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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN POLAND

-- 2012 --

This report is submitted by Poland to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 June 2013.

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

1.1 Summary of new legal provisions of competition law and related legislation/Government proposals for new legislation

1. In 2012 the Office of Competition and Consumer Protection (UOKiK) continued work on amendments to the Act of 16 February 2007 on Competition and Consumer Protection. Based on its own experience as well as on the practice of foreign authorities, UOKiK proposed a list of changes aiming at improvement of merger control system and more effective detection of anti-competitive agreements. Public debate on the amendment to the antimonopoly law was launched during the conference organized by UOKiK at the University of Wrocław in March 2012. In course of consultative conferences held in July in premises of the Office, nearly 140 organizations of entrepreneurs had a chance to comment on the planned changes. Moreover, every interested person could submit their suggestions via UOKiK's website. The assumptions for the Act were adopted by the Council of Ministers. In December 2012, a draft of amended provisions was submitted for consultations.

2. UOKiK's proposal concerning mergers includes introduction of a two-phase merger control (instead of current one phase). According to the new regulation transactions raising no doubts of the Office could be concluded within 30 days, whereas more difficult cases could be examined within four months. Another novelty would be the so called "competition concern". Purpose of this institution is to enable the competition authority to inform parties of a complex merger case and such where giving clearance to concentration would be impossible, about its reservations towards the transaction under scrutiny. The parties would be able to react still at the stage of pending proceeding. Furthermore, UOKiK proposes modification regarding conditional clearance decisions. Under the amended law the time foreseen for fulfillment of the condition would not be made public, if it is requested by the entrepreneur. At the moment disclosure of this information in the text of the decision lowers the negotiation position of the parties, which are obliged to dispose assets or divest control over an undertaking.

3. UOKiK submitted also a series of proposals as regards combating prohibited agreements. The Office would like to raise effectiveness of the leniency programme by introducing the so called "leniency plus". Undertakings will be able to obtain even more significant fine reductions for participation in anti-competitive agreement if they provide the authority with information on other undetected agreements. The changed law would also contain provisions allowing for settlements (competition-restricting practice would be eliminated faster from the market, for undertakings that would mean the possibility to receive a 10% fine reduction). Institution of remedies is another substantial amendment to the Polish antimonopoly law proposed in 2012. The President of UOKiK would have a chance to indicate in the decision measures that must be taken by an undertaking to eliminate the impacts of infringement or discontinue the prohibited practice. The President would be also able to impose financial fines on natural persons who violated competition law.

1.2 Other relevant measures, including new guidelines

4. In 2012 the Office issued the following guidelines: Clarifications on issuing the commitment decision in cases of competition restricting practices and practices infringing collective consumer interests and Clarifications concerning the assessment by the President of UOKiK of the notified concentrations http://uokik.gov.pl/merger_control.php - top. These legally non-binding guidelines explain procedures applied by UOKiK in course of the conducted proceedings.

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 competition authority and courts*

5. In 2012 UOKiK received **438** notifications, launched **176** explanatory proceedings and **54** antitrust proceedings.

6. The table represents the structure of the proceedings in detail:

	Total	Closed in 2012
Antitrust proceedings:	147	93
Antitrust proceedings concerning horizontal agreements		
Including:	18	9
– conducted pursuant to Article 101 TFEU	1	0
Antitrust proceedings concerning vertical agreements	23	11
Including:	0	0
– conducted pursuant to Article 101 TFEU	0	0
Antitrust proceedings concerning abuses of a dominant position	106	73
Including:	1	1
– conducted pursuant to Article 102 TFEU	1	1
Explanatory proceedings:	469	303

Structure of the decisions issued by the President of UOKiK in 2012

	Horizontal agreements	Vertical agreements	Abuse of a dominant position
Decisions finding the practice to be competition-restricting and ordering its discontinuation	3	4	19
Decisions finding the practice to be competition-restricting and recognising that it has been discontinued	5	6	11
Commitment decisions	0	1	37
Proceedings discontinued in total, including due to:	1	0	6
a. finding no competition-restricting practice	1	0	3
b. other reasons	0	0	3

7. Court decisions in antitrust matters: Entrepreneurs may lodge appeals against the decisions of the President of UOKiK and complaints about the President's resolutions to the Court of Competition and Consumer Protection at the Regional Court in Warsaw (SOKiK). Appeals against decisions of the Court of Competition and Consumer Protection may be heard by the Court of Appeal in Warsaw. It is also possible to file a cassation complaint to the Supreme Court.

8. The statistics of judgements in antitrust proceedings are the following:

	Court of Competition and Consumer Protection	Court of Appeal	Supreme Court
Number of judgements issued in 2012 in antitrust cases including:	60	29	2
– concerning vertical agreements	29	8	0
– concerning horizontal agreements	8	5	0
– concerning abuses of a dominant position	19	15	2

Conclusions of the judgements of the Court of Competition and Consumer Protection in antitrust cases	Number
Overruling the decision of the President of UOKiK	3
Changing the decision of the President of UOKiK	10
Dismissing the enterprise's appeal	47

2.1.2 *Description of significant cases*

- Decision RLU - 38/2012: Bid-rigging by consortium members

On 31 December 2012 the President of the Office of Competition and Consumer Protection issued decision addressed to two companies operating in municipal waste sector of the city Białystok. MPO and Astwa formed a consortium, which submitted the winning bid in the tender organised by the Municipal Property Management for the collection and transportation of waste. Provisions of the Public Procurement Law allow to establish consortiums on condition that undertakings involved are not able to execute a contract by themselves. The above mentioned companies claimed that due to technical limitations it was impossible for them to participate in the tender independently. In course of the proceeding conducted by UOKiK it was proven that in fact MPO and Astwa concluded an agreement aiming at distortion of competition mechanisms on the market. The evidence collected demonstrated that the two companies did not need to, and in practice did not, cooperate. The consortium allowed them to maintain their market shares as they were the largest entities operating in Białystok. Taking into account precedent character of the case, the President of the Office decided to refrain from imposition of the fine.

- Decision DOK – 9/2012: The collusion of a producer of lubricant products and distributors

On 31 December 2012 the President of UOKiK issued also a decision concerning vertical agreement between Orlen Oil and its distributors. The company concluded with its trading partners prohibited agreement, according to which lubricants (e.g. engine oils) of the brand Platinum Line could not be sold at rates lower than specified by the manufacturer. Evidence gathered during the antimonopoly proceeding, launched in April 2012, showed that the practice had lasted since 2003. The President decided to impose on Orlen Oil financial fine amounting to nearly 2 million PLN.

- Decisions DOK - 1/2012 and DOK - 2/2012: Abuses on the gas market

In 2012 the President of UOKiK concluded two proceedings concerning the company PGNiG (Polskie Górnictwo Naftowe i Gazownictwo, Polish Oil & Gas Company), which was abusing its dominant position on the gas market.

The first decision, issued in April 2012, referred to clauses applied by PGNiG in contracts for gas supply (mainly with large industrial recipients). The agreements contained provisions according to which notice of termination submitted after 30th September of a given year resulted in dissolving the contract only at the end of the following year. The President of the Office decided that such a long term of notice (even 15 months in extreme cases) might have discouraged PGNiG's contractors to withdraw from the agreements and choose services of other entities. The company's practice might have also influenced the trade between EU Member States, therefore it was probable that EU law was infringed. The proceeding against PGNiG was concluded by commitment decision, on which basis the enterprise was obliged to shorten the contract term of notice and to propose its clients modified draft contracts. Moreover, the company had to submit a report on the state of the commitment implementation. By the end of January 2013 it also had to inform the Office about recipients who accepted the proposed amendments in agreements and about those, who denied to do so.

In the second decision, from July 2012, the President of UOKiK fined PGNiG with 60 million PLN. The company's practices impeded liberalisation of the natural gas sales market. It refused to conclude a comprehensive sales contract with another company, NowyGaz, which was willing to buy fuel from PGNiG and enter the gas retail market. During the investigation it was proven that the refusal was not justified although PGNiG claimed that it could not sign the contract due to formal and technical problems. Its conduct resulted in situation in which end-recipients of gas could purchase it exclusively from PGNiG. The enterprise discontinued the practice and signed the agreement with NowyGaz. This served as a mitigating circumstance when calculating the fine.

2.2 *Mergers and acquisitions*

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

9. In 2012, **194** cases concerning merger and acquisition (M&A) control were conducted, of which **155** were closed with the following result:

	Number
Merger cases handled by UOKiK in 2012	194
including:	
– concluded in 2012	155
Types of conclusions reached in merger cases in 2012:	
a. total clearances	136
including:	
– consents to transactions which will substantially lessen competition - waivers of merger prohibition (Article 20 section 2. of the Act of 16 February 2007 on Competition and consumer protection)	0
b. conditional clearances	1
c. prohibitions	0
d. discontinued merger proceedings	0
e. returned merger notifications	16
f. withdraw of the notification	2

10. The statistics of judgements in proceedings concerning merger control:

Court of Competition and Consumer Protection	Court of Appeal	Supreme Court
4	1	0

2.2.2 *Summary of significant cases.*

- Decision DKK-62/2012: Clearance to takeover of Sygnity by Asseco Poland

In July 2012 the company Asseco Poland was granted clearance for the takeover of Sygnity. Both companies operate in the IT sector. Asseco Poland is the leader of the International Asseco Group consisting of over 60 firms from all around the world. It provides IT solutions for the banking sector and also for public administration, health care institutions, international organizations, industry, trade and services. Asseco Poland specializes in consulting, production and supplies of computer software and hardware. Listed on the Warsaw Stock Exchange, Sygnity offers services to small and medium enterprises as well as to public administration.

In frames of the notified transaction Asseco planned to buy Sygnity's shares in order to obtain no less than 66,9 percent of votes at the general meeting of shareholders and the right to purchase further shares in the future.

For the purpose of the proceeding carried out by UOKiK a survey among 47 providers of IT services was conducted. Analysis covered also major contractors of both companies. Moreover, Asseco Poland and Sygnity were asked several times for additional explanations and information.

Based on the collected data the President of the Office stated in her decision that the concentration would not contribute to significant limitation of competition on the relevant markets, especially by creation or strengthening the dominant position, therefore clearance for the transaction was given.

- Decision DKK-131/2012: Clearance to takeover of Petrolot by PKN Orlen

The case of the takeover performed by PKN Orlen over Petrolot was referred to the Polish Competition Authority by the European Commission upon request of participants of the transaction. Despite community dimension of the takeover its effects would occur on the territory of Poland, thus UOKiK was entrusted to conduct the proceeding.

PKN Orlen specializes in processing crude oil into unleaded petrol, diesel, heating oil, and aviation fuel as well as plastics and other petroleum related products. Petrolot supplies Polish airports. During the proceeding it was under a joint control of PKN Orlen and national airlines Polskie Linie Lotnicze LOT.

The President of UOKiK decided that acquisition of 100 percent of Petrolot's shares by PKN Orlen would not result in significant competition restriction. The two companies did not compete with each other but they were acting on vertically connected markets. PKN Orlen was offering fuel on the market of refinery sales of JET avgas, whereas Petrolot was purchasing it and offering on the market of fuel delivery at 11 airports in Poland. At the same time PKN Orlen was not the only avgas producer in Poland. Another enterprise – Lotos Group had a similar capacity in that respect.

Furthermore, the President of UOKiK came to conclusion that the transaction might have also positive effect as the PLL LOT would cease to be Petrolot's shareholder and by this the risk of treating this airline in a privileged way would be eliminated. The clearance was issued in December 2012.

- Decision DKK-23/2012: Conditional clearance to takeover of Polfa Warszawa by Polpharma

On 26 March the President of UOKiK issued her only conditional decision in merger proceeding in 2012. The transaction under scrutiny was notified by pharmaceutical company Polpharma,

which planned to take control over another producer and seller of medicines – Polfa Warszawa. The takeover was planned in the form of acquiring majority of shares of Polfa Warszawa.

In course of the proceeding it was revealed that the transaction would restrict competition on three markets of launching medicines – over-the-counter anticoagulants, fluoroquinolones (antibiotics of general use) and sulphonamides available on doctor's prescription. After the takeover the position of its participants would be significantly strengthened. On the eye treatment agents market they would become monopolists whereas on the two others their market shares would exceed 40 percent, which according to provisions of the antimonopoly act, would imply that they hold dominant position. Furthermore, among consumers two anticoagulants produced by Polpharma and Polfa Warszawa, Polocard and Acard, were the most recognized medicines of their kind, which caused that other pharmaceutical firms failed to compete effectively even by offering cheaper products.

Upon the decision, within 18 months from its issuance Polpharma is obliged to dispose all rights to the medicines from the above mentioned groups produced either by itself or by Polfa Warszawa (e.g. either Polocard or Acard). The purchasers of the rights must not belong to the same capital group and cannot be jointly controlled by any entity from this group. Moreover, the buyer must be approved by UOKiK. Until then Polpharma is obliged to maintain the level of its market share (70 percent) and not to decrease expenditures on advertisement and promotion of the products in relation to their sales – as compared with two previous years.

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

11. UOKiK not only enforces competition law but also performs its mission by partaking in legislative procedures concerning effective protection of competition and consumers interests. This task is mainly realized by drafting legal acts and participating in inter-departmental consultations. In 2012 UOKiK was involved in works on over 2.1 thousand projects and opinions on the acts drafted by the Parliament. The Office's specialists were analyzing the documents trying to identify how the new regulations could possibly influence competition and consumers.

12. In 2012 UOKiK contributed to the law-making process by conducting the legislative works on (i.a):

- Assumptions and the Act amending the Act on competition and consumer protection;
- Assumptions and the Act amending the Act on consumer credit and the Act on liability of collective entities for acts prohibited under penalty;
- Regulation of the Council of Ministers amending the Regulation on the submission of reports on the award of state aid and information on negative decisions on such aid using the SHRIMP application.

13. Furthermore, UOKiK took part in the legislative process on (i.a):

- Assumptions for the Act amending the Public procurement law;
- Energy law;
- Gas law;
- Act on renewable energy sources.

4. Resources of competition authorities

4.1 Resources overall (current numbers and change over previous year)

4.1.1 Annual budget (in your currency and USD):

	2011		2012	
	PLN	USD*	PLN	USD*
Total annual budget:	54.54 mln	17,26 mln	55.13 mln	17.44 mln
Expenditure structure:				
(a) UOKiK	52.226 mln	16,53 mln	53.22 mln	16.84 mln
(b) funding for non-governmental associations carrying out governmental consumer protection tasks	1.700 mln	0.53 mln	1.70 mln	0.53 mln
(c) Tasks connected to national security	4.000 mln	0.0013 mln	0.004 mln	0.0013 mln
(d) Preparation and maintenance of the EU Presidency	611.000 mln	193.354.43	0.21 mln	0.066 mln

*USD = 3,16 PLN (08/05/2013)

4.1.2 Number of employees (person-years):

	Persons	Posts
1 January 2012	468	455.05
31 December 2012	465	449,91
Average per year	464,23	450,84

Staff turnover in 2012

	Persons	Posts
Employed	22	18,75
Terminated employment	26	22.5

Age of Employees	Lawyers	Economists	Others	Total
Up to 30	48	13	57	118
30-40	94	40	73	207
40-55	17	19	58	94
56 and above	4	14	28	46

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

5.1 Market Studies

14. Examining the condition 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. The results of the largest and - from an economic standpoint - most important market analyses are presented to the public during debates organized by the Office and involve the participation of experts. In 2012, UOKiK conducted a total of **36** inquiries, including **34** concerning the national market and **2** concerning local markets.

15. Selected market research carried out by UOKiK in 2012:

- Study on the market of communal waste

The survey was conducted in frames of works on the amendment of the Act on maintaining cleanliness and order in communes and resulted in the report *Competition in the Polish market of reception and management of communal waste* published in March 2012.

UOKiK examined the situation in over 1000 municipalities, apart from that 286 undertakings were surveyed for the purpose of assessing the impact of the new regulations. Based on the performed analysis, UOKiK expressed its observations towards the amendments.

Before the reform it was the property owners who decided which undertaking collected their waste. Under the new rules, the choice of such a company can only be made by municipality through a tender procedure. Most of all, the Office was concerned that the new law would cause emergence of local monopolies and lead to the elimination from the market of many currently operating entities. In the new system all the waste from a given area will be collected by only one company. That will deprive many smaller companies of the possibility to function on the market. One entity means also that there is no incentive to reduce prices and increase the quality of services. Moreover, the tender procedure is connected with the risk of bid-rigging and the so far experience of a number of communes which have previously took over the “dominion over the waste” shows that this solution often leads to higher costs incurred by the local government.

Unfortunately, the amendment was enacted without taking into account UOKiK’s remarks. The new rules will be effective from 1 July 2013. The Office will carefully observe situation on the market and intervene, as necessity arises.

- Study of the national freight transport market with an emphasis on the railway freight transport

The analysis carried out from October 2010 until March 2012 aimed at establishing the size of the market, market shares of particular carriers and to verifying the definition of that market used so far by the President of the Office. The report published by UOKiK refers to the market conditions in the period 2009-2010.

UOKiK gathered information from over 200 enterprises. The survey allowed to find out about the situation on the Polish market of railway freight but also, in addition, to collect data on other means of transport.

When analysing the market three criteria were taken into account: freight’s weight, transportation work performed and revenue from the sales of railway transport services. The information gathered proved that PKP Group, as in previous years, held dominant position on the market of freight transportation by rail. Joint market share of companies DB and CTL still was a few times lower in comparison to PKP Group. Another finding of the survey was that despite suggestions of some carriers, the railway freight transport should be still treated as one market at country level.

- Study on the gas market

In September 2012 UOKiK presented report titled *Directions for the development of competition and consumer protection on the gas market in Poland*. Currently in Poland companies from PGNiG group enjoy position similar to monopoly at all levels of gas trading. The necessity to introduce competition mechanisms is beyond doubt. The report reflects findings of the survey conducted on the gas market as well as suggestions of UOKiK concerning further stages of liberalization.

UOKiK proposed a number of solutions which could be implemented in order to modernize the gas market (e.g. financial and accounting separation within PGNiG). According to UOKiK it should be gradually opened for competition and gas prices should be released only after wholesale market is created. The report focuses also on the situation of consumers, it contains many suggestions on how to improve their position.

5.2 *Information and educational activities*

5.2.1 *Relations with media*

16. Mass media play an extremely important role in conveying UOKiK's message to the general public. Therefore the Office strives to be often present in the media and is involved in active cooperation with the journalists. The following numbers illustrate UOKiK's efforts in that respect: 227 press releases published by the Office; the decisions and verdicts of the President of UOKiK were the subject of 9227 press articles, 9571 internet publications. Moreover, the Office's activity was discussed in 221 radio and TV emissions. UOKiK organised 7 press conferences.

5.2.2 *Biggest media campaigns*

- Entrepreneur – don't collude!

In 2012 UOKiK started a social campaign which aim was to raise the awareness concerning anticompetitive agreements. The campaign was dedicated to professional market participants as well as future executives – students of management and economics.

Entrepreneurs were encouraged not to collude by a series of videos published in the internet, radio broadcasts and newspapers articles. All the information could be also found on UOKiK's website in the part devoted to the campaign. In November and December 2012 experts from the Office visited five institutions of higher education in Warsaw with lectures on prohibited agreements.

The official launch of the campaign took place during the conference held at the Faculty of Law of the University of Wrocław titled *More effective ways of market protection – time for change in law?*, which also served as an occasion to discuss the most important assumptions of the amendments to the Act on competition and consumer protection.

5.2.3 *Organizing the competitions*

- Libertas et Auxillium Awards

Winners of the seventh edition of the competition *Libertas et Auxillium* were announced in June 2012. The concept of the initiative was to award best newspaper articles, radio and TV programmes devoted to competition and consumer protection. The best releases were selected based on their level, significance for the public opinion and innovative character. The award ceremony was preceded by a debate *Effective ways of fighting with cartels* gathering entrepreneurs, lawyers and journalists.

- Best Master's thesis competition

In 2012 UOKiK in cooperation with the Competition Law Association organized for the fourth time the contest for the best Master's degree thesis on competition and consumer protection issues. By this initiative organizers wanted to, as in previous years, promote antitrust law among students. Financial prizes were granted to authors of most innovative and creative works, which reflected authors' original thoughts and insightful approach.

5.2.4 Conferences

17. In 2012 UOKiK continued its practice to organize yearly a number of conferences during which representatives of public administration, law-makers, lawyers-practitioners, academics, entrepreneurs, journalists can discuss the most current and important questions of competition law. The list of the events contains the following meetings:

- *State Aid Days* (Warsaw, 29-30 May)
- The conditions of the liberalization of the gas sector in Poland (Warsaw, 11 September)
- 2nd International Competition Law Forum (Warsaw, 27 September)
- Protection of competition in public procurement (Toruń, 12 October)
- Meeting of the Chief Economist Working Group, DG Competition, European Commission (Warsaw, 22 November)

5.2.5 Preparation to the 12th ICN Annual Conference

18. During the 10th ICN Annual Conference in the Hague it was officially announced that the Polish Competition Authority was entrusted to organize the Annual Conference in 2013. Since then the President of the Office joint ICN Steering Group and UOKiK's Department of International Relations and Public Communication started intensive preparations to the event. Large part of these works was carried out in 2012. In autumn UOKiK conducted survey for the purpose of the Special Project *Working with courts and judges*.

5.2.6 Publications and bulletins

19. Initiated in 2011 series of publications titled *The library of UOKiK* expanded in 2012 by the following works on competition protection prepared by the Office's experts:

- The system of antitrust proceedings in cases concerning the control of concentration between undertakings (Mateusz Błachucki)
- State aid for undertakings (Karolina Gałązka)

20. The Office published also two theses awarded in the competition for the best Master's degree thesis.

21. The publications are available free of charge to all interested institutions (schools, local authorities, enterprises and consumers). They can be also found on UOKiK's website: <http://www.uokik.gov.pl> (in Polish).