been issued on the basis of false, incomplete or misleading information or documents;
 - 2) the undertaking has not fulfilled commitments or obligations imposed thereupon in the decision referred to in paragraphs 1 to 3.
6. The President of the Office may, upon consent of the undertaking concerned, revoke the decision referred to in paragraph 1, if the circumstances that may have a significant impact on the issuance of such decision, have changed.
7. In the event that the decision is revoked, the President of the Office shall adjudicate on the merits of the case.

Title V

Organisation of competition and consumer protection

Chapter 1

The President of the Office

Article 29

1. The President of the Office shall be the central government administration body competent in the protection of competition and consumers. The Prime Minister shall supervise activities of the President of the Office.
2. The President of the Office is:
 - 1) an authority performing tasks imposed upon the authorities of the Member States of the European Union, pursuant to Articles 84 and 85 of the EC Treaty. In particular, the President of the Office shall be the competent competition authority within the meaning of Article 35 of Regulation No. 1/2003/EC;
 - 2) a single liaison office within the meaning of the provisions of Regulation No.2006/2004/EC and, in the scope of his statutory competences, shall be the competent authority referred to in Article 4, paragraph 1 of Regulation No. 2006/2004/EC;
3. The Prime Minister shall nominate the President of the Office from among the persons selected as a result of an open and competitive recruitment process.
 - 3a. The position of the President of the Office may be occupied by a person who:
 - 1) holds a Master's or equivalent degree;
 - 2) is a citizen of Poland;
 - 3) enjoys full public rights;
 - 4) has not been sentenced with a valid verdict for a deliberate crime or a deliberate fiscal crime;
 - 5) possesses managerial abilities;

- 6) holds minimum 6 years of employment track record, including minimum 3 years on managerial positions;
 - 7) possesses education and knowledge in the fields for which the President of the Office is responsible.
- 3b. Information on recruitment to the position of the President of the Office shall be announced by way of publication in an easily accessible place in the Office and in the Public Information Bulletin of the Office and the Public Information Bulletin of the Chancellery of the Prime Minister. The announcement shall specify:
- 1) the name and address of the Office;
 - 2) the position;
 - 3) requirements related to the position as specified in the applicable regulations;
 - 4) scope of duties to be performed in the position;
 - 5) the required documents;
 - 6) deadline and place to file documents;
 - 7) information on recruitment methods and techniques.
- 3c. The deadline referred to in paragraph 3b, subparagraph 6 may not be shorter than 10 days from the publication day of the announcement in the Public Information Bulletin of the Chancellery of the Prime Minister.
- 3d. Recruitment to the position of the President of the Office shall be performed by a team nominated by the Head of the Chancellery of the Prime Minister by authority of the Prime Minister. The team shall be composed of minimum 3 persons whose knowledge and experience will assure that the best candidates are selected. During the recruitment process, the assessment shall be focused on the candidate's professional experience, knowledge required to perform the tasks in the position and managerial skills.
- 3e. The assessment of the knowledge and managerial skills referred to in paragraph 3d, on commission of the team, may be performed by a person who is not a team member and who holds qualifications adequate to perform the assessment.
- 3f. Team members or the person referred to in paragraph 3e shall be obliged to keep confidential all information on the persons applying for the position that may be acquired during the recruitment process.
- 3g. The recruitment process shall result in selection of maximum 3 candidates who will be presented to the Head of the Chancellery of the Prime Minister.
- 3h. The team shall draw up a report from the recruitment process specifying:
- 1) the name and address of the Office;
 - 2) the position for which the recruitment process was performed and the number of candidates;
 - 3) first and last names, addresses of maximum 3 best candidates in the order of the extent they meet the requirements specified in the announcement on recruitment;
 - 4) information on the applied recruitment methods and techniques;
 - 5) justification of the selection or reasons for not selecting a candidate;
 - 6) members of the team.
- 3i. Results of the recruitment process shall be published without delay in the Public Information Bulletin of the Office and the Public Information Bulletin of the Chancellery of the Prime Minister. Information on the results of the recruitment shall specify:
- 1) the name and address of the Office;
 - 2) the position for which the recruitment process was performed;
 - 3) first and last names of the selected candidates and their places of residence within the meaning of the provisions of the Civil Code or information of failure to select a candidate.

- 3j. The publication of the announcement on recruitment and results thereof in the Public Information Bulletin of the Chancellery of the Prime Minister is free of charge.
4. The Prime Minister shall dismiss the President of the Office. The President of the Office shall perform his duties until the date of appointing his successor.
5. [Repealed]
6. The President of the Office shall perform his tasks supported by the Office of Competition and Consumer Protection, hereinafter referred to as “the Office”.
7. [Repealed]
8. [Repealed]

Article 30

1. The Prime Minister shall nominate Vice Presidents of the Office from among the persons selected by way of an open and competitive recruitment process. The Prime Minister shall dismiss the Vice Presidents of the Office upon the request of the President of the Office.
2. The team performing recruitment to the positions referred to in paragraph 1 shall nominate the President of the Office.
3. The provisions of Article 29, paragraphs 3a to 3j shall apply accordingly to the recruitment to the positions referred to in paragraph 1.

Article 31

The scope of the activities of the President of the Office shall include:

- 1) controlling undertakings' compliance with the Act;
- 2) issuing decisions in cases concerning counteracting competition-restricting practices, concentrations of undertakings, infringements of collective consumer interests, as well as other decisions stipulated in the Act;
- 3) analysing the level of concentration in the economy and on the market behaviour of undertakings;
- 4) preparing the draft government programmes for the development of competition and the draft government consumer protection policy;
- 5) co-operating with foreign and international consumer and competition protection authorities and organisations;
- 6) performing tasks and exercising competences of a competition protection authority of the European Union Member State, as determined in Regulation No. 1/2003/EC and Regulation No. 139/2004/EC,
- 7) performing tasks and exercising competences of the competent authority and of the single liaison office of the European Union Member State, as determined in Regulation No. 2006/2004/EC;
- 8) preparing and submitting to the Council of Ministers draft legal acts concerning the protection of competition and consumers;
- 9) submitting to the Council of Ministers periodical reports on the implementation of the government programmes for competition development and consumer policy;
- 10) co-operating with the territorial self-government authorities in the scope resulting from the government consumer policy;
- 11) initiating inspections of products and services to be performed by consumer organisations;
- 12) preparing and editing publications and educational programmes promoting awareness of competition and consumer protection;
- 13) addressing undertakings in matters concerning the protection of rights and interests of consumers;

- 14) fulfilling the international obligations of the Republic of Poland in the scope of cooperation and exchange of information in the field of consumer and competition protection and state aid;
- 15) collecting and disseminating judgements passed in cases concerning competition and consumer protection, in particular posting the decisions issued by the President of the Office on the Office's website;
- 16) co-operating with the Head of the National Crime Information Centre in the scope essential for the fulfilment of his statutory tasks;
- 17) performing other tasks defined by the present Act or by separate acts.

Article 32

1. The President of the Office shall issue the Official Journal of the Office of Competition and Consumer Protection.
2. The following information may be published in the Official Journal of the Office of Competition and Consumer Protection, in its entirety or part:
 - 1) decisions and resolutions of the President of the Office,
 - 2) judgements of the Regional Court in Warsaw- the Court of Competition and Consumer Protection, hereinafter referred to as "the Court of Competition and Consumer Protection",
 - 3) judgement of the Court of Appeal in appeal cases concerning the judgements of the Court of Competition and Consumer Protection,
 - 4) judgments of the Supreme Court concerning cassation of the judgements of the Court of Appeal, - or their conclusions.
3. The publications referred to in paragraph 2 shall be made with the omission of information constituting a business secret and other secret protected under separate provisions.
4. Information, communications, notices, explanations and interpretations of high significance to the application of provisions regarding the scope of activities of the President of the Office, shall be also published in the Official Journal of the Office of Competition and Consumer Protection.

Article 33

1. The Office shall be composed of the Central Office in Warszawa and Branch Offices in Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Warszawa and Wrocław.
2. The Branch Offices shall be managed by their directors.
3. The Prime Minister shall determine, by way of a regulation, the territorial and material competence of the Branch Offices for cases falling within the scope of the activities of the President of the Office, taking into consideration the nature and number of cases occurring in the relevant territory.
4. In addition to the cases falling within their competence, the Branch Offices may deal with other cases entrusted to them by the President of the Office.
5. In particularly justified circumstances, the President of the Office may take over a case falling within the competence of a given Branch Office or refer it to be dealt with by another Branch Office, or refer a case falling within his own competence to be dealt with by an indicated Branch Office.
6. Decisions and resolutions in cases falling within the competence of the Branch Offices and in cases referred by the President of the Office pursuant to paragraph 5 above, shall be issued by the directors of the Branch Offices on behalf of the President of the Office.

Article 34

The organisation of the Office shall be defined by the statutes granted by the Prime Minister, by way of a regulation.

Article 35

1. [Repealed]
2. [Repealed]
3. The President of the Office may order the Trade Inspection to proceed with the inspection or to perform other tasks included in the scope of his activities.
4. [Repealed]

Article 36

[Repealed]

Chapter 2

Local government and consumer organisations

Article 37

The tasks in the field of the protection of consumer interests in the scope determined by the Act and by separate provisions shall be performed also by local government as well as by consumer organisations and other institutions, the statutory tasks of which include the protection of consumer interests.

Article 38

The task of the local government in the field of consumer protection shall consist in promoting consumer education, in particular by way of introducing elements of consumer awareness into educational programmes in the public schools.

Article 39.

1. The tasks of the local government at poviats level concerning the protection of consumer rights shall be performed by poviats (municipal) consumer ombudsmen, hereinafter referred to as "consumer ombudsmen".
2. Poviats may, by way of an agreement, appoint a single consumer ombudsman.

Article 40

1. The consumer ombudsman shall be employed by the starost or city mayor in towns with poviats rights.
2. The consumer ombudsman shall be a person holding a university degree, in particular in law or economics and possessing minimum five years of professional experience.
3. The consumer ombudsman shall be directly subordinated to the starost (city mayor).
4. The organisational status of the consumer ombudsman shall be determined by the poviats statutes or regulations. In poviats populated by over 100 thousand inhabitants and in towns with poviats rights, the consumer ombudsman may perform his tasks with the help of an individual office.
5. For the remaining matters related to the legal status of the consumer ombudsman, the provisions of Act of 21 November 2008 on local government workers (Journal of Laws No. 223, item 1458) shall apply accordingly.

Article 41

[Repealed]

Article 42

1. The tasks of consumer ombudsman shall, in particular, include the following:
 - 1) providing free of charge consumer advice and legal information in the scope of protection of consumer interests;
 - 2) submitting requests for proclaiming and amending local regulations in the scope of protection of consumer interests;
 - 3) addressing undertakings in cases concerning protection of consumer rights and interests;
 - 4) co-operating with the territorially competent Office branches, bodies of Trade Inspection and consumer organisations;
 - 5) performing other tasks prescribed by the present Act and by separate provisions.
2. Consumer ombudsman may in particular bring an action on consumers' behalf and, with their consent, join lawsuits in cases concerning protection of consumer interests.
3. In cases concerning petty offences to the detriment of consumers, consumer ombudsman shall act as a public prosecutor within the meaning of the provisions of the Act of 24 August 2001 - the Code of Procedure in Cases Prosecuted as Petty Offence (Journal of Laws No. 106, item 1148, as amended)).
4. Undertaking addressed by a consumer ombudsman acting pursuant to the provisions of paragraph 1, subparagraph 3, is under an obligation to provide the ombudsman with requested explanations and information and to take a stance in relation to comments and opinions of the ombudsman.
5. The provisions of Article 63 of the Act of 17 November 1964 - the Code of Civil Procedure shall apply accordingly, to consumer ombudsman.

Article 43

1. The consumer ombudsman shall submit for approval an annual activity report to the starost (city mayor) by 31 March each year which contains information on their activity in the preceding year as well as submit the report to the relevant local Branch Office.
2. [Repealed]
3. The consumer ombudsman shall be obliged to continually present to the Branch Offices the relevant conclusions and inform them about problems concerning consumer protection which require taking measures at the government administration level.

Article 44

1. The National Council of Consumer Ombudsmen, hereinafter referred to as "the Council" shall assist the President of the Office.
2. The Council shall be a standing opinion-giving and advisory body of the President of the Office in the scope of the matters related to protection of consumer rights at the poviát government level.
3. The tasks of the Council shall include, in particular:
 - 1) submitting proposals on directions of legislative changes in provisions pertaining to protection of consumer rights;
 - 2) giving opinions on matters related to draft legal acts or directions of the government consumer policy;
 - 3) giving opinions on such other matters falling within the scope of protection of consumers as the President of the Office may refer to the Council;

- 4) conveying information concerning protection of consumers to the extent as indicated by the President of the Office.
4. The Council shall comprise nine consumer ombudsmen, one from each area of local competence of the branches of the Office of Competition and Consumer Protection.
5. The members of the Council shall be appointed and dismissed by the President of the Office. Appointments shall be granted upon a request of the directors of the branches referred to in paragraph 4, subject to a written consent of the recommended consumer ombudsmen. The recalling from the function of a consumer ombudsman shall result in the expiry of his or her membership in the Council.
6. The Office shall provide administrative support for the Council.
7. The Office shall refund to the members of the Council the costs of commuting to meetings of the Council in accordance with the provisions on dues to which a person employed in a state or local government unit of the budget sector is entitled in connection with domestic business travel.
8. The work practices of the Council shall be laid down in the regulations established by the President of the Office.

Article 45

1. The consumer organisations shall represent consumer interests towards the bodies of central and local government and may participate in the implementation of the government consumer policy.
2. The organisations referred to in paragraph 1 are, in particular, entitled to:
 - 1) expressing opinions on the draft legal acts and other documents concerning rights and interests of consumers;
 - 2) elaborating and disseminating consumer educational programmes;
 - 3) performing tests of products and services and publishing their results;
 - 4) editing periodicals, research studies, folders and leaflets;
 - 5) providing free-of-charge consumer advisory services and free-of-charge assistance in handling consumer claims, unless the statutes of the organisation provide otherwise;
 - 6) participating in the work on standardisation;
 - 7) implementing government tasks in the field of consumer protection, commissioned to them by the central and local government administration bodies;
 - 8) applying for allocation of public funds for the implementation of the tasks referred to in subparagraph 7.
3. The central and local government administration bodies shall be obliged to consult consumer organisations on the issues concerning the directions of activities aimed at protection of consumer interests.

Article 46

The amount of annual closed-end grants, within the meaning of the Act of 30 June 2005 on Public Finance (Journal of Laws No. 249, item 2104, as amended⁷), allocated from the state budget for the implementation of the tasks referred to in Article 45, paragraph 2, subparagraph 7 shall be determined in the Budget Act in the part of the state budget, the administrator of which is the President of the Office.

Title VI
Proceedings before the President of the Office

Chapter 1
General Provisions

Article 47

1. The proceedings before the President of the Office shall be conducted as explanatory proceedings, antimonopoly proceedings or proceedings concerning practices violating collective consumer interests.
2. The explanatory proceedings may precede instituting the antimonopoly proceedings or proceedings concerning practices violating collective consumer interests.

Article 48

1. The President of the Office may institute, on an ex officio basis, and by way of a resolution, explanatory proceedings, if the circumstances indicate a possibility that the provisions of the Act have been infringed, as to matters regarding a given branch of economy, or as to matters regarding protection of consumer interests, and in any other cases as provided for by the Act.
2. The explanatory proceedings may in particular aim at:
 - 1) initially determining whether an infringement of the provisions of this Act has occurred, such as may justify the institution of antimonopoly proceedings, including whether the case is of an antimonopoly nature;
 - 2) initially determining whether an infringement of the provisions of this Act has occurred, such as may justify the institution of proceedings regarding the use of practices violating the collective interests of consumers;
 - 3) a study of the market, including the determination of the structure and degree of concentration thereof;
 - 4) initially determining whether an obligation exists to submit a notification of an intended concentration;
 - 5) determining whether an instance of the violation has occurred, of any consumer interest being protected by the law, such as may justify the undertaking of actions specified in the relevant separate acts.
3. The explanatory proceedings shall be concluded by way of a resolution.
4. The explanatory proceedings should not last in excess of 30 days, and as regards particularly complex issues, not longer than 60 days from the date of the institution thereof.
5. In the case as referred to in paragraph 2, subparagraph 3, the provision of paragraph 4 and Article 35 of the Act of 14 June 1960 - the Code of Administrative Procedure (Journal of Laws of 2000 No. 98, item. 1071, as amended)) shall not apply.

Article 49

1. The antimonopoly proceedings in the cases of competition-restricting practices, proceedings concerning practices violating collective consumer interests and in cases involving imposition of fines shall be instituted on ex officio basis.
2. The antimonopoly proceedings concerning concentrations shall be instituted upon a request or on an ex officio basis.

Article 50

1. Undertakings shall be obliged to provide all necessary information and documents upon request of the President of the Office.
2. The request referred to in paragraph 1 should include:
 - 1) indicating the scope of such information;
 - 2) indicating the objective of the request;
 - 3) the time limit for providing information;
 - 4) an instruction about sanctions for non-delivery of information or for providing false or misleading information.
3. Everyone shall be entitled to submit, in a written form, on their own initiative or upon request of the President of the Office, explanations concerning essential circumstances of a given case.

Article 51

1. Only the original document or its copy certified by a public administration body, notary, attorney at law, legal adviser or authorised employee of the undertaking may serve as the documentary evidence in the proceedings before the President of the Office.
2. The evidence in the proceedings before the President of the Office shall constitute the document drawn up in the Polish language, subject to paragraph 3.
3. Where such document has been drawn up in a foreign language also the translation into Polish of this document or of its part intended to serve as the evidence in the proceedings should be submitted, certified by a sworn translator.

Article 52

1. The party adducing witness evidence shall be obliged to precisely indicate facts subject to confirmation by the testimony of individual witnesses and to indicate the data to allow proper summons of the witnesses.
2. The President of the Office, when summoning a witness, shall indicate in his summons the name, surname and domicile of the summoned, the place and date of giving the explanation, the parties and subject of the case as well as the provisions on penal sanctions for false testimony.

Article 53

1. The testimony of a witness, after its entry into the protocol, shall be read out before a witness and, depending on circumstances, completed or verified based on his/her comments.
2. The protocol of the hearings of a witness shall be signed by the witness and by the employee of the Office carrying out the hearings.

Article 54

1. In cases requiring special information, the President of the Office having heard requests of the parties concerning the number of experts and their selection, may summon one or more experts in order to seek their opinion.
2. The expert, within the meaning of paragraph 1, may be also a legal person specialised in the relevant field.

Article 55

Until the termination of the activities of an expert each party may request him/her to be excluded from the proceedings for the same reasons as may be requested to exclude the employee of the Office. The party lodging a request to exclude an expert after activities have been initiated by the expert, has an obligation to render plausible that the reason justifying the exclusion arose thereafter or was unknown to the party beforehand.

Article 56

The President of the Office may order to present to an expert the case records and the subject of inspection. The provisions of Article 71, paragraph 1 shall apply accordingly.

Article 57

1. The opinion of an expert should contain its justification.
2. The experts may submit their joint opinion.

Article 58

1. The President of the Office shall award an expert the remuneration in accordance with the provisions on costs of obtaining expert's evidence in court proceedings, subject to paragraph 3.
2. The President of the Office may impose upon a party which has filed a request for obtaining expert's evidence, the obligation to pay an advance on account of the expert's expenses.
3. If no decision is issued, stating that the practice restricting competition has been applied, or collective consumer interests have been violated, the costs of the expert's remuneration shall be borne by the State Treasury.

Article 59

1. The President of the Office may address a scientific institute, within the meaning of the provisions on science financing rules, to issue an opinion.
2. In its opinion, the institute shall indicate a person or persons who carried the research and issued the opinion.
3. The provisions of Articles 54 to 58 shall apply accordingly.

Article 60

1. During the proceedings the President of the Office may hold a hearing.
2. The hearing referred to in paragraph 1 shall be an open session, subject to paragraph 4.
3. The President of the Office may summon for the hearing, and examine parties, witnesses as well as ask for an expert opinion.
4. The hearing referred to in paragraph 1 is a closed session, if during its course, the information considered is subject to business secrecy or other secrecy protected under separate provisions. The provisions of Articles 153 and 154 of the Act of 17 November 1964 - the Code of Civil Procedure, shall apply accordingly.

Article 61

The President of the Office may address a territorially competent regional court to examine witnesses and obtain an expert opinion, where it is supported by the nature of the evidence or consideration of significant inconvenience or significant costs of obtaining the evidence. When addressing the court for providing evidence, the President of the Office shall issue a resolution which shall define:

- 1) the court which is to provide evidence,
- 2) means of evidence,
- 3) facts to be established.

Article 62-68

[Repealed]

Article 69

1. The President of the Office may, upon a request or on an ex officio basis, and by way of a resolution, limit to an extent indispensable the right to have access to evidence being attached to the case files, in the case that rendering such evidence accessible would entail a risk that the business secret, or any other secrets being liable to protection under the relevant separate provisions, may be revealed.
2. The restriction referred to in paragraph 1 shall also apply to evidence included in the proceedings pursuant to Article 73 paragraph 5.
3. The resolution issued pursuant to paragraph 1 shall be subject to a complaint.
4. The party filing a request for a limited right of access to evidence shall also submit to the President of the Office a version of the document that does not comprise any information subject to a limitation referred to in paragraph 1, as furnished with a relevant annotation.
5. A version of the document not comprising any information being liable to a limitation referred to in paragraph 1 shall be rendered accessible to the parties concerned, as furnished with a relevant annotation.

Article 70

1. Any information and evidence received by the President of the Office under the procedure of Article 109, including information on the undertaking's request for renouncement from imposing a fine or reducing thereof (leniency), shall not be rendered accessible, subject to paragraphs 2 and 3.
2. The President of the Office shall provide the parties concerned with access to information and evidence referred to in paragraph 1, prior to issuing a decision.
3. The provision of paragraph 1 shall not apply in the event the undertaking moving for leniency agrees in writing to render the information and evidence referred to in paragraph 1 accessible.

Article 71

1. The employees of the Office shall protect company secrets as well as other information, protected subject to other applicable regulations, that they may have acquired during proceedings.
2. The provision of Article 71, paragraph 1 does not apply to publicly available information, information on initiating proceedings and information on decisions closing such proceedings and the content thereof.
3. The provisions of Article 71, paragraphs 1 and 2 shall apply also to the employees of Trade Inspection and other persons involved in the inspections referred to in Article 105a paragraph 2.

Article 72

The public administration bodies are under obligation to render accessible to the President of the Office the files being in their possession as well as information relevant to the proceedings before the President of the Office.

Article 73

1. Information received in the course of the proceedings may not be used in any other proceedings based on separate provisions, subject to paragraphs 2 to 4.
2. The provision of paragraph 1 shall not apply to:
 - 1) penal proceedings exercised by a public-complaint procedure, or fiscal penal proceedings;
 - 2) other proceedings exercised by the President of the Office;
 - 3) sharing information with the European Commission and competition authorities of the European Union Member States, under Regulation No. 1/2003/EC;
 - 4) sharing information with the European Commission and competent authorities of the European Union Member States, pursuant to Regulation No. 2006/2004/EC;
 - 5) providing competent authorities with information which may indicate that any separate provisions have been infringed.
3. The President of the Office shall provide regulatory authorities involved in the market of telecommunications and postal services, as well as management of fuels and energy, hereinafter referred to as “regulatory authorities” with information, including results of research and market analyses required in proceedings conducted by these authorities, save for information:
 - 1) for which the confidentiality obligation results from international commitments, in particular information obtained in the course of proceedings instituted pursuant to Article 81 or 82 of the EC Treaty;
 - 2) obtained from the undertaking in connection with the application of Article 109 of the Act.
4. The regulatory authorities shall be obliged to protect the information obtained pursuant to paragraph 3, in particular the information may not be used in other proceedings than those conducted by the regulatory authorities. The provisions of Articles 69 and 71 shall apply accordingly.
5. Information received in the course of proceedings from a competition authority of a Member State of the European Union may be used in the course of the said proceedings under the terms upon which such information has been provided by that authority, including not using the information to impose sanctions upon certain persons..
6. The President of the Office shall notify the parties concerned, of having included in the pool of evidence the information obtained in the course of any other proceedings exercised by him.

Article 74

When issuing the decision terminating the proceedings, the President of the Office shall take into consideration only the charges to which the parties concerned could assume their position.

Article 75

1. The President of the Office shall discontinue proceedings, by way of a resolution, in the event that:
 - 1) the notification on intended concentration of undertakings has been withdrawn;
 - 2) the fine referred to in Article 106, paragraph 2, and Articles 107 and 108, has not been imposed;
 - 3) the case has been taken over by the European Commission under the relevant provisions of the Community law.
2. The President of the Office may, by way of a resolution, discontinue proceedings if the case concerned has been resolved by a competent competition authority of a Member State of the European Union.

Article 76

Subject to Articles 93 and 105, proceedings shall not be instituted if 5 years elapsed from the end of the year when:

- 1) the infringement of the provisions of the Act took place;
- 2) a decision about imposition of a fine became legally binding.

Article 77

1. If the proceedings result in the assessment by the President of the Office that the provisions of the Act have been infringed, the undertaking which has committed this infringement shall be obliged to bear the costs of the proceedings.
2. In the cases particularly justified the President of the Office may impose upon a party the obligation to reimburse only part of the expenses or desist from charging costs.

Article 78

Regardless of the result of the proceedings, the President of the Office may impose upon a party the obligation to reimburse expenses due to its unreliable or clearly unfair behaviour, in particular costs resulting from avoidance to give explanation or submitting untruthful explanation, concealment or delayed presentation of the evidence.

Article 79

The costs of necessary opinions of experts and scientific institutes within the meaning of the provisions on science financing rules in cases related to concentrations shall be borne by the undertakings participating in the concentration.

Article 80

The President of the Office shall decide upon the costs by way of a resolution, which may be included in the decision terminating the proceedings.

Article 81

1. The decision of the President of the Office shall be subject to an appeal to the Court of Competition and Consumer Protection, lodged within two weeks from the date of delivering the decision.
2. In the case where the appeal against the decision is lodged, the President of the Office shall without delay remit it to the Court of Competition and Consumer Protection together with the case files.
3. Where the President of the Office considers the appeal to be justified, he/she may - without remitting the files to the court - revoke or change the decision in its entirety or in part, about which, without delay, the party is informed by sending a new decision, which may be appealed against.
4. Prior to the remittance of the appeal to the court or the revocation or the change of the decision pursuant to paragraph 3, the President of the Office may also, in justified cases, perform additional activities aimed at clarification of objections contained in the appeal.
5. The provisions of paragraphs 1 to 4 shall apply, accordingly, to the resolutions of the President of the Office which are subject to complaints, however a complaint is to be lodged within one week from the day of delivering the resolution.

Article 82

1. Legal means for refuting the decision foreseen in the Code of Administrative Procedure and concerning the resumption of proceedings, revocation, change or assessment of invalidity of decisions shall not apply to the decision of the President of the Office.
2. The provision of paragraph 1 shall apply accordingly to the resolutions of the President of the Office.

Article 83

The matters not governed by the present Act, as regards the proceedings before the President of the Office, shall be subject to the provisions of the Act of 14 June 1960 - the Code of Administrative Procedure, subject to Article 84.

Article 84

To the matters concerning the evidence in the proceedings before the President of the Office in the scope not regulated in the present chapter, Articles 227 to 315 of the Act of 17 November 1964 - the Code of Civil Procedure, shall apply accordingly.

Article 85

The provisions of this chapter shall apply accordingly to the cases regarding imposition of fines for infringement of provisions laid down in the Act.

Chapter 2

Antimonopoly proceedings concerning competition-restricting practices

Article 86

1. Everybody may submit to the President of the Office a written notification concerning a suspicion that competition-restricting practices have been applied, together with a justification.
2. The notification referred to in paragraph 1 may include in particular:
 - 1) indication of the undertaking which is accused of applying competition-restricting practices;
 - 2) description of the actual state being the basis of the notification;
 - 3) indication of the provision of the Act or the EC Treaty, the infringement of which is objected against by the notification submitter;
 - 4) making the infringement of the provisions of the Act or the EC Treaty plausible;
 - 5) identification data of the notification submitter.
3. Any documents that may constitute the evidence of infringing the provisions of the Act shall be attached to the notification.
4. The President of the Office shall provide the notification submitter, within the time period specified in Articles 35 to 37 of the Act of 14 June 1960 - the Code of Administrative Procedure, with information in writing about the way of considering the notification together with its justification.

Article 87

1. The President of the Office shall, in accordance with Article 11, paragraph 6 of Regulation No. 1/2003/EC, refuse to institute antimonopoly proceedings in the event that:
 - 1) the European Commission is exercising proceedings regarding the same case;
 - 2) the case has been resolved by the European Commission.

2. The President of the Office may, pursuant to Article 13 of Regulation No. 1/2003/EC, refuse to institute antimonopoly proceedings in the event that:
 - 1) the competent competition authority of another Member State of the European Union is conducting proceedings regarding the same case;
 - 2) the case has been resolved by the competent competition authority of another Member State of the European Union.
3. If in the case referred to in paragraph 2, subparagraph 1, the President of the Office has instituted antimonopoly proceedings concerning a given case, he/she may suspend the proceedings, by way of a resolution, until the competent competition authority of another Member State of the European Union resolves the case.

Article 88

1. The party to the proceedings shall be every person against whom the proceedings concerning the application of competition-restricting practices are instituted.
2. The President of the Office shall issue a resolution about the instituted antimonopoly proceedings and shall notify the parties concerned of this fact.

Article 89

1. If, in the course of antimonopoly proceedings, it has been rendered plausible that any further application of the practice being objected against may cause serious and hard-to-remove threats to competition, the President of the Office may, prior to the conclusion of the antimonopoly proceedings, and by way of a decision, impose on the undertaking being alleged to be using a given practice, an obligation to omit acting in a certain manner, in order to prevent those threats. Lodging of an appeal shall not stay execution of the said decision. Prior to issuing the decision, no right shall be vested in the party concerned to express itself as to the evidence and materials gathered, or demands submitted, as referred to in Article 10 of the Act of 14 June 1960 - the Code of Administrative Procedure.
2. In the decision referred to in paragraph 1, the President of the Office shall determine the period for which it is due to be binding. The decision shall be binding for no longer than until a decision is issued concluding the proceedings regarding the case.
3. The President of the Office may extend, by way of a decision, the validity period of the decision referred to in paragraph 1. The provision of paragraph 2, the second sentence, shall apply accordingly.
4. In the event that a decision is issued, as referred to in paragraph 1, Article 106, paragraph 1, subparagraphs 1 and 2 shall not apply.

Article 90

The President of the Office may rule that the decision be immediately enforceable in whole or in part, where it is necessary for the protection of competition or important interest of consumers.

Article 91

1. If there are grounds to suppose that any objects, files, books, documents and other data carriers within the meaning of the regulations on informatisation of operations of entities performing public tasks are stored in residential premises or any other premises, building or means of transportation and such storage may affect the findings which are material to pending proceedings, the Court of Competition and Consumer Protection, upon the request of the President of the Office, may consent to perform a search in such premises by the Police, including seizure of objects that may be used as evidence in the proceedings. The provisions of Article 105c, paragraphs 2 to 4 shall apply accordingly.

2. The search referred to in paragraph 1 shall be also attended by an authorised employee of the Office and other persons referred to in Article 105a, paragraph 2.
3. On instruction of the Court of Competition and Consumer Protection, the police shall perform the actions referred to in paragraph 1.

Article 92

The antimonopoly proceedings concerning competition-restricting practices shall be completed no later than 5 months from the date of their institution. The provisions of Articles 35 to 38 of the Act of 14 June 1960 - the Code of Administrative Procedure, shall apply accordingly.

Article 93

Proceedings concerning application of competition-restricting practices shall not be instituted where since the end of the year in which they were abandoned one year has elapsed.

Chapter 3

Antimonopoly proceedings concerning concentration

Article 94

1. Every person who notifies, in conformity with paragraph 2, the intention of concentration shall be a party to the proceedings.
2. The intention of concentration shall be notified by:
 - 1) merging undertakings jointly - in the case referred to in Article 13, paragraph 2, subparagraph 1;
 - 2) an undertaking taking over the control - in the case referred to in Article 13, paragraph 2, subparagraph 2;
 - 3) jointly all undertakings participating in creation of a joint undertaking - in the case referred to in Article 13, paragraph 2, subpaagraph 3;
 - 4) an undertaking acquiring part of another undertaking's property - in the case referred to in Article 13, paragraph 2, subparagraph 4.
3. In the case where a concentration is implemented by a dominant undertaking by intermediary of at least two dependent undertakings, the notification of intention of concentration shall be submitted by a dominant undertaking.
4. For the requests for instituting the antimonopoly proceedings in concentration cases the undertakings shall pay fees. If the request has been submitted but no fee has been paid, the President of the Office shall summon the applicant to pay the fee within 7 days with the instruction that if the fee is not paid, the request will not be considered.
5. The fees referred to in paragraph 4 shall constitute the state budget income.
6. The Council of Ministers shall determine, by way of a regulation:
 - 1) the detailed conditions to be met by the notification of the intention of concentration, including a list of information and documents which this notification should contain, taking into consideration the specificity of activities conducted by different types of undertakings and, in particular by financial institutions;
 - 2) the rate of fees referred to in subparagraph 4 as well as the procedure of payment, making sure that they do not constitute a barrier for the undertakings as regards implementing the concentration.

Article 95

1. The President of the Office:
 - 1) shall return the notification of the intention of concentration, if the intention of concentration is not subject to a notification pursuant to Article 13 in connection with Article 14;
 - 2) may return within 14 days the notification of the intention of concentration, if the intention of concentration fails to meet the requirements with which it should comply;
 - 3) may summon the party notifying the intention of concentration to eliminate the indicated errors in the notification or to supplement necessary information, in the appointed time limit;
 - 4) may return the notification of the intention of concentration, if despite the summons pursuant to subparagraph 3, the party notifying the intention of concentration fails to eliminate the indicated errors or supplement necessary information, in the appointed time limit.
2. The President of the Office may present to the undertaking or undertakings participating in the concentration the requirements referred to in Article 19, paragraph 2, appointing the time limit for the undertaking(s) to respond to the proposal; failure to reply or a negative answer shall result in the issuance of the decision referred to in Article 20, paragraph 1.

Article 96

1. The antimonopoly proceedings in concentration cases should be terminated not later than within 2 months from their institution.
2. In the event that the undertaking has presented the conditions determined in Article 19, paragraph 2, the final date referred to in paragraph 1 shall be extended by additional 14 days.
3. The time limits as established in paragraphs 1 and 2, do not include the time periods of waiting for a notification from other participants of the concentration, or the time periods necessary to eliminate errors or supplement necessary information, as referred to in Article 95, paragraph 1, subparagraph 3, or to respond to the measures proposed by the President of the Office, referred to in Article 19, paragraph 2, as well as the time period of waiting until the fee is paid, as referred to in Article 94, paragraph 4.

Article 97

1. The undertakings whose intention of concentration is subject to a notification shall be under obligation to refrain from implementing the concentration until the issuance of the decision by the President of the Office or the lapse of the time limit in which such a decision should be issued.
2. The legal action pursuant to which the concentration is to be implemented may be performed under condition of the issuance by the President of the Office, by way of a decision, of the approval for implementing the concentration, or after the lapse of the time limit referred to in Article 96.

Article 98

The realisation of the public offer to purchase or exchange of stocks, notified to the President of the Office under the procedure stipulated in Article 13, paragraph 1, shall not be considered as an infringement of the obligation referred to in Article 97, paragraph 1, provided that the buyer does not exercise the voting rights arising from the acquired stocks or exercises them solely in order to maintain the full value of his capital investment or to prevent the substantial damage which might affect the undertakings participating in the concentration.

Article 99

In the case of non-compliance with the decision referred to in Article 21, paragraph 1 or 4, the President of the Office may, by way of a decision, accomplish a division of the undertaking. To the division of a company, the provisions of Articles 528 to 550 of the Act of 15 September 2000 - the Code of Commercial Partnerships and Companies (Journal of Laws No. 94, item 1037, as amended) shall apply accordingly. The President of the Office has the competence of the bodies of companies participating in the division. Moreover, the President of the Office may apply to the court for the annulment of the agreement or for undertaking other legal means aimed at restoring the previous status.

Chapter 4

Proceedings concerning practices violating collective consumer interests

Article 100

1. Every person may submit a notification in writing to the President of the Office about a suspicion of applying practices violating collective consumer interests.
2. The notification referred to in paragraph 1 may be also submitted by a foreign organisation entered in the list published in the Official Journal of the European Communities, of organisations entitled in the European Union Member States to file a request for instituting proceedings, where the object of its activity warrants its submitting a notification concerning an infringement resulting from unlawful omissions or such acts performed in the Republic of Poland, which jeopardise collective consumer interests in the Member State where the organisation is seated.
3. The provisions of Article 86, paragraphs 2 to 4 shall apply accordingly.

Article 101

1. The party to the proceedings shall be every person against whom the proceedings concerning the application of practises violating collective consumer interests are instituted.
2. The President of the Office shall issue a resolution instituting proceedings concerning the application of practises violating collective consumer interests and he/she shall notify the parties of this fact.

Article 102

A settlement may be made in proceedings concerning practices violating collective consumer interests where the nature of the case warrants this and the settlement is not intended to circumvent the law or is not contrary to public interest or a legitimate consumer interest.

Article 103

The President of the Office may rule that the decision be immediately enforceable in whole or in part where an important consumer interest so warrants.

Article 104

The proceedings concerning practices violating collective consumer interests shall be concluded no later than within two months, and in particularly complicated cases no later than within three months from the date of their institution. The provisions of Articles 35 to 38 of the Act of 14 June 1960 - the Code of Administrative Procedure, shall apply accordingly.

Article 105

No proceedings concerning practices violating collective consumer interests shall be instituted where a year has elapsed from the end of the year in which such practices were discontinued.

Chapter 5

Inspection in the course of proceedings before the President of the Office

Article 105a.

1. During proceedings before the President of the Office, an inspection may be held at each undertaking involved, hereinafter referred to as the “inspected party”, with reference to the proceedings; such inspection shall be performed by an authorised employee of the Office or Trade Inspection, hereinafter referred to as the “inspecting party”.
2. The President of the Office may authorise the following persons to participate in the inspection:
 - 1) an employee of a competition protection authority of a Member State, referred to in Article 22 of Regulation No. 1/2003/EC;
 - 2) an employee of the applicant authority within the meaning Article 3, subparagraph f of Regulation No. 2006/2004/WE in instances referred to in Article 6, paragraph 3 thereof;
 - 3) persons holding specific information if such information is required to perform the inspection.
3. With respect to matters falling within the competencies of branch offices or with respect to matters entrusted to branch offices by the President of the Office pursuant to Article 33, paragraphs 4 and 5, the employees of the branch offices shall perform inspections on the basis of authority of the director of the branch offices issued on behalf of the President of the Office.
4. The authority to perform inspection shall specify:
 - 1) identification of the inspecting authority;
 - 2) providing the legal basis;
 - 3) date and place of issue;
 - 4) first and last name and position of the inspecting person and number of his/her official ID; if persons referred to in paragraph 2 are authorised to participate in the inspection - first and last names of such persons, number of their passport or another ID document;
 - 5) identification of the inspected party;
 - 6) identification of the subject and scope of inspection;
 - 7) identification of commencement date of the inspection and the anticipated completion date thereof;
 - 8) signature of the authorising person with details of his/her position or function;
 - 9) instruction of the rights and obligations of the inspected entity.
5. The authority to perform inspection, referred to in paragraph 1 may be issued by the President of the Office as well as voivodeship inspectors of the Trade Inspection upon the proposal of the Chief Inspector of the Trade Inspection.
6. The inspecting persons shall deliver the authority to hold the inspection to the inspected party or the person authorized thereof and present their official IDs whereas the persons authorised to participate in the inspection, referred to in paragraph 3 - their ID cards, passport or other document confirming their identity.
7. If the inspected party or persons authorised thereby are absent, the authority to perform the inspection or official IDs, ID cards, passport or other documents confirming the identity shall be presented to another employee of the inspected party who may be recognised to be

the person referred to in Article 97 of the Act of 23 April 1964 - Civil Code, or to a witness who shall be a public official while not being an employee of the inspecting authority. In such circumstances, the authority shall be delivered to the inspected party without delay, however not later than on the third day from initiating the inspection.

Article 105b.

1. The inspecting persons shall be authorised to:
 - 1) access the site and the buildings, other premises and means of transportation held by the inspected party;
 - 2) request presentation of files, books, all kinds of documents and data carriers related to the subject of the inspection as well as true copies and extracts thereof and to make notes of their content;
 - 3) request the persons referred to in Article 105d, paragraph 1 to provide oral explanations on the subject of the inspection.
2. Persons authorized to participate in inspections pursuant to Article 105a, paragraph 2 shall hold the same authority as the inspecting person with respect to access to the site and the buildings, other premises and means of transportation held by the inspected party and access to files, books, all kinds of documents and data carriers related to the subject of the inspection as well as true copies and extracts thereof and to make notes of their content as well as shall be entitled to participate jointly with the inspecting person in the search referred to in Article 91 and 105c.
3. During the inspection, the inspecting party may be assisted by functionaries of other State inspection authorities or the Police. State inspection authorities and the Police shall perform operations on instructions of the inspecting person.
4. In justified instances, the proceedings of inspections or any specific operations thereof may be recorded with video and audio equipment subject to the prior notification thereof to the inspected party. Electronic data carriers within the meaning of the regulations on informatisation of operations of entities carrying out public tasks, on which the proceedings of inspections or any specific operations thereof have been registered, shall be attached to the inspection protocol.

Article 105c.

1. During the inspection, the inspecting persons may search the premises or objects subject to the consent of the court of competition and consumer protection, provided upon the request of the President of the Office.
2. If there is a justified suspicion of a serious breach of the Act, in particular when evidence could be obliterated, the request referred to in paragraph 1 may be filed by the President of the Office before antimonopoly proceedings are initiated.
3. The court of competition and consumer protection shall issue its decision with respect to the matter referred to in paragraph 1 within 48 hours. Decisions of the court of competition and consumer protection may not be appealed.
4. In all matters not provided for in the Act, the provisions of the Act of 6 June 1997 - Criminal Procedure Code relating to search shall apply accordingly.

Article 105d.

1. The inspected party, the person authorised thereby, the holder of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 shall be obliged to:
 - 1) provide the requested information;
 - 2) provide access to the site and buildings or other premises and means of transportation;
 - 3) provide access to files, books and all kinds of documents or other data carriers.

2. The persons referred to in paragraph 1 may refuse to provide information or collaborate only when that could lead to criminal responsibility for themselves or their spouses, ascendants, descendants, brothers and sisters as well as relatives in the same line or degree and co-habiting persons as well as persons who have been adopted, stay under the guardianship or care thereof. Such right to refuse information or collaboration shall survive the marriage or the relationship of adoption, guardianship or care.

Article 105e.

1. The inspected party shall provide the inspecting persons and other persons authorised to participate in the inspection with conditions and facilities required for efficient performance of the inspection, in particular the inspected party shall:
 - 1) make copies of documents, including printouts from data carriers requested by the inspecting persons;
 - 2) provide if possible a lockable separate room if this is required to perform the inspection;
 - 3) provide a separate place to store documents and secured objects;
 - 4) provide available means of telecommunications to the extent required to perform the inspection.
2. The inspected party shall certify the copies of documents and printouts for compliance with original. If this is refused, the documents shall be certified by the inspecting persons with a record in the inspection protocol.

Article 105f.

1. The inspecting persons or the persons authorised to participate in the inspection shall ascertain facts on the basis of evidence collected during the inspection, in particular documents, objects, site inspections as well as oral or written explanations and statements and other data carriers.
2. The evidence referred to in paragraph 1 may be secured by way of:
 - 1) storing such evidence in a separate, locked and sealed premises with the inspected party;
 - 2) deposit against receipt to the inspecting persons in the premises of the Office or a voivodeship branch of Trade Inspection.

Article 105g.

1. During the inspection referred to in Article 105a, paragraph 1, the President of the Office may issue a decision on seizing files, books, all kinds of documents or data carriers within the meaning of the regulations on informatisation of operations of entities carrying out public tasks and of other entities that may be used as evidence in the matter, for the duration of the inspection, however not longer than 7 days.
2. The person holding the objects referred to in paragraph 1 shall be requested by the inspecting persons to deliver the objects voluntarily and if this is refused, the objects may be seized pursuant to the regulations on enforcement procedure in administration.
3. The decision on seizing the objects may be appealed by persons whose rights have been violated. The appeal, if any, does not stop the enforcement of the decision.
4. The provisions of paragraphs 1 to 3 do not apply to the securing at the inspection site, with the purpose of performing inspection operations, of files, books, all other documents or data carriers and other objects that may be used as evidence in the matter and to the premises of the inspected entity where the documents or objects are stored.

Article 105h.

1. The objects that are subject to the seizure referred to in Article 105g, paragraph 1, released, seized or found during the inspection, after visual inspection and drafting a seizure protocol, shall be taken away or left on deposit with a trustworthy person with an obligation to deliver them upon each request of the authority carrying out the proceedings.
2. The seizure protocol shall identify the case to which the seizure of objects or search is related, and the exact time of commencing and closing the operations, the precise list of seized objects and, to the extent required a description thereof as well as reference to the decision of the President of the Office on the seizure. The protocol shall be signed by the person performing the seizure and a representative of the inspected party.
3. The person seizing the objects referred to in paragraph 1 shall be obliged to deliver to the interest parties a receipt specifying the objects that were seized and by whom and to notify without delay the undertaking whose objects were seized.
4. The seized objects shall be returned as soon as they are found unnecessary to the carried out proceedings or by annulling by the court of competition and consumer protection of the decision to seize such objects, however not later than after expiry of the period referred to in Article 105g, paragraph 1.

Article 105i.

Without initiating separate proceedings, the President of the Office may carry out an inspection, including a search pursuant to Article 91 or Article 105c:

- 1) upon the request of the European Commission if the undertaking or a person authorised to represent the undertaking or holder of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1, object to holding an inspection by the European Commission during proceedings held pursuant to the provisions of Regulation No. 1/2003/EC or Regulation No. 139/2004/EC;
- 2) upon the request of the European Commission or the competition authority of a Members State in the situation specified in Article 22 of Regulation No. 1/2003/EC or Article 12 of Regulation No. 139/2004/EC.

Article 105j

1. The operations performed during the inspection shall be recorded by the inspecting persons in an inspection protocol.
2. The inspection protocol shall specify in particular:
 - 1) identification of the name or first and last name and address of the inspected party;
 - 2) date of commencement and end of the inspection;
 - 3) first and last name and position of the inspecting persons;
 - 4) identification of the subject and scope of inspection;
 - 5) description of facts ascertained during the inspection;
 - 6) description of attachments;
 - 7) instruction given to the inspected party on their rights to make reservations to the protocol and a right to refuse to sign the protocol.
3. The evidence collected during the inspection shall be attached to the inspection protocol.

Article 105k

1. The inspection protocol shall be signed by the inspecting person and the inspected party.
2. Being presented the protocol within 7 days prior to the signature thereof, the inspected party may submit written reservations to the protocol.

3. If reservations referred to in paragraph 2 are submitted, the inspecting person shall make an analysis thereof and, if required, take additional inspection actions; if the reservations are found justified, the inspecting person shall amend or make additions to the relevant part of the protocol in the form of an annex to the protocol.
4. If the reservations are not found to be justified in whole or in part, the inspecting person shall notify the inspected party thereof in writing.
5. Refusal to sign the protocol shall be mentioned in the protocol by the inspecting person.
6. The protocol shall be made in two counterparts one of which shall be delivered to the inspected party with the exception of the evidence kept by the inspecting person.

Article 105l

Inspection of business operations of an undertaking shall be subject to the provisions of chapter 5 of the Act of 2 July 2004 on freedom of business operations (Journal of Laws of 2007, No. 155, item 1095, as amended).

Title VII

Fines

Article 106

1. The President of the Office may impose upon the undertaking, by way of a decision, a maximum fine of 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed, if the undertaking, even if unintentionally:
 - 1) has committed an infringement of the ban determined in Article 6, as regards the nonexcluded scope under Articles 7 and 8, or an infringement of the ban determined in Article 9;
 - 2) has committed an infringement of Article 81 or Article 82 of the EC Treaty;
 - 3) has implemented a concentration without a consent of the President of the Office;
 - 4) has committed the application of a practise violating collective consumer interests within the meaning of Article 24.
2. The President of the Office may further impose by way of a decision a fine of the equivalent of EUR 50 000 000 on an undertaking if the undertaking, even unintentionally:
 - 1) provided incorrect data in the application referred to in Article 23 or in the notification referred to in Article 94, paragraph 2;
 - 2) failed to provide information requested by the President of the Office pursuant to Article 12, paragraph 3, Article 19, paragraph 3 or Article 50 or provided incorrect or misleading information;
 - 3) does not collaborate during the inspection performed within proceedings pursuant to Article 105a subject to Article 105d, paragraph 2.
3. In the case the undertaking was created by way of merger or transformation of other undertakings, when calculating the revenue referred to in paragraph 1, the revenue gained by these undertakings in the accounting year preceding the year when the fine was imposed should be taken into account.
4. In the case the undertaking failed to obtain the revenue in the accounting year preceding the year when the fine was imposed, the President of the Office may establish the fine in the equivalent of two hundred-fold the average remuneration.

Article 107

The President of the Office may impose by way of a decision a fine of equivalent of up to EUR 10,000 on an undertaking for each day of delay in execution of the decisions issued pursuant to Article 10, Article 12, paragraph 1, Article 19, paragraph 1, Article 20, paragraph 1, Article 21, paragraphs 2 and 4, Article 26, Article 28, paragraph 1 and Article 89, paragraphs 1 and 3, decisions issued pursuant to Article 105g, paragraph 1 or court judgements in cases concerning competition-restricting practices, practices violating collective interests of consumers and concentration; the fine shall be imposed as of the date specified in the decision.

Article 108

1. The President of the Office may, by way of a decision, impose on a person holding a managerial post or being a member of a managing authority of the undertaking, a maximum fine of fifty-fold the average remuneration, should such a person, intentionally or unintentionally, have not:
 - 1) executed any of the decisions, resolutions or judgements referred to in Article 107;
 - 2) notified an intention of concentration referred to in Article 13;
 - 3) provided information, or have provided unreliable or misleading information, as required by the President of the Office pursuant to Article 50.
2. The President of the Office may impose the fine referred to in Article paragraph 1 on:
 - 1) persons authorised by the inspected party referred to in Article 105a, paragraph 6, holders of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 and the persons referred to in Article 105a, paragraph 7 for:
 - a) failure to provide information or providing incorrect or misleading information requested by the President of the Office,
 - b) failure to collaborate during an inspection held within proceedings pursuant to Article 105a;
 - 2) witnesses for refusal to make testimony without valid reason.

Article 109

1. Subject to paragraph 4, the President of the Office shall refrain from imposing a fine referred to in Article 106, paragraph 1, subparagraphs 1 or 2, upon an undertaking taking part in an agreement referred to in Article 6, paragraph 1 or Article 81 of the EC Treaty, should this undertaking have jointly fulfilled the following conditions:
 - 1) it has been the first, amongst the participants of the agreement, to:
 - a) provide the President of the Office with information concerning the existence of such a prohibited agreement, as may suffice for instituting antimonopoly proceedings, or
 - b) present to the President of the Office, upon its own initiative, a proof rendering it possible to issue a decision referred to in Article 10 or 11 - providing that the President of the Office did not have at that time any information or pieces of evidence proving sufficient for instituting antimonopoly proceedings or issuing a decision referred to in Article 10 or 11;
 - 2) it is fully co-operating with the President of the Office in the course of the proceedings, providing him with any and all proofs or pieces of evidence that it has at its disposal, or the ones it may have at its disposal, and promptly giving any information relating to the case, upon its own initiative or upon demand of the President of the Office,
 - 3) it has ceased participating in the agreement not later than as of the day on which it notified the President of the Office, the existence of an agreement or presented evidence referred to in subparagraph 1, point b;

- 4) it was not the initiator of the agreement and did not induce other undertakings to participate in the agreement.
2. In the event that an undertaking participating in an agreement referred to in Article 6, paragraph 1 or in Article 81 of the EC Treaty, appears not to be meeting the conditions referred to in paragraph 1, then the President of the Office shall decrease the fine referred to in Article 106, paragraph 1, subparagraph 1 or 2, being imposed on that undertaking, should the latter have jointly fulfilled the following conditions:
 - 1) it has presented to the President of the Office, upon his own initiative, evidence which to an essential extent will contribute to issuing a decision referred to in Article 10 or 11;
 - 2) it has ceased participating in the agreement not later than as of the day on which it presented the evidence referred to in subparagraph 1.
3. In the case referred to in paragraph 2, subject to Article 110, the President of the Office shall impose a fine:
 - 1) being not in excess of 5% of the revenue earned in the accounting year preceding the year within which the fine is imposed - upon the undertaking which has first met the conditions referred to in paragraph 2;
 - 2) being not in excess of 7% of the revenue earned in the accounting year preceding the year within which the fine is imposed - upon the undertaking proving to be the second to have met the conditions referred to in paragraph 2;
 - 3) being not in excess of 8% of the revenue earned in the accounting year preceding the year within which the fine is imposed - upon other undertakings which have met the conditions referred to in paragraph 2.
4. In case that an undertaking has fulfilled the conditions determined in paragraph 1, subparagraph 1, point b and subparagraphs 2 to 4, the President of the Office shall impose a fine in the amount as determined in paragraph 3, subparagraph 1, provided that another undertaking participating in the agreement had prior thereto met the conditions determined in paragraph 1, subparagraph 1, point a and subparagraphs 2 to 4.
5. The Council of Ministers shall determine, by way of a regulation, the procedure to be followed in the event when undertakings have applied for renouncement or reduction of a fine, including in particular:
 - 1) the method of accepting and considering undertakings' requests for renouncement or reduction of a fine,
 - 2) the method of notifying the undertakings of the position assumed by the President of the Office - having regard to a necessity for ensuring the option for producing a reliable assessment of whether the undertakings have fulfilled the conditions referred to in paragraphs 1 and 2, and for classifying the requests appropriately.

Article 110

1. In case whereby an undertaking has been established by way of merging or transformation of other undertakings, when calculating its turnover, as referred to in Article 109 paragraph 3, the revenue earned by such undertakings in the accounting year preceding the year within which the fine is imposed, shall be considered.
2. In case whereby an undertaking has not gained any revenue in the accounting year preceding the year within which the fine is imposed, the President of the Office may impose a fine amounting up to:
 - 1) fifty-fold the average remuneration, imposed on the undertaking which has first met the conditions, referred to in Article 109, paragraph 2;
 - 2) seventy-fold the average remuneration, imposed on the undertaking which has second met the conditions, referred to in Article 109, paragraph 2;

- 3) eighty-fold the average remuneration, imposed on other undertakings which have met the conditions, referred to in Article 109, paragraph 2.

Article 111

When fixing the amount of the fines referred to in Articles 106 to 108, the duration, gravity and circumstances of the infringement of the provisions of the Act, as well as the previous infringement, should be particularly taken into account.

Article 112

1. The fines referred to in Articles 106 to 108 are to be paid out of the income after taxation or out of another form of the surplus of income over expenses decreased by the taxes.
2. Financial resources originating from the fines referred to in Articles 106 to 108 shall constitute the state budget income.
3. The fine is to be paid within 14 days from the validation of the decision issued by the President of the Office.
4. In the case of the ineffective lapse of the time limit referred to in paragraph 3, the fine shall be subject to collection on the basis of the provisions on administrative execution proceedings.
5. In case of delay in the payment of a fine, the interest shall not be collected.

Article 113

1. Upon a request of the undertaking or persons referred to in Article 108, the President of the Office may, by way of a resolution which is not subject to a complaint, defer the payment of the fine or establish an instalment plan, taking into account important interests of the applicant.
2. The President of the Office may abrogate, by way of a resolution which is not subject to a complaint, the deferment of payment of the fine, or the payment on the instalment plan, where new or previously unknown circumstances, substantial for the settlement, are disclosed.

Title VIII

Penal provision

Article 114

1. Whoever, acting against the provision of Article 42, paragraph 4, has breached the obligation of providing the Consumer Ombudsman with explanations and information being the subject of the Ombudsman's approach, or the obligation to take a stance on the Ombudsman's comments and opinions, shall be liable to a fine of at least PLN 2000.
2. Deciding and adjudging as regards cases involving acts determined in paragraph 1 shall be effectuated pursuant to the provisions of the Act of 24 August 2001 - the Code of Procedure in Cases Prosecuted as Petty Offence.

Title IX

Amending, transitional and final provisions
(omitted here)

3. Regulation of the Council of Ministers of 30 March 2011 on the exemption of certain types of vertical agreements from the prohibition on competition restricting agreements

Pursuant to Article 8 paragraph 3 of the Act of 16 February 2007 on competition and consumer protection (Journal of Laws No. 50, item 331, as amended¹), it is hereby ordained as follows:

§ 1.

The regulation specifies:

- 1) requirements to be fulfilled so that a vertical agreement could be considered exempted from the prohibition referred to in Article 6 paragraph 1 of the Act of 16 February 2007 on competition and consumer protection, hereinafter referred to as “the Act”;
- 2) clauses whose presence in a vertical agreement infringes Article 6 paragraph 1 of the Act;
- 3) clauses whose presence in a vertical agreement is not regarded as an infringement of Article 6 paragraph 1 of the Act;
- 4) duration of the exemption.

§ 2.

The provisions of the regulation shall not apply to vertical agreements covered by the scope of other regulation issued pursuant to Article 8 paragraph 3 of the Act.

§ 3.

For the purposes of this regulation:

- 1) exemption - shall mean the exemption of vertical agreements from the prohibition referred to in Article 6 paragraph 1 of the Act;
- 2) vertical agreements - shall mean agreements concluded between two or more undertakings of which each operates - as part of such an agreement - at a different level of trade, and whose subject are the conditions of purchase, sale or resale of goods;
- 3) exclusive purchasing obligations - shall mean clauses included in vertical agreements pursuant to which a buyer, directly or indirectly, commits himself to purchase goods covered by a vertical agreement exclusively from one supplier;
- 4) exclusive supply obligations - shall mean clauses included in vertical agreements pursuant to which a supplier, directly or indirectly, commits himself to sell goods covered by a vertical agreement exclusively to one buyer and a buyer commits himself to use or resell those goods in a way specified by a supplier;
- 5) selective distribution system - shall mean the distribution system where a supplier, directly or indirectly, commits himself to sell goods covered by a vertical agreement exclusively to distributors selected according to criteria specified in that agreement and distributors commit themselves not to resell those goods to distributors not belonging to that system in the territory where a supplier conducts business activity or has taken measures proving that this entity intends to conduct business activity within this system;

- 6) franchise distribution system - shall mean the distribution system where a distributor, directly or indirectly, commits himself to resell goods purchased from a supplier and covered by a vertical agreement, using intellectual and industrial property rights or know-how made available by a supplier against a remuneration;
- 7) supplier - shall mean an undertaking selling to a buyer goods covered by a vertical agreement;
- 8) buyer - shall mean an undertaking purchasing goods covered by a vertical agreement;
- 9) distributor - shall mean an undertaking purchasing goods covered by a vertical agreement with an intention to resell them at the wholesale level (wholesale distributor) or retail level (retail distributor) as well as an undertaking concluding with a supplier a vertical agreement pursuant to which it sells goods covered by a vertical agreement on behalf of a supplier;
- 10) intellectual and industrial property rights - shall mean rights vested pursuant to the provisions on the protection of intellectual and industrial property;
- 11) know-how - shall mean non-patented, undisclosed to the public technical or technological information or organisational and administrative rules as for which measures were taken aimed at preventing their disclosure if they constitute a whole or a part of specific practical information resulting from experiences of a supplier, performed research or tests relevant to a buyer in terms of use, sale or resale of goods covered by a vertical agreement;
- 12) non-compete obligation - shall mean resulting directly or indirectly from a vertical agreement:
 - a) exclusion of a buyer's rights to manufacture, purchase, sell or resell goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for goods covered by a vertical agreement;
 - b) obligation of a buyer to make, at a specific supplier or undertakings indicated by it, more than 80% of all purchases of goods covered by a vertical agreement and of goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for those goods, calculated on a basis of the value or, should it be accepted in the specific relevant market - of the volume of purchases made by a buyer in a previous calendar year;
- 13) end-user - shall mean a consumer or undertaking purchasing goods covered by a vertical agreement in connection with a conducted business activity other than a distribution business activity;
- 14) buyer's customer - shall mean an undertaking not being a party to a vertical agreement, purchasing goods covered by a vertical agreement from a buyer being a party to that agreement for the purpose of their resale;
- 15) active sale - shall mean active operations of a seller taken for the purpose of increasing sales or acquiring new customers, consisting in particular in carrying out advertising or promotional activities, establishing branches or organising distribution centres in the specific territory.

§ 4.

The exemption covers vertical agreements, in particular those including exclusive purchasing obligations or exclusive supply obligations or establishing selective distribution systems or franchise distribution systems, provided that those agreements fulfil the exemption conditions laid down in the regulation.

§ 5.

The exemption covers vertical agreements concluded between associations of undertakings and their members and between associations of undertakings and their suppliers if:

- 1) all association members are retail sellers of goods not being services and
- 2) turnover of each association member, including the turnover of undertakings belonging to its capital group, did not exceed the equivalent of EUR 50 million in a previous calendar year.

§ 6.

The exemption covers non-reciprocal vertical agreements concluded between competitors if:

- 1) a supplier is a manufacturer and distributor of goods not being services and a buyer is a distributor and is not a competitor at the manufacturing level or
- 2) a supplier provides services at several levels of trade and a buyer supplies goods or provides services at the retail level and is not a competitor at this level of trade at which it purchases services covered by a vertical agreement.

§ 7.

1. The exemption covers vertical agreements containing provisions which refer to transferring to a buyer or using by it intellectual and industrial property rights or know-how if those provisions are not a primary subject-matter of such agreements and are directly related to use, sale or resale of goods covered by an agreement by a buyer or its customers.
2. The exemption is applied when, with respect to goods covered by a vertical agreement, the provisions, referred to in paragraph 1, do not contain, at the same time, restrictions of competition having the same objective as clauses and agreements which are not exempted pursuant to the regulation.

§ 8.

1. Vertical agreements are subject to the exemption if:
 - 1) share of a supplier and capital group to which a supplier belongs in the relevant market of sale of goods covered by such an agreement does not exceed 30%,
 - 2) share of a buyer and capital group to which a buyer belongs in the relevant market of sale of goods covered by such an agreement does not exceed 30% - subject to § 9.
2. If under a multilateral vertical agreement an undertaking purchases goods covered by that agreement from an undertaking being a party to that agreement and sells those goods to another undertaking also being a party to that agreement, the exemption is applied when its share in the market, both as a buyer and as a supplier, does not exceed 30%.

§ 9.

1. If the share referred to in § 8:
 - 1) does not exceed 30%, but, upon concluding a vertical agreement rises above this value, not exceeding, however, 35%, the exemption is applied also for the period of two calendar years following the year in which the threshold of 30% was exceeded for the first time;
 - 2) does not exceed 30%, but, upon concluding a vertical agreement rises above 35%, the exemption is applied also for the period of one calendar year following the year in which the threshold of 35% was exceeded for the first time.
2. The exemption period, referred to in paragraph 1, may not last, in total, longer than two consecutive calendar years following the year in which the threshold of 30% was exceeded for the first time.

§ 10.

1. The share, referred to in § 8, in case of:
 - 1) a supplier - is calculated on a basis of the selling value of goods covered by a vertical agreement and of the selling value of other goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for those goods;
 - 2) a buyer - is calculated on a basis of the purchase value of goods covered by a vertical agreement and of the purchase value of other goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for those goods.
2. If the data regarding the selling value or the purchase value are not available, the market share is calculated on a basis of other reliable market information, including information on the sales or purchase volume.
3. The market share is calculated on a basis of data regarding a previous calendar year.
4. In calculating the market share, sale between undertakings belonging to one capital group is not included.
5. In calculating the market share of a supplier, goods sold to distributors being parties to a vertical agreement concluded with this supplier for the purpose of their resale are included.

§ 11.

The exemption does not cover vertical agreements which, directly or indirectly, independently or in relation with other circumstances dependent on parties to those agreements are aimed at restricting:

- 1) right of a supplier to fix a selling price by imposing on a buyer minimum or fixed selling prices for goods covered by a vertical agreement;
- 2) territory or group of customers, where or to which a buyer may sell goods covered by a vertical agreement, exclusive of restriction:
 - a) regarding the premises or area where a buyer conducts its business activity,
 - b) of active sale to a specific territory or a specific group of customers reserved for a supplier or assigned by a supplier to another buyer, if those restrictions do not prevent buyer's customers from selling goods covered by a vertical agreement,
 - c) of sale to end-users by a wholesale distributor,
 - d) with regard to distributors operating under the selective distribution system - of resale of goods covered by a vertical agreement to distributors not belonging to that system, in a territory where a supplier conducts its business activity or has taken measures proving that it intends to conduct a business activity under that system,
 - e) of the right of a buyer to resell components covered by a vertical agreement to other undertakings which would use them to manufacture goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for goods being sold by a supplier;
- 3) with regard to retail distributors operating under the selective distribution system - a possibility to sell to end-users, exclusive of restriction of a possibility to sell by them in the premises not fulfilling criteria laid down in a vertical agreement being a basis for establishing the selective distribution system;
- 4) cross-supplies between distributors operating under the selective distribution system, including distributors operating at various levels of trade;

- 5) the right of a supplier to sell components covered by a vertical agreement - as spare parts - to end-users, repair shops or other service providers to which a buyer did not entrust repairing or servicing goods manufactured using those components.

§ 12.

Clauses, whose presence in a vertical agreement infringes Article 6 paragraph 1 of the Act, are clauses which directly or indirectly prohibit:

- 1) to compete for a specified time of more than five years or for an unspecified time unless a buyer sells goods covered by a vertical agreement in the premises or in a territory whose owner, perpetual user, lessee or leaseholder is a supplier or which a supplier rents or leases from third parties not related to a buyer and the duration of such a commitment does not exceed the period of occupying those premises or that territory; the non-compete obligation which is renewed tacitly after five years is regarded as concluded for an unspecified time;
- 2) distributors operating under the selective distribution system - to sell goods of only certain competitors of a supplier;
- 3) buyers - to manufacture, purchase, sell or resell goods after the termination of a vertical agreement unless the validity of such clauses:
 - a) refers to goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for goods covered by a vertical agreement and
 - b) is limited to the premises or territory where a buyer conducts its business activity during the validity of a vertical agreement and
 - c) is required for the protection of know-how provided to a buyer by a supplier - and the duration of their validity is limited to one year after the termination of a vertical agreement, exclusive of a possibility to impose restriction which has no time limit on the use and disclosure of know-how.

§ 13.

The exemption is not applied to vertical agreements if clauses, referred to in § 12 and whose presence in a vertical agreement infringes Article 6 paragraph 1 of the Act, may not be separated from a vertical agreement as a whole.

§ 14.

To vertical agreements subject to the exemption pursuant to the regulation of the Council of Ministers of 19 November 2007 on the exemption of certain types of vertical agreements from the prohibition on competition restricting agreements (Journal of Laws No. 230, item 1691) nonfulfilling the exemption conditions laid down in this regulation, the existing provisions shall apply, pending the adjustment of those agreements to the provisions of this regulation, not longer however, than until 30 November 2011.

§ 15.

The regulation remains valid until 31 May 2023.

§ 16.

The regulation enters into force on 1 June 2011.

4. Regulation of the Council of Ministers dated 17 July 2007 concerning the notification of the intention of concentration of undertakings

Pursuant to art. 94 item 6 of the act dated 16 February 2007 on competition and consumer protection (Journal of Laws No. 50, item 331 and No. 99, item 660) the following is ordered:

§ 1.

1. This regulation specifies:
 - 1) detailed conditions to be met by the notification of intention of concentration of undertakings, including a list of information and documents, hereinafter referred to as the "list", to be included in such a notification;
 - 2) amount of fees for requests to initiate antimonopoly proceeding in case of concentration and method of their payment.
2. The list referred to in item 1 point 1 is included in the appendix to the regulation.

§ 2.

Each time the regulation refers to:

- 1) act - this shall mean the act dated 16 February 2007 on competition and consumer protection;
- 2) concentration - this shall mean factual conditions referred to in art. 13 item 2 of the act;
- 3) notification - this shall mean the notification of intention of concentration of undertakings;
- 4) notifying undertakings - this shall mean the undertakings directly taking part in the concentration, obligated to make the notification in the meaning of art. 94 item 2 and 3 of the act;
- 5) President of the Office or the Office - this shall mean the President of the Office of Competition and Consumer Protection or the Office of Competition and Consumer Protection.
- 6) KRS - it shall mean the National Court of Registration.

§ 3.

The notification constitutes a request to initiate the antimonopoly proceeding on concentration, referred to in art. 49 item 2 of the act.

§ 4.

The notifying undertaking presents complete information and documents compliant with the factual conditions according to the list, with reservation of § 5 and 6.

§ 5.

1. The President of the Office may, upon request of the notifying undertaking included in the notification, consider it as meeting the requirements specified in § 4, despite a lack of information or documents included in the list, if at the same time:
 - 1) the notifying undertaking does not have access to the whole or part of the information or documents;

- 2) the activities undertaken by him did not give any results;
 - 3) this undertaking demonstrated the due diligence in undertaking activities aimed to obtain this information or documents.
2. In the cases referred to in item 1, the notifying undertaking must provide the estimate data and indicate the sources and grounds of estimates made. If during the proceeding the undertaking receives such information or documents referred to in item 1, it shall immediately provide them to the President of the Office.
 3. The notifying undertaking may not make reference to unavailability of information or documents relating to the capital group it belongs to.

§ 6.

1. The President of the Office may, upon request of the notifying undertaking included in the notification, consider it as meeting the requirements specified in § 4, despite a lack of information or documents included in the list, if the notifying undertaking renders it plausible that this information or documents are not objectively necessary for the issuance of the decision concerning the notified intention of concentration.
2. The provision of item 1 does not apply to the notification of intention of concentration which refers to undertakings which are competitors in the meaning of art. 4 point 11 of the act.
3. Acknowledgment of the notification referred to in item 1 as meeting the requirements specified in § 4 does not free the notifying undertaking from obligation to present, upon demand of the President of the Office, information or documents, if in the course of the proceeding they become necessary to issue the decision concerning the intention of concentration that has been notified.

§ 7.

The documents included in the notification must meet the requirements specified in art. 51 of the act.

§ 8.

1. Financial sums included in the list are in PLN thousands.
2. Recalculations in PLN of values initially expressed in EUR or other foreign currencies must be made according to rules specified in art. 5 of the act.

§ 9.

The notifying undertaking who considers the information presented in the notification to be the business secret in the meaning of the regulations on combating unfair competition must indicate in the notification which information is the business secret, or in case of notification of the intention of concentration made by more than one undertaking, present with the notification a request referred to in art. 69 item 4 of the act.

§ 10.

The requests to initiate antimonopoly proceedings in cases of concentration before the President of the Office of Competition and Consumer Protection are subject to a fee amounting to PLN 5,000 per notification of intention of concentration of undertakings, payable by the notifying undertaking.

§ 11.

The fee referred to in § 10 is payable by the undertaking obligated to pay it in cash at the cash desk or to the bank account of the tax office specific for the place of office of the undertaking.

§ 12.

The undertaking filing a request to initiate the antimonopoly proceeding on concentration attaches to the request a proof of payment referred to in § 10.

§ 13.

The regulation of the Council of Ministers dated 3 April 2002 concerning the notification of intention of concentration of undertakings (Journal of Laws No. 37, item 334) becomes ineffective.

§ 14.

The regulation comes into force 14 days from the day of publication.

Attachment to the Regulation of the Council of Ministers dated 17 July 2007 (item 937).

LIST OF INFORMATION AND DOCUMENTS WHICH SHOULD BE INCLUDED IN THE
NOTIFICATION OF THE INTENTION OF CONCENTRATION OF UNDERTAKINGS

Introduction (general explanations)

1. The present List of Information and Documents (LID) is a sample application form. The LID must be prepared in accordance with the numbering of chapters and points. If a point does not apply to a given undertaking or market, please enter "not applicable". The documents included in LID or made available on one's own initiative must be submitted as attachments. They constitute the integral part of the LID. Any information or documents which constitute a part of this LID should be additionally submitted in an electronic form (diskette, CD-ROM, DVD or sent by e-mail to the e-mail address of the specific department of the Head Office or specific Branch office of the Office).
2. If the undertaking taking part in the concentration is a natural person referred to in art. 4 point 1 letter c of the act, the box relating to information about the name (point 1.1.1 or point 1.3.1) should indicate the person's first and last name. Other identification details must be provided when they apply to this form of undertaking.
3. If the undertaking taking part in the concentration is a local government unit, the box relating to information about the name (point 1.1.1 or point 1.3.1) should indicate its name and territorial scope. Other identification details must be provided when they apply to this form of undertaking.
4. If the undertaking taking part in the concentration is an undertaking not operating on the basis of the Polish law (foreign entity), the box relating to information about the name (point 1.1.1 or point 1.3.1) should indicate also the name and address, possibly the e-mail of entities related with it personally, by capital and organisationally, as well as branches and representative offices operating in the territory of the Republic of Poland. If the undertaking taking part in the concentration is an undertaking not operating on the basis of the Polish law (foreign entity), the identification details and documents should specify the registration number (point 1.1.2 and 1.3.2) as well as an excerpt from KRS or other register (point 6.1.) should be attached, if such register exists.
5. If the undertaking taking part in the concentration is a financial institution, the information about sales (point 8.2) and structure of supply (point 9.1.) should be filled in using the measures specific for the services it provides.

PART I

Information and documents identifying the undertakings participating in concentration and describing the intended concentration

169

Chapter I

Basic information about undertakings directly taking part in concentration

1.1. Details identifying the notifying undertakings

For each of notifying undertakings, please provide:

- 1.1.1. name (company name) and address of registered office (and e-mail address, if any),
- 1.1.2. identification number (for Polish undertakings, NIP or REGON),
- 1.1.3. legal form (joint-stock company, limited liability company, other commercial company, undertaking operating as partner in a partnership, state-owned company, cooperative, other),
- 1.1.4. object of actual activity - according to the applicable classifications,
- 1.1.5. persons filling the functions of management body members (first and last name, functions, addresses and e-mail addresses, if any, if different than in point 1.1.1, phone and fax numbers),
- 1.1.6. first and last names of proxies, if appointed (their postal or e-mail addresses, phone and fax numbers),
- 1.1.7. first and last name of the person authorised to contacts with the Office (if different than in point 1.1.6 and if the proxies are not appointed, if different than in point 1.1.5, his/her postal and e-mail address, phone and fax numbers).

1.2. In case of joint notification, in which a joint proxy is appointed, please provide his/her first and last name, address and e-mail address if any, and the first and last name and address and e-mail address of the person authorised to contacts with the Office, if different than the proxy.

1.3. Identification details of other undertakings directly taking part in concentration

For each of other undertakings directly taking part in the concentration, please provide:

- 1.3.1. name (company name) and address of registered office (and e-mail address, if any),
- 1.3.2. identification number (for Polish undertakings, NIP or REGON),
- 1.3.3. legal form (joint-stock company, limited liability company, other commercial company, undertaking operating as partner in a partnership, state-owned company, cooperative, other),
- 1.3.4. object of actual activity - according to the applicable classifications,
- 1.3.5. persons filling the functions of management body members (first and last name, functions, addresses and e-mail addresses, if any, if different than in point 1.3.1, phone and fax numbers),
- 1.3.6. first and last name of the person authorised to contacts with the Office (if different than in point 1.3.5 - his/her postal and e-mail address, phone and fax numbers).

Chapter II

Detailed description of the intended concentration

Please provide a detailed description of the intended concentration:

2.1. Please indicate the form of concentration (merger, taking over of control, creation of a joint undertaking) and provide its short characteristics, and in particular:

- 2.1.1. In case the concentration is to take place as a result of merger of two or more undertakings, referred to in art. 13 item 2 point 1 of the act, please specify its form in the light of provisions of the Commercial Companies Code relating to company merger or other provisions.
- 2.1.2. In case the concentration is to take place in form of taking over control referred to in art. 13 item 2 point 2 of the act - please provide:
 - 2.1.2.1. whether the control is taken over by one or more undertakings,
 - 2.1.2.2. whether the undertaking takes over, as part of a single transaction, control over one or a larger number of undertakings,
 - 2.1.2.3. whether the concentration is related to purchase or take over of stock admitted for public trading - in what form such concentration will result in taking the control over.
- 2.1.3. In case the concentration is to take place in form of establishing a joint undertaking referred to in art. 13 item 2 point 3 of the act - please provide:
 - 2.1.3.1. the name (company name) and address of the undertaking established,
 - 2.1.3.2. indicate the scope of its intended activity,
 - 2.1.3.3. specify in which consists the concentration nature of the operation.
- 2.1.4. In case the concentration is to take place in form of purchasing by one undertaking a part of assets of another undertaking (whole or a part of the company) referred to in art. 13 item 2 point 3 of the act - please provide:
 - 2.1.4.1. whether the whole or a part of the undertaking is subject to concentration,
 - 2.1.4.2. in which consists the concentration nature of the operation.
- 2.2. In addition:
 - 2.2.1. please provide the characteristics:
 - 2.2.1.1. of the reason for concentration,
 - 2.2.1.2. its economic objectives,
 - 2.2.1.3. financing method,
 - 2.2.1.4. expected consequences of concentration for its participants, competition and consumers,
 - 2.2.1.5. description of the impact of the concentration to the relevant market, production costs, product prices and market effect of scale,
 - 2.2.2. please provide whether the offer to purchase stock admitted to public trading, which the notifying undertaking intends to make, is backed up by the management of the company whose stock is to be purchased,
 - 2.2.3. please provide the planned schedule of concentration,
 - 2.2.4. please indicate the planned structure of ownership and control after concentration,
 - 2.2.5. please indicate types and amount of public aid related to the notified concentration.

Chapter III

Turnover of undertakings participating in the concentration

- 3.1. Please demonstrate that the combined turnover of the undertakings participating in the concentration, in the year preceding the year of notification, exceeds the values specified in art. 13 item 1 of the act and that the notification exclusion provided for in art. 14 point 1 of the act does not apply to the intended concentration.
When calculating the turnover for the purposes of the act, please take into consideration the rules specified in art. 16 of the act and the regulation issued on the basis of art. 17 of the act.

- 3.2. Please demonstrate that the turnover of undertakings participating in the concentration does not exceed the values specified in art. 1 of the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (taking into consideration the principles of calculating the turnover it provides for).
- 3.3. When providing the above information, please also indicate the turnover obtained individually by each of the concentration participants.

Chapter IV

Information about ownership and control within the capital group

For each of undertakings directly participating in the concentration, please provide a statement of all the undertakings belonging to its capital group in the meaning of art. 4 point 14 of the act (with isolation of undertakings which realise the turnover in Poland) and indicate the formal and practical grounds of the direct or indirect control it has over other undertakings or what is the control over it, with presentation of the characteristics of the capital groups.

Information required in this chapter should be presented in a descriptive form and in form of diagrams, graphic charts or tables.

Chapter V

Information about earlier concentrations

For each of undertakings directly participating in the concentration and for each of undertakings listed in the statement referred to in chapter IV, please provide a list and short characteristics of concentrations made within the last two years by undertakings belonging to the capital groups identified in chapter IV.

In each case, please indicate whether the concentration was subject to the obligation of notification and if yes, please indicate whether, when and to which body it was notified.

Chapter VI

Documents confirming the information included in chapters I - V

The notifying undertakings must attach to this list:

- 6.1. Current excerpt from the National Court Register or other register.
- 6.2. Copies of final or the most up-to-date versions of contracts or documents identifying the activities on the basis of which the concentration is to be made.
- 6.3. In case of company merger - copies of the merger plan, referred to in art. 499 and 518 of the act dated 15 September 2000 - Commercial Companies Code.
- 6.4. In case of public offer of take over - issue prospectus or a copy of the offer in the meaning of the act dated 29 July 2005 on trading in financial instruments.
- 6.5. Copies of annual approved financial statements of undertakings participating in the concentration from the last two preceding years (in particular the balance sheet, profit and loss account, cash flow report, statement of changes in share capital).
- 6.6. The undertakings which have consolidated financial reports meet the above conditions by attaching the approved consolidated report to the request.
- 6.7. In case of notifying the intention of concentration in a period which makes it impossible to present the financial report for the last financial year, the undertaking must present reliable estimates in scope of financial results for this year, indicating the reasons for not submitting complete documentation in this scope. The missing financial report must be immediately provided to the Office in case it is elaborated and approved by the authorised body of the undertaking.

- 6.8. Copies of analyses, reports, studies and research prepared for the members or for the meetings of the board, supervisory board or general or ordinary shareholders' meeting in order to assess or analyse the concentration in scope of competition conditions, present and potential competitors, as well as conditions on the market.
- 6.9. A list of publicly available sources of information about the markets to be impacted by the intended concentration, in particular sector periodicals, statistics and analyses made available (also for a fee) to third persons, websites containing information useful to assess the notified intention of concentration.

PART II

Information on relevant markets impacted by the concentration

Chapter VII

Relevant markets impacted by the concentration

7.1. Identification of relevant product and geographic markets

Please provide in this scope:

7.1.1. relevant product markets on which the undertaking taking part in the concentration operate:

7.1.1.1 for which the relevant geographic market includes the territory of Poland or its part,

7.1.1.2 for which the relevant geographic market is the market other than specified in point 7.1.1.1.

Please provide these markets, indicating at least the name of the goods (in the meaning of art. 4 point 7 of the act), their designation according to the applicable classification and the area which according to the notifying undertaking is the relevant geographic market; identification of relevant markets maybe made in form of a table.

7.1.2. Pursuant to provisions of art. 4 point 9 of the act:

7.1.2.1. the relevant product market covers the goods which due to their purpose, price and properties, including the quality, are considered by their buyers as substitutes,

7.1.2.2. the relevant geographic market covers the area of goods offering, in which - due to their type and properties, existence of barriers of entry, consumer preferences, significant differences of prices and costs of transport - there are similar competition conditions.

7.2. Identification of relevant markets impacted by the concentration

Please indicate:

7.2.1. all the relevant markets impacted by the concentration in the horizontal configuration. The relevant market impacted by the horizontal concentration is every product market, on which at least two undertakings taking part in the concentration are involved (common markets) and where the concentration leads to obtaining a joint share in the geographic market in the amount of more than 20%,

7.2.2. all the relevant markets impacted by the vertical concentration. The relevant market impacted by the vertical concentration is every product market, if at the same time:

7.2.2.1. at least one of the undertakings taking part in the concentration operates,

7.2.2.2. it is simultaneously the market of purchase or sale (previous or next trade level) on which any of the other undertakings participating in the concentration operate,

- 7.2.2.3. the market share of the undertakings participating in the concentration on those markets exceeds 30%, regardless on whether there is presently the supplier-recipient type relation between those two undertakings.

Chapter VIII

Basic information about the relevant markets impacted by the horizontal or vertical concentration
The information below must be presented separately for each of the relevant product markets impacted by the horizontal or vertical concentration, separately for each of the two last or preceding years and separately for the Polish market - domestic or local - and for the market wider than the Polish market, if the relevant geographic market is not the Polish market (domestic or local).

- 8.1. The size of market, and please provide:
- 8.1.1. the estimate size of market expressed in value and quantity (in natural units),
 - 8.1.2. indicate the grounds and the sources of data on the basis of which estimates were made and, if possible, attach documents confirming those estimates,
 - 8.1.3. provide the estimate amount of production capabilities which may be directed to this market, in the response to an increase of prices significant for producers.
- 8.2. The size of sales and share in the market of undertakings participating in the concentration, and please provide:
- 8.2.1. the size of sales (expressed in value and quantity) of each of the undertakings participating in the concentration as well as the estimate percent shares in the market of each of the undertakings participating in the concentration,
 - 8.2.2. indicate the grounds and the sources of data on the basis of which estimates were calculated and, if possible, attach documents confirming those calculations or estimates.
- 8.3. The importance of foreign trade, and please provide:
- 8.3.1. the estimate total value and number and directions of import to Poland,
 - 8.3.2. specify the share of import of the capital groups to which the undertakings participating the concentration belong in the total import to Poland,
 - 8.3.3. estimate the degree in which any quota barriers, tariff barriers and other trade barriers as well as the transport costs impact this import,
 - 8.3.4. indicate the grounds and the sources of data on the basis of which estimates were made and, if possible, attach documents confirming those estimates.
- 8.4. Main competitors, and please provide:
- 8.4.1. the estimate share in the market expressed in value (and if possible, in quantity) and in percentage for all the competitors (including the importers) who have at least 10% share in the relevant geographic market.
 - 8.4.2. indicate the grounds and the sources of data on the basis of which estimates were made and, if possible, attach documents confirming those estimates.
- 8.5. Main recipients and suppliers, and please provide:
- 8.5.1. main recipients (at least three), who are not members of the capital group, to which the undertaking participating in the concentration belongs, and the estimate percent share of their purchases in the total value of sales of undertakings participating in the concentration,
 - 8.5.2. three main suppliers, who are not members of the capital group, to which the undertaking participating in the concentration belongs, and the estimate percent share of their supplies in the total value of sales of undertakings participating in the concentration,
 - 8.5.3. indicate the grounds and the sources of data on the basis of which estimates were made and, if possible, attach documents on which those estimates base.

Chapter IX

Detailed characteristics of the relevant markets impacted by the horizontal or vertical concentration

Separately for each of the relevant markets impacted by the horizontal or vertical concentration, please:

9.1. Specify the structure of supply:

9.1.1. Describe distribution channels and service networks on those markets, in particular:

9.1.1.1. present the distribution systems existing on the market and their importance and specify the scope in which the distribution is carried out by independent undertakings or undertakings belonging to the same capital group to which undertakings participating in the concentration belong,

9.1.1.2. present the service networks (e.g. maintenance and repairs) existing on the market and their importance and specify the scope in which the services are carried out by independent undertakings or undertakings belonging to the same capital group to which undertakings participating in the concentration belong,

9.1.2. Estimate the value of total production capacities for the last two years preceding the concentration and specify what part of those production capacities is assigned to each of the undertakings participating in the concentration and the size of indexes of their utilisation by each of them; present materials or indicate the sources on the basis of which the amounts of estimated production capacities on those markets were assessed.

9.1.3. Provide all other factors characterising the supply structure on the markets impacted by the concentration and which the notifying undertakings consider important.

9.2. Specify the structure of demand:

9.2.1. Present the structure and dynamics of supply, indicating:

9.2.1.1. the market growth stages, e.g. initial stage, development stage, fully formed stage and dwindling stage and the estimate growth of demand,

9.2.1.2. meaning and changes in the preferences of recipients in the scope of product brands (including the level of brand loyalty), their differentiation and supply of full assortment of products,

9.2.1.3. level of concentration or scattering of recipients,

9.2.1.4. division of recipients to various groups with the description of the "typical recipient" in each of the groups,

9.2.1.5. importance of exclusive distribution contracts and other types of long-term contracts,

9.2.1.6. the level at which the demand is created by the public administration bodies, government agencies, State-owned enterprises and other similar entities.

9.2.2. Provide all other factors characterising the structure of demand, which the notifying undertakings consider important.

9.3. Entry on and exit from the market

9.3.1. Please provide if - according to the best knowledge of the notifying undertakings - within the last five years, there were some significant entries on any of the relevant markets impacted by the concentration, and what were the estimate market shares of those undertakings in that period.

9.3.2. Provide whether according to the assessment of notifying undertakings, there are undertakings (including those which currently operate outside Poland) that could enter the market.

9.3.3. Please describe different existing factors which may impact the entry on the markets impacted by the concentration, analyzing the possibilities of entry on those markets

from a geographic and product point of view, in particular:

- 9.3.3.1. the estimate cost of entry on the market (research and development, creation of distribution systems, promotions, advertising, service, etc.) calculated by comparison to the costs of operation of a significant competitor, with specification of the market share of this competitor, present materials or indicate sources on the basis of which the amount of total cost of entry on the market and cost of operation of the significant competitor was calculated,
- 9.3.3.2. all the legal barriers of entry, such as licenses, permits, or any standards,
- 9.3.3.3. all the limitations resulting from patents, know-how or other exclusive rights in the scope of intellectual and industrial property on those markets and all the limitations in obtaining licences for those rights,
- 9.3.3.4. scope in which each of the undertakings participating in the concentration is the licensor or licensee of patents, know-how and other exclusive rights on relevant markets,
- 9.3.3.5. importance of the economy of scale for the production of products on the markets impacted by the concentration,
- 9.3.3.6. access to supply sources, including for instance availability of raw materials.

9.3.4. Also you may provide all other factors characterising the entry on the market, exit from the market or illustrating the attractiveness of operation on relevant markets impacted by the concentration and which the notifying undertakings consider important.

9.4. Research and development

- 9.4.1. Please assess the importance of research and development for the ability to compete of the companies operating on the relevant markets in the long term.
- 9.4.2. Please present the types of research and development on relevant markets impacted by the concentration, carried out by the undertakings participating in the concentration.
- 9.4.3. In particular, please focus on:
 - 9.4.3.1. directions and intensity of research and development carried out on those markets, including by the undertakings participating in the concentration,
 - 9.4.3.2. course of the technological development on those markets in the appropriately long period (including development of products or services, production processes, distribution systems, etc.),
 - 9.4.3.3. significant innovations launched on those markets and the undertakings which launched them,
 - 9.4.3.4. innovation cycle on those markets and indication in which stage of this cycle the undertakings participating in the concentration are.

9.5. Cooperation arrangements

- 9.5.1. Please provide the level in which the cooperation contracts (horizontal or vertical) exist on the markets impacted by the concentration.
- 9.5.2. Please provide information on the most important cooperation arrangements concluded by the undertakings participating in the concentration, concerning the markets impacted by the concentration, such as research and development contracts, licence contracts, joint production agreements, specialisation agreements, distribution agreements, long-term supply agreements and information exchange agreements.

9.6. Membership in associations of entrepreneurs

- 9.6.1. Please specify the associations of entrepreneurs operating in the Republic of Poland, of which the undertakings participating in the concentration are members.

Chapter X

Other information on markets and effects of concentration

- 10.1. Information on relevant markets impacted by the conglomerate concentration.
 - 10.1.1. Please provide all the relevant markets impacted by the conglomerate concentration.

The relevant market impacted by the conglomerate concentration is every product market, on which between the undertakings taking part in the concentration there are no horizontal or vertical relations, but at least one of the undertakings participating in the concentration has more than 40 % share in any relevant market.
 - 10.1.2. For each relevant market impacted by the conglomerate concentration, please provide the estimate value of the market and the market shares in the year preceding for each of the capital groups, to which the undertakings participating in the concentration belong, separately for the Polish market - domestic or local - and for the market wider than the Polish market, if the relevant geographic market is not the Polish market (domestic or local).
- 10.2. Information about the global context of the intended concentration
 - 10.2.1. The notification may also include a description of the intended concentration in the global context, characterising among others the position of undertakings participating in the concentration at a scale exceeding the markets related to the markets impacted by the horizontal, vertical or conglomerate concentration.
 - 10.2.2. Please specify:
 - 10.2.2.1. whether the intention of concentration is subject to notification at another national or international competition protection authority,
 - 10.2.2.2. names of authorities and dates of notifications, if they were already made,
 - 10.2.2.3. dates and sentences of positions of those authorities, if they have been already issued.
 - 10.3.1. Information on positive effects of concentration, balancing its negative effects for the competition, the existence of which will allow to make the decision referred to in art. 19 item 2 of the act.
 - 10.3.2. The notification may also conclude, with the justification, that the intended concentration:
 - 10.3.2.1. will contribute to the economic growth or technical progress,
 - 10.3.2.2. will have a positive effect on the national economy,
 - 10.3.2.3. will have other positive effects.(place and date of LID elaboration)
(stamp and signature of the person representing the managing body or the proxy of the notifying undertaking(s))

Chapter XI

Explanations

11. Each time the list refers to:
 - 11.1. undertakings participating in the concentration, this shall mean;
 - 11.1.1. undertakings directly participating in the concentration, including:
 - 11.1.1.1. jointly the merging undertakings - in the case referred to in art. 13 item 2 point 1 of the act,
 - 11.1.1.2. undertaking taking the control over - in the case referred to in art. 13 item 2 point 2 of the act,
 - 11.1.1.3. jointly all the undertakings participating in establishment of a joint undertaking - in the case referred to in art. 13 item 2 point 3 of the act,

- 11.1.1.4. undertaking purchasing a part of the assets of another undertaking - in the case referred to in art. 13 item 2 point 4 of the act,
- 11.1.2. other undertakings belonging to capital groups, in the meaning of art. 4 point 14 of the act, to which the undertakings directly participating in the concentration belong,
- 11.2. financial institutions - this shall mean in particular banks, insurance companies, national investment funds, investment funds companies or trust funds companies, pension companies and brokerage houses;
- 11.3. turnover - this shall mean the turnover calculated according to the provisions of art. 16 of the act and regulation issued on the basis of art. 17 of the act;
- 11.4. preceding year - this shall mean the financial year preceding the year of notification of the intention of concentration.

5. Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of undertakings' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines

Pursuant to Article 109(5) of the Act of 16 February 2007 on competition and consumer protection (Journal of Laws, No. 50, item 331, as amended¹), it is provided as follows:

§ 1.

The Regulation specifies the mode of proceeding in cases of undertakings' applications to the President of the Office of Competition and Consumer Protection, hereinafter referred to as the "President of the Office" for immunity from or reduction of the fines referred to in Article 106(1) (1) or (2) of the Act of 16 February 2007 on competition and consumer protection, hereinafter referred to as the "Act".

§ 2.

1. An undertaking which believes that it meets the requirements referred to in Article 109(1) or (2) of the Act may submit to the President of the Office a written application for immunity from or reduction of a fine, hereinafter referred to as "application". The President of the Office provides a confirmation of the date and time of receipt of the application.
2. An application sent by electronic mail or by fax to the electronic mail address or the fax number indicated on the website of the Office of Competition and Consumer Protection, hereinafter referred to as the "Office", is considered as submitted on the day and time when it was received by the Office, provided that the document's original or its copy, authenticated in the way set out in Article 51 of the Act, is delivered to the President of the Office not later than in 3 days of the day when the application was received by the Office by electronic mail or fax.

3. The undertaking may also submit the application orally for the record. The employee who is preparing the record puts the date and the time on the document.
4. The date of receipt of an application submitted orally for the record is the date and hour when the record was commenced to be prepared.

§ 3.

1. The undertaking encloses with the application the evidence or information referred to in Article 109(1)(1) or the evidence referred to in Article 109(2)(1) of the Act.
2. In the application the undertaking may present a description of the agreement, indicating, in particular:
 - 1) the undertakings which concluded the agreement,
 - 2) the products or services which the agreement refers to,
 - 3) the territory which the agreement covers, 1 Amendments to the Act were published in the Journal of Laws in 2007, No. 99, item 660 and No. 171, item 1206 and in 2008, No. 157, item 976, No. 223, item 1458 and No. 227, item 1505.
 - 4) the purpose of the agreement,
 - 5) the circumstances of concluding the agreement,
 - 6) the roles of the particular participants in the agreement,
 - 7) the names, surnames and official posts of the persons performing significant functions in the agreement,
 - 8) the duration of the agreement,
 - 9) whether an application for immunity from or reduction of a fine has also been submitted to the national competition authorities of the European Union Member States or to the European Commission.
3. Moreover, the undertaking encloses with the application the following:
 - 1) a statement that the undertaking has ceased its participation in the prohibited agreement, specifying the date of cessation,
 - 2) a statement that the undertaking submitting the application was not the instigator of the agreement and that it did not induce other undertakings to participate in the agreement - in cases referred to in Article 109(1) of the Act.

§ 4.

The undertaking may also enclose with its application other evidence or information indicating the existence of the prohibited agreement.

§ 5.

1. The undertaking may submit an application indicating, in particular, the following:
 - 1) the undertakings which concluded the agreement,
 - 2) the products or services which the agreement refers to,
 - 3) the territory which the agreement covers,
 - 4) the duration of the agreement,
 - 5) the purpose of the agreement,
 - 6) whether an application for immunity from or reduction of a fine has been also submitted to the national competition authorities of the European Union Member States or to the European Commission,- if the application contains the preliminary information or evidence referred to in Article 109(1)(1) or (2)(1) of the Act.

2. With the application the undertaking encloses the statements referred to in § 3(3) above.
3. The President of the Office provides a confirmation of the date and time of the application's submission, specifying, without delay, the scope of information that needs to be produced to complete the application and the deadline within which the undertaking is obliged to complete the application.
4. The application, having been completed within the deadline referred to in section 3 above, is considered as submitted on the date when it was submitted as set out in section 1 above.
5. Failure to provide the necessary evidence or information referred to in Article 109(1)(1) or (2)(1) of the Act on time results in dismissing the application.

§ 6.

In the event that the President of the Office finds that the application is incomplete, and in particular that the attachments referred to in § 3 are missing, or that the application contains formal defects, the President of the Office requests, without delay, the undertaking to complete the application within a specified deadline. If the application is not completed within the specified deadline, the President of the Office dismisses the application, and notifies, without delay, the undertaking in writing of this fact, indicating the reasons for the dismissal.

§ 7.

In the event that, based on the analysis of the application, the President of the Office finds that the undertaking does not meet the requirements referred to in Article 109(1)(1), or (2)(1), the President of the Office notifies, without delay, the undertaking in writing about the dismissal of the application.

§ 8.

1. In the event that, based on the analysis of the application, the President of the Office finds that the undertaking potentially meets the requirements referred to in Article 109(1) or (2) of the Act, the President of the Office notifies, without delay, the undertaking in writing of this fact. In the notification, the President of the Office also informs the applicant that its acceptance is of preliminary character and that it shall undergo verification in the course of the antitrust proceedings; the undertaking is also instructed about the legal consequences of the failure to cooperate or of inadequate cooperation with the President of the Office.
2. In the notification referred to in section 1 above, the President of the Office also informs the undertaking of the order in which the application was submitted to the President of the Office.

§ 9.

In the case of dismissing an application, the application shall not be taken into consideration when establishing the order of submitted applications for the purposes of applying Article 109(1)-(4) and Article 110 of the Act.

§ 10.

1. The undertaking may withdraw its application at any time before the President of the Office issues the decision concerning the prohibited agreement to which the application refers.
2. Withdrawal of an application shall not influence the order of the remaining applications already submitted.

§ 11.

1. An undertaking which believes that it meets the requirements referred to in Article 109(1) of the Act may submit a summary application in the event that it has submitted to the European Commission an application for immunity from fines for participation in a prohibited agreement covering the territory of more than three Member States of the European Union.

2. The summary application indicates:
 - 1) the undertakings which concluded the agreement,
 - 2) the products or services which the agreement refers to,
 - 3) the territory the agreement covers,
 - 4) the purpose of the agreement,
 - 5) the duration of the agreement,
 - 6) the European Union Member States where evidence for the existence of the agreement exists.
3. The summary application also contains information about applications that have been submitted or that will be submitted by the undertaking in other European Union Member States or to the European Commission.
4. With the summary application, the undertaking encloses the statements referred to in § 3(3).
5. In the event of instituting proceedings concerning the agreement to which the summary application refers, the President of the Office requests the undertaking to complete the summary application within a specified deadline with the information or evidence referred to in Article 109(1)(1) of the Act.
6. The application completed within the deadline referred to in section 5 above is considered as submitted on the date when the summary application was submitted.

§ 12.

Applications submitted before the date of this Regulation's entry into force are subject to the previous provisions.

§ 13.

The Regulation of the Council of Ministers of 17 July 2007 concerning the mode of proceeding in cases of undertakings' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines, is repealed (Journal of Laws No 134, item 938).

§ 14.

This Regulation shall enter into force after 14 days of the date of its publication.

The publication in the series *UOKiK Library*, including studies prepared by employees of the Office of Competition and Consumer Protection.



Mateusz Błachucki is an advisor to the President at the Department of Merger Control in the Office of Competition and Consumer Protection (UOKiK). He is a case handler specializing in pharmaceutical, energy, as well as retail and beverages sectors. Mateusz is also representing UOKiK before the courts in competition cases. Mateusz Błachucki is responsible for international cooperation in merger cases. He is an expert in working groups devoted to merger control and cooperation with various international fora i.e. ICN, ECN, ECA and OECD Competition Committee.

Mateusz Błachucki holds a PhD in law (thesis on the Polish merger procedure, Polish Academy of Sciences - awarded as a second best Ph.D. thesis defended in Poland in the area of law in 2011), M.A. (Hons) in Law (University of Warsaw, 2002) and M.A. in Economics (Warsaw School of Economics, 2003). Furthermore, Mateusz gained a fine academic experience during his employment as a lecturer at the University of Cardinal Stefan Wyszyński in Warsaw and Warsaw University. Currently, he holds a position of assistant professor in the Institute of Legal Studies at the Department of Administrative Law at the Polish Academy of Sciences. He is also a member of the Scientific Council of the Institute of Legal Studies.

Mateusz Błachucki is an author of the monograph *System of Polish Merger Procedure*, Warsaw 2012. He is editor and co-author of several books: *Recent Issues in Delimitation of Jurisdiction of Civil and Administrative Courts*, Warsaw 2011, *Analysis of Changes in Administrative Procedural Code in 2010-2011*, Warsaw 2012 and *Sources of Administrative Law and Protection of Citizens' Rights and Liberties*, Warsaw 2013 (forthcoming). Mateusz has also written various articles in the field of competition law, state aid and administrative procedure.

Office of Competition and Consumer Protection

pl. Powstańców Warszawy 1 < 00-950 Warsaw < Poland

tel. +48 22 55 60 800 < uokik@uokik.gov.pl

www.uokik.gov.pl

ISBN 978-83-60632-82-6