

Unclassified

DAF/COMP(2010)12/28



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

28-Apr-2010

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP(2010)12/28
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN POLAND

-- 2009 --

This report is submitted by Poland to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 16-17 June 2010.

JT03282574

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English - Or. English

TABLE OF CONTENTS

1.	Changes to competition laws and policies, proposed or adopted.....	3
1.1	Summary of new legal provisions of competition law and related legislation	3
1.2	Other relevant measures, including new guidelines.....	3
2.	Enforcement of competition laws and policies	4
2.1	Action against anticompetitive practices, including agreements and abuses of dominant position	4
2.2	Mergers and acquisitions	6
3.	The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies.....	7
3.1	The draft Act on pursuing claims in group proceedings.....	7
3.2	Draft Act on collective public transport.....	7
4.	Resources of competition authorities	8
4.1	Resources overall.....	8
5.	Summaries of or references to new reports and studies on competition policy issues	8
5.1	Market analysis	8
5.2	Information and education activities.....	9

1. Changes to competition laws and policies, proposed or adopted

1. 2009 was a year of intensive activity in the competition protection area in Poland. The Office of Competition and Consumer Protection (UOKiK) carried out 176 proceedings in relation to competition-restricting practices and 144 merger control proceedings. One of the Office's priorities in 2009 was to enhance the leniency programme and consequently new rules were introduced which allow enterprises to benefit from the programme more easily.

1.1 Summary of new legal provisions of competition law and related legislation

1.1.1 New regulation concerning the Leniency Programme

2. On 24 February 2009 Regulation 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 entered into force. According to the new Regulation, an enterprise which wants to admit to participating in a prohibited agreement can submit a leniency application to the President of UOKiK, even if it does not include all the required information. The application will be accepted on condition that the enterprise later completes it within a specified date. This is important because only the first enterprise to report to the antitrust authority and provide evidence of a cartel may expect to be granted immunity from fine. The second, third and subsequent applicants may only expect to have their sanctions reduced by, respectively, up to 50%, 30%, and 20% of the fine which would have been imposed if they had not filed a leniency application. Moreover, the provisions specify what information should be provided by leniency applicants. The Regulation has been implemented as part of the harmonisation process with the model leniency programme developed by the European Competition Network (ECN).

1.1.2 The Act on proceedings in matters concerning state aid

3. In 2009 the work on the amendment of the Act of 30 April 2004 on proceedings in matters concerning state aid was continued. The most important changes included:

- prohibition of granting or paying out aid if the beneficiary has not yet returned aid covered by the European Commission's recovery decision,
- putting the aid donor under the obligation to notify the beneficiary in writing of the reference number of aid granted by the Commission (if the aid is granted under an aid scheme),
- putting enterprises which are applying for *de minimis* aid and have not received such aid before under the obligation to submit so-called negative statements,
- a delegation to the Council of Ministers to enact a regulation laying down what data need to be provided by *de minimis* aid applicants.

1.2 Other relevant measures, including new guidelines

1.2.1 Guidelines on setting fines

4. Since 1 January 2009, UOKiK has been applying Guidelines on setting fines for infringements of competition law. The document enumerates what criteria are taken into consideration and how they affect the amount of the fine. They constitute a "practical manual" addressed to the businesses helping them to understand the methodology used for determining antitrust sanctions.

1.2.2 Guidelines on leniency

5. As of 24 February 2009 to accompany the new regulation concerning the Leniency Programme, a set of Guidelines on leniency - a practical guide for enterprises- entered into force. Their aim is to increase transparency and predictability as regards the leniency programme.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant position

2.1.1 Summary of activities of:

6. In 2009 UOKIK launched **193** explanatory proceedings and **27** antitrust proceedings. The table represents the structure of the proceedings in detail:

Structure of the proceedings in detail

	Total	Closed in 2009
Antitrust proceedings	176	107
Antitrust proceedings concerning horizontal agreements	15	8
Including:		
- conducted pursuant to Article 101 TFEU	4	4
Antitrust proceedings concerning vertical agreements	22	10
Including:		
- conducted pursuant to Article 101 TFEU	0	0
Antitrust proceedings concerning abuse of a dominant position	139	89
Including:		
- conducted pursuant to Article 102 TFEU	3	2
Explanatory proceedings	492	350

Structure of the decisions issued by the President of UOKIK in 2009

	Horizontal agreements	Vertical agreements	Abuses of a dominant position
Decisions finding the practice to be competition-restricting and ordering its cessation	3	2	35
Decisions finding the practice to be competition-restricting and recognising that it has been ceased	5	6	14
Other decisions	0	1	29
Proceedings discontinued in total, including due to:	0	1	11
a) finding no competition-restricting practice	0	1	9
b) other reasons	0	0	2

2.1.2 *Description of significant cases, including those with international implications*

- **Cement – decision of 8 December 2009 (No. DOK-7/2009)**

The antitrust proceedings in the matter were instituted in December 2006. UOKiK was checking whether the producers of grey cement Lafarge Cement, Górażdże Cement, Grupa Ożarów, Cemex Polska, Dyckerhoff Polska and cement manufacturing plants Warta and Odra concluded an illegal agreement. The Office launched the proceedings having received signals about the irregularities occurring on the construction market and based on the findings from its comprehensive inquiry of the conduct of enterprises operating on this market carried out in the years 2003-2006.

In the course of the proceedings and the largest-scale down raid in the history of the Polish antitrust authority, the Office gathered extensive evidence. Moreover, the producers themselves furnished the authority with further information in the course of the proceedings. Based on the collected materials, the President of UOKiK concluded that at least since 1998 the largest cement producers in Poland had been dividing the market, by fixing market shares of particular parties, establishing minimum prices of cement, co-ordinating price rises, their dates and the order of introducing them.

The President of UOKiK decided not to punish Lafarge Cement and to significantly reduce the fine for Górażdże Cement – the company was ordered to pay a fine of 5% of its previous year's revenue. Both enterprises co-operated with UOKiK under the leniency programme. The remaining five cartel participants were fined with maximum punishments – 10% of revenue each. In total, the six parties to the agreement were ordered to pay the total of PLN 411,586,477. These have been the highest fines imposed during the Office's 20 years of operation. Noteworthy, the proceedings were also carried out under EU regulations and the final decision was consulted with the European Commission.

- **Freight rail transport – decision of 7 July 2009 (No. DOK-3/2009)**

In January 2006 the Competition Authority launched antitrust proceedings against PKP Cargo. The proceedings were instituted upon an application from its competitor – CTL Logistics.

The materials collected in the course of the proceedings showed that PKP Cargo abused its dominant position and discriminated some of its contractors offering them worse terms of co-operation. PKP Cargo provides freight services under general terms, that is based on standard freight agreements made in cargo offices, as well as under special terms, which include attractive price discounts. The company claimed that each form of co-operation was available to all its clients on equal conditions. However, under the company's policy, an enterprise considered to be its competitor could only sign a general agreement with respect to goods transported as part of its own activity. As a consequence, some enterprises did not have the possibility of benefitting from much more favourable terms of co-operation.

As a result of PKP Cargo's policies, two contractors ordering the freight of an equal shipment of goods on the same route and with trains of the same type may still have been treated differently. If one of these entities used PKP Cargo's services only and the other also transported goods on its own, the first could obtain more favourable terms than the latter, in spite of the fact that the costs incurred by each were identical.

According to UOKiK, the system limited PKP Cargo's competitors' possibility of conducting activity and did not allow new entities to enter the market.

More beneficial co-operation terms have also not been available to companies which were not PKP Cargo's competitors, but belonged to the same group as an enterprise recognised as PKP Cargo's rival. By imposing such contract terms, the dominant company limited the economic freedom of companies having no agreement with PKP Cargo and infringed their right to choose freely the sphere of their activity. The decision was made immediately enforceable. According to the Office, its further application could have an irreversible impact on the market. The company was fined for the abuse of its dominant position with PLN 60 million.

2.2 *Mergers and acquisitions*

2.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

7. In 2009, **144** cases concerning merger and acquisition (M&A) control were conducted, of which 123 were closed with the following result:

	Number
Merger cases handled by UOKiK in 2009	144
including:	
- concluded in 2009	123
Types of conclusions reached in merger cases in 2009:	
a) total consents	97
including:	
- consents to transactions which will not substantially lessen competition - waivers of merger prohibition (Article 20(2))	0
b) conditional consents	1
c) prohibitions	3
d) discontinued merger proceedings	3
e) withdrawn merger notifications	10
f) decisions imposing a fine for failure to notify a transaction	2
g) other conclusions	7

2.2.2 *Summary of significant cases*

- **Conditional consent to the takeover of Kotlin by Agros Nova – decision of 25 February 2009 (No. DKK-9/2009)**

The acquirer produces juices, soft drinks, jams, sauces, soups, ready-to-eat dishes and ketchups under such brands as Fortuna, Dr Witt, Pysio, Garden and Łowicz. Kotlin was a producer and seller of fruit and vegetable preserves, especially ketchups, tomato concentrates, vegetable preserves and jams. The company was also the owner of Sorella and Guiseppe brands. Agros Nova and Kotlin products are one of the most frequently purchased goods of this type in Poland. The analysis of the transaction's effects showed that it might result in a substantial lessening of competition on the domestic jams retail market.

Due to the above, the President of the Office issued a conditional consent. First of all, Agros Nova had to sell Kotlin's jam production line and Sorella trademarks by 31 August 2010. The assets could be sold only to an investor independent of Agros Nova's capital group and accepted by the President of UOKiK. By the time the above conditions were fulfilled, the acquirer was

under the obligation to maintain the sales volume of Sorella jams in Poland at least at 70% of the brand's average sales volume, and to maintain the expenses for promotion and advertising of these products at the 2007 and 2008 average. Moreover, Agros Nova will have to cease selling Kotlin jams within 3 years from the transaction. UOKiK put Agros Nova under the obligation to provide it with feedback on the fulfilment of the above conditions.

- **Prohibited acquisition in the food market – decision of 8 October 2009 (No. DKK-68/2009)**

The decision concerned the acquisition of control over FoodCare, connected with the production of Gellwe products, by Reiber Foods Polska. Both enterprises operate in the food industry. The acquirer belongs to the Norwegian capital group Rieber&Son and operates in Poland under the brand name Delecta. FoodCare, on the other hand, owns brands such as Gellwe, Tiger and Fitella. Having analysed the transaction, the President of UOKiK decided that clearing it would lead to a substantial lessening of competition on the domestic markets of different food products. As a result of the takeover, Rieber would obtain a dominant position on these markets. Prohibiting the takeover, the President of UOKiK took also into account the barriers to entry existing on the relevant market. The consequent high costs as well as brand loyalty significantly hinder potential competitors from entering the market.

3. The role of Competition Authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

8. UOKiK shapes competition policy not only by conducting administrative proceedings and imposing fines on dishonest businesses but also by participating in law-making process. In 2009 UOKiK contributed in the legislative work concerning: Energy Law, Act on the maintenance of tidiness and order in municipalities, public road transport, collective redress, gambling and Telecommunications Law. In 2009, the President of the Office has issued opinions on a total of 2.3 thousand draft pieces of legislation and other government documents submitted to UOKiK for consultation. When issuing the opinions, the authority mainly took into account a particular draft's impact on competition, consumers and its compliance with the rules of granting state aid to enterprises. The Office also issued opinions on EU documents, including the Green Paper on Consumer Collective Redress.

3.1 *The draft Act on pursuing claims in group proceedings*

9. In the course of the work on the draft Act, the Office put forward many proposals aimed at encouraging consumers to pursue claims by means of group litigation. Some of these have already been introduced to the draft. For example, in line with one of UOKiK's proposals, consumers will be able to be represented before court by a consumer ombudsman, thus avoiding any attorney's fees. Unfortunately, the power of legal representation, despite recommendations by the Office, does not apply to the staff of non-governmental consumer organisations such as the Polish Consumer Federation or Association of Polish Consumers, who for years have been helping non-professional market players. They will not even be able to file a court action on behalf of consumers in group proceedings. The Office also argued, unsuccessfully, that the party represented by a consumer ombudsman should continue to be exempted from any court costs.

3.2 *Draft Act on collective public transport*

10. In order to ensure that unviable routes continue to be operated, the draft Act proposed that local authorities may be given the power to grant chosen contractors exclusive rights to transport persons on particular routes or even in whole transport networks. UOKiK is of the opinion that such a solution would affect small and medium sized transportation enterprises, and as a result, citizens would need to pay unjustified costs imposed by monopolies, including higher fares. In other words, if one entity had the

exclusive right to operate given routes, there would be no competitive pressure forcing the provider to reduce prices.

11. The Office believes that if local authorities were given the power to grant such exclusive rights, they could favour municipal enterprises. Instances of such conduct have already been found in investigations carried out by the President of UOKiK. The draft Act explicitly stated that carriers would be chosen in a tender procedure, nevertheless, this principle would not apply to contracts carried out by entities subordinate to local governments themselves.

12. The work on the draft Act was not completed in 2009.

4. Resources of Competition Authorities

4.1 Resources overall

4.1.1 Annual budget

13. UOKiK's total annual budget was PLN 49.8 million, including:

- The Office of Competition and Consumer Protection – **PLN 47.865 million**,
- Funding for non-governmental organisations implementing consumer protection activities commissioned by the State - PLN 1.928 million,

14. National defence-related activities – **PLN 7 thousand**.

4.1.2 Number of employees

Employment

	Persons	Posts
1 January 2009	460 (including 164 of former GIIH1 staff)	441.48 (including 159.83 of former GIIH staff)
31 December 2009	442	426.18
Average per year	442	425.49

Staff turnover in 2009

	Persons	Posts
Employed	220	212.58
Terminated employment	74	70.13

5. Summaries of or references to new reports and studies on competition policy issues

5.1 Market analysis

15. Examining the state of competition on the Polish market has two major objectives: to collect evidence for the investigations conducted by the Competition Authority and to review the concentration processes taking place in the economy to detect any possible infringements or the risk of their occurrence.

¹ Chief Inspectorate of Trade Inspection

In 2009, UOKiK conducted a total of **48** inquiries, including **34** concerning the national market and **14** concerning local markets.

- Example: Inquiry into the market of door production and distribution

The aim of the inquiry was to assess the market power of the largest enterprises operating on the national market of the production and distribution of outer and inner doors, establish the intensity of competition on the market, and to reveal any competition problems that might be present there. UOKiK also examined the distribution methods and distribution agreements between door producers and distributors.

The research showed that the domestic market of door production and distribution is not highly concentrated. Many enterprises operate on it, both at national and local level. No significant competition problems were discovered. However, UOKiK found that in certain cases the Act on competition and consumer protection might have been infringed. The examination of selected sales agreements indicated that producers most probably fixed resale prices with their recipients, which may mean that they had made a competition-restricting agreement. The Office considered undertaking appropriate steps in relation to these findings.

5.2 *Information and education activities*

5.2.1 *Relations with media*

16. Advocacy and educational campaigns are vital elements of UOKiK's activity. Office is regularly present in media and actively co-operates with journalists. In 2009 Office published 119 press releases and delivered 9000 answers to current journalists' queries. Decisions and verdicts of UOKiK President were subject of 18 500 press articles and 2 000 radio and TV emissions. In 2009 UOKiK organised or co-hosted 16 press conferences.

5.2.2 *Biggest media campaigns*

17. In 2009 **Leniency Programme** media campaign was conducted. Its objective was to inform the public about the harmful effects of price fixing agreements and to encourage cartel participants to co-operate with the Office in order to avoid fines or receive more lenient sanctions. The campaign included broadcasting an advertising entitled "Żart" (A Joke) on business and information TV and radio channels. The media campaign was supported with direct mailing targeted at 500 largest enterprises in Poland and 335 companies operating on local markets. They received information packs on the leniency programme. Thanks to the involvement of radio broadcasters, the advertising was also broadcast free of charge by almost 20 largest nationwide and regional radio stations. The campaign took place in February and May 2009.

18. **Competition in local markets** was another big campaign carried out between June and August 2009. It was addressed to mayors, governors, city mayors and representatives of utility companies. As a part of the action, training sessions in antimonopoly law were delivered in nine Polish regions. UOKiK also published a brochure on the issue: *Competition on local markets with selected decisions by the President of UOKiK*.

5.2.3 *Organising the competitions*

- **Libertas et Auxillium Awards**

In 2009 UOKiK in co-operation with the Adam Smith Centre and the Association of Polish Journalists organised the 4th edition of journalists' competition – Libertas et Auxilim Awards.

The aim of the initiative is to honour journalists who have had a significant contribution to the education of market participants. Awards were granted for the best articles and broadcasts issued in 2008 in two categories: competition and consumer protection.

- **Best Master's thesis competition**

In 2009 UOKiK together with Competition Law Association organised the 2nd edition of competition for the Best Master's thesis devoted to competition and consumer protection issues. The goal of the initiative is to popularise the competition law among students and encourage them to focus their research interest on related matters. Theses were evaluated by the jury composed of lawyers and economists specialised in competition law. The authors of the best theses were rewarded with financial prizes.

5.2.4 *Conferences*

19. Five academic conferences were organised in 2009 with participation of public authorities, business, Polish and foreign academics and foreign antimonopoly authorities' representatives. Below there are named only a few:

- International Competition Law Forum (Warsaw, 15-16.04.2009)
- International seminar on abuse of dominant position in the market of new technologies (Warsaw, 8 July 2009)
- Current issues in merger control (Warsaw, 29 October 2009). A workshop organised under the Central European Competition Initiative. The initiative was the first event held within the celebrations of the 20th anniversary of the foundation of UOKiK's, which falls in 2010.

5.2.5 *Publications and bulletins*

20. The information and educational activity of the Office also includes extensive publishing work. In 2009 the total of **15** titles were released and distributed free of charge to all interested institutions (schools, local authorities, enterprises and consumers). Below there are the titles of some of the materials published in 2009:

- Price fixing agreements
- Bid rigging,
- Competition on local markets with selected decisions by the President of UOKiK
- State aid.

5.2.6 *Public data base of decisions of the President of UOKiK*

21. Increasing public access to decisions issued by UOKiK President is one of basic elements of the UOKiK's advocacy portfolio. This is why in 2009 the Office introduced a new public data base providing decisions delivered since 2003. New data base is equipped with wide range of search possibilities.